

The Heart Of The Matter: Intent In Business Halacha

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Yerushalayim

In Parshas Tetzave, the Torah discusses the garments that the Kohanim wore in their service in the Mishkan. The Gemara (Zevachim 88b) explains that each one of the garments that the Kohanim wore atoned for a different sin. The Gemara relates that the Choshen Hamishpot, the breastplate, atoned for erroneous judgments. The Kli Yakar (28:15) explains that in every judgment, in addition to the evidence involved, the judge must use his intellect and powers of assessment and evaluation to come to a decision. In Torah literature, it is the heart of the Dayan in which the deliberation relating to judgment takes place. It is for this reason that the breastplate, which atoned for erroneous judgment was worn on the heart.

In fact, in every financial

transaction between two or more parties, the intent of each party is a crucial

element of the overall operation. Sometimes, a limiting condition is explicitly

expressed, and other times, the transaction may be bound by certain conditions

which, though not expressed explicitly, will nonetheless be implicit and self-understood.

This week's journal will focus on

the halachic principles of conditions, assumptions, and circumstantial evidence.

Tort Law vs. Contract Law

Generally speaking, a person's financial and

monetary activities can be categorized under one of two groupings - those that

involve the actions and intentions of one party, and those that involve the actions and intentions of two or more parties. Stealing or causing damage, for

example will fall under the first category, whereas loans, buying and selling and employment fall under the second.

The Torah provides detailed laws for both of these

sets of circumstances, but there is a fundamental difference between the two.

In situations that involve an agreement between two parties, the Halacha recognizes that the intentions of the parties constitutes an important part of their mutual commitments. The Halacha provides a default position for the law

but allows much leeway for the two parties to adapt their agreement in ways

that will influence the Halachic effect of the agreement. For example, the Torah forbids one to overcharge another when selling him something. If the buyer is overcharged more than a sixth of the value of the item being sold, he

may invalidate the sale. However, if at the outset the two parties agree that they forgo their rights in this respect, the Halachos of Ona'ah - overcharging or underpaying - do not apply.

Owner is the Ruler of the Asset

Rav Abramski elucidates this point as follows:

"It is a fundamental rule in the Torah's financial laws, that a person is the sole ruler over his financial assets. Neither the law nor the judge can dictate the fate of his money. This is the way of our holy Torah - ownership belongs solely to the titleholder. This fundamental strand runs through the issues of a person's financial activities as a red thread runs through a white cloth. An individual is the sole decider over his property and assets, to the full extent of the law."

Implicit vs. Explicit

How then does one adapt a situation in order to change the legal effect of one's actions?

The simplest way to do so is to express explicitly a condition at the time of action. For example, someone sells an item to his friend, and says to him, "I am selling this to you on condition that although I am overcharging you by \$100 you will have no claim against me." In such circumstances- even if it turns out that he has overcharged- the buyer, who agreed to the condition, will have no recourse in Halacha.

There are, however, rules as to how to express this condition in order for it to be effective. For example, *Tenai kofful* - the condition must be stated both ways - "If "x" occurs then the sale should be valid, but if "x" does not occur then the sale should be invalid." Another example - the condition should be mentioned before the effect.

These rules are collectively known as "*Mishpetei Hatenoim*," and they are required for all Kiddushin and Gittin that are made upon precondition. When it comes to monetary matters,

however, there is a difference of opinion amongst the Rishonim if these rules

are required. Although the Rambam, Rabbenu Tam and the Rosh require *Mishpetei*

Hatenoim for financial transactions too, the Tur (241)

quotes Rashbam and some Geonim as ruling that these rules do not apply. The Nesivos Hamishpot (207:1) quotes Ateres Zvi (which in turn is based on the Bais Hillel) as deciding that in monetary transactions that are conditional, *Mishpetei Hateno'im* are not required; it is sufficient to declare the condition at the time of the transaction for the transaction to be conditional. Mishpat Shalom explains that the *Mishpetei Hateno'im* can be complex and difficult to apply. Furthermore, most people are not aware of them or the correct way to use them. If we were to insist on these rules

then it would make it very difficult to make everyday transactions conditional. Thus it has been accepted to adopt the opinion of the Poskim who do not require *Mishpetei Hateno'im* in financial transactions. (C.f. Aruch Hashulchan 207:6). Nonetheless, in real estate transactions which have conditions attached, it is customary to write in the contract that all the conditions mentioned were affected in the most effective way possible according to Chazal.

The Concept of "Umdena"

Taking this concept of conditional transactions further, one may be able to restrict the effect of a transaction even without actually expressing a condition. If it is absolutely clear to all that one intends to act only because of certain circumstances, then if the circumstances change in a way that makes the transaction unnecessary or undesirable, one may retract from it. For example, a man is on his deathbed, and he gives away all his possessions to others. He then recovers and returns to his normal activities. He may retract from all the gifts that he gave away, even if he performed valid *kinyanim* for all of them, because it is clear to all that he only gave everything away because he thought that he was going to die. As such it can be considered as if he declared explicitly that the gifts are being effected on condition that he does not recover. Thus if it transpires that he does recover, he may retract from the gifts. Situations such as this, that create presumptions based on what would be clearly evident to all independent observers, are called "*Umdenah*." (In order to oblige someone to pay out money, though, the *Umdenah* has to be a compelling presumption beyond any doubt.)

As a result of the above, sometimes an agreement or transaction will include implicit clauses that were not explicitly stated by the parties but are automatically assumed. For example, if everyone in this place/town/country agrees to such conditions, they are assumed to be agreed upon unless stated explicitly otherwise. Thus, with regard to employer-employee agreements, the local custom is binding unless agreed otherwise. So for example, if the local law provides for a payment of severance pay in the event that the employee gets fired, this becomes obligatory in Halacha too, because we assume that both parties to the contract agree to the terms of employment as defined by local custom, unless they specify otherwise.