BAIS HAVAAD
HALACHA CENTER

על פי התורה אשר יורוך
Yorucha
weekly overview

A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY OVERVIEW VIDEO

Laws of Asmachta
Halachic Deals & Documents: Part II

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COMPLEMENTARY COMPONENTS:

There are a few peripheral items that can affect a written agreement. Amongst those which we will discuss in this installment are:

1. *Heter Iska*: A document that permits one to lend money with interest in a halachically acceptable way. In truth, a *Heter Iska* does not permit the taking of interest on a loan; rather, it transforms the loan into an investment, thereby changing the interest into profits on the investment. For the sake of simplicity, we will refer to the parties as "borrower" and "lender" when they have a *Heter Iska*, even though they really are now investors.
2. *Shtar Moda'ah*: A document in which one party makes a preemptive declaration in front of witnesses that invalidates a future agreement he intends to execute. In this document, he lets it be known that he does not truly commit to the agreement, but is being forced to do so under duress. Such documents are sometimes valid and sometimes not, as we shall see later on.
3. *Asmachta*: Basically, *Asmachta* translates as "exaggeration". The rule of *Asmachta* is that there are times when one does not have to keep an agreement because it is obvious that he never seriously meant to keep his word.

CASE STUDY: PAYING MORE PRINCIPAL IN EXCHANGE FOR FORGIVING THE INTEREST:

The following story illustrates these and other important concepts of *shtaros*.

- **The Loan:** A man, whom we'll call Reuven, lent money to a group of businessmen with a *Heter Iska* that allowed him to charge an interest rate of 12%.
- **Borrowers Assumption:** The borrowers had hoped to refinance a property they owned, intending to use that money to repay this and other debts. A short time later, the real estate downturn of 2008 arrived, which led banks to tighten their guidelines for granting mortgages. The borrowers found themselves unable to refinance because they no longer qualified for a new mortgage, and had no way to repay the loan.
- **Renegotiating the Terms:** Left with no other option, they approached their creditors and asked to renegotiate the terms of their loan. They made a deal with Reuven, whereby they would pay up the principal quicker, in exchange for him forgiving the interest. They had originally arranged to pay him $2,000 a month, including the 12% interest. The deal for the accelerated payout that they reached had them paying $4,000 a month, with no interest. Reuven agreed to the new terms and a short document was written up to that effect.
- **Reuven Circumventing the Renegotiated Terms:** The borrowers then began making payments based on this *Shtar Mechilah* - settlement agreement. When they made what they thought was their final payment, they believed they were now free from this debt. Instead, they were shocked to

receive a summons to *bais din*. Reuven's claim was that he never really intended to go through with the settlement and only agreed because he had no other choice if he wanted to recoup his money.

- **Claim of Duress:** To prove this, he produced a *Shtar Moda'ah*, in which he declared that he still expected full payment and did not really agree to the compromise.

Bais din now had to determine whether the *Shtar Mechilah* was valid altogether, and also whether the *Shtar Moda'ah* was enforceable.

THE STRUCTURE OF A SHTAR MODA'AH:

There are two types of *Shtar Moda'ah*:

1. A *Moda'ah* regarding a future two-sided transaction, such as a sale or loan.
2. A *Moda'ah* regarding a future one-sided transaction, such as when one gives a gift or forgives a debt.

It is much easier for the *Moda'ah* to be enforced in a one-sided transaction. In a two-sided transaction, the party making the *Moda'ah* has to be able to prove substantively that the agreement was made under duress. Additionally, the witnesses who sign the *Moda'ah* also have to know about the exact circumstances that forced the party to sign the agreement against his will. In a one-sided transaction, a *Moda'ah* is valid even without proof of duress.

In our story, it would seem that the forgiveness of the interest is a one-sided transaction, as Reuven is forgiving a debt and not receiving anything in return besides the principal he is entitled to regardless. This would make his *Shtar Moda'ah* much more effective.

The *Maharam M'Lublin* speaks about a case where a borrower doesn't have the funds to pay a lender and negotiates to pay a lesser amount. The lender accepts the new terms and even swears that he will take the lower payment. The *Maharam* rules that the lender can claim that he was forced against his will to accept the terms and even to say that he swore against his will, and the entire new deal can be invalidated. This would seem to indicate that certainly in our story, Reuven – who never swore to anything – can claim he only agreed to forgive the interest under duress.

However, the *Har Hacarmel* disagrees with the *Maharam* and says that the borrower's claim that he has no money to pay is an acceptable reason to delay payment of a loan; therefore, the lender is also gaining from the new terms as he would not have gotten the principal of the loan back without this agreement. This would make it a two-sided transaction, which would mean that the lender is not automatically believed to say he acted out of duress.

ACCELERATING THE MONTHLY PRINCIPLE PAYMENTS

There is another factor in our story that can be used against Reuven. Here, the borrowers agreed to make larger monthly payments than was previously agreed upon instead of the interest. Although they would have needed to pay the principal in any case, they would have had more time to do so. The Gemara[1] says clearly that receiving one's money earlier has value. Since Reuven is receiving his money sooner, it cannot be said that he received nothing from the settlement agreement. Rather, it would be considered a two-sided transaction, and Reuven would not automatically be believed to say that he acted under duress.

Because of this consideration, as well as the fact that the lenders really don't have funds to pay back the interest, which is an acceptable halachic reason to delay payment, the *bais din* ruled that the settlement agreement was indeed a two-sided transaction and the *Shtar Moda'ah* is null and void because it was lacking proof of duress.

DIFFERENT TYPES OF ASMACHTA:

Having determined that the Shtar Moda'ah is not valid, the *bais din* now turned to the question of whether the *Mechilah* settlement was valid in the first place. This is where the concept of *Asmachta* comes in.

The concept of *Asmachta* states that any stipulations that clearly were never meant to be carried through are not valid. There is a dispute amongst the Rishonim regarding what type of stipulations are considered

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Asmachta. Some Rishonim say that the only way to invalidate an agreement is if one party stipulates that he is entering into the agreement on condition that he does or doesn't do a certain thing, and then discovers that unforeseen circumstances make it impossible for him to carry out his plans. Such a case is clearly an *Asmachta*, as this party only entered the agreement in the first place believing he would be able to do what he agreed to do, and it is evident that he never would have accepted the agreement had he known that it would not be in his control to do it.

Some Rishonim take it a step further and add another example of *Asmachta*. They say that if one party entered into an agreement on condition that the other party does something, the first party can later claim that they never thought the second party would be able to do that thing; therefore, even if the condition was met, the first party can say that they never seriously thought they'd have to keep their end of the deal, as they never believed the other party would fulfill the condition. The *Rema* agrees with these Rishonim and rules that such an *Asmachta* also invalidates an agreement.

In our story, Reuven was confident that the lenders – who admitted they were short on money - would not be able to make their monthly payments. He only went through with the new agreement and forgave the interest because of that assumption. Had he known that they actually would keep to the payment schedule, he would not have agreed to forgive the interest; thus, he can claim that it was only an *Asmachta* and not a valid agreement.

WHAT IS KINYAN ETEIN?

Another serious issue the *bais din* looked into was that the verbiage of the document was deficient. The *shtar mechilla* said that the lender was agreeing to forgo "the interest"; however, as we explained, there was a *Heter Iska* on the loan, which technically means that the loan was transformed into an investment and there is no interest, only profits.

To explain further, we need to mention another halachic concept. A "*Kinyan etein*", which is a contract obligating someone to do a specific action at some time in the future. In halacha, such a contract is not valid. One classic *Kinyan etei*n is a "commitment to forgive" [in the future]. This settlement would appear to be just such a *kinyan etein*.

[In secular law, however, there definitely is a concept of drafting a binding contract to obligate a party to do something and this is commonly done. Typically, we would apply the halachic law known as "*Situmta*", which means that halacha recognizes the common custom. Therefore, according to many Poskim a *Kinyan etein* will halachically be valid today because the common legal custom is that such contracts are binding. However, other Poskim disagree and say that such a contract is never halachically valid.]

In our story, it was unclear if the contract would have passed muster in a secular court at all; therefore, the *bais din* was not willing to give it credence purely on the basis of *Situmta*.

HOW HETER ISKA WORKS:

However, there is a different reason that would validate the *Shtar Mechilah*, as follows: As we said, a *Heter Iska* transforms a loan into an investment. The interest the "lender" receives is now considered his profit on the investment. Technically, the "borrower" could claim that there was no profit on the investment and he, therefore, has no additional money to give the other party. However, if he says this, the "lender" can force him to swear that there was no profit, as the *Rabbanan* decreed that in such situation, where one person is managing someone else's money, one can make his partner swear to ensure he is saying the truth.

The *Heter Iska* stipulates that if the borrower chooses to give a predetermined amount of "profits", whether or not those profits actually materialized, the "lender" will not demand that he swear. What that boils down to is that the way a *Heter Iska* works is that it states that one side is investing money in something and is agreeing to forgo his right to demand a *shvuah*, on condition that he receive a set amount of profits.

If one were to forgive the profit/interest of the *Heter Iska*, as Reuven did in our story, we must analyze what he is actually doing. Is he forgiving the right to demand a *shvuah*, thereby uprooting the entire basis of the agreement and giving the lenders the ability to claim that there were no profits – which would take away his rights to the profits? Or do we assume he already forgave the shvuah, and is now merely forgiving the "*t'nai*", the condition that he must

receive a certain amount of profits for doing so?

The idea of forgiving a *t'nai* is found in the area of *Kiddushin* or *Gittin*. The Gemara says that if someone marries a lady based on a certain condition, he can forgive the condition and allow the Kiddushin to stand without it. The *Ran* explains that the man made this *t'nai* under the assumption that he would want it fulfilled. Ultimately, he forgave it because, for whatever reason, he decided that he does not care if it is fulfilled or not. Had he known that he would change his mind and not care about the *t'nai*, he never would have made it; therefore, it falls off retroactively.

It stands to reason, that the requirements of regular transactions of buying and selling do not apply here. In such transactions, Chazal instituted the idea that an *Asmachta* can invalidate a deal if it is clear that one party never really intended to go through with it. Additionally, in such transactions, *Kinyan Etein* is not valid and the correct language must be used to indicate that the contract is only for what was done and is not meant to obligate something for the future. Those rules were said when someone is trying to execute a transaction. However, in our case, all that is being done at this point is that the *t'nai* is being forgiven. This is not an actual transaction, as all that is being done is that one party is showing that he never intended for the *t'nai* to apply under these circumstances. One could argue that all these restrictions do not apply which would impede the *t'nai* from being forgiven. As such, being that the *Moda'ah* is not valid, and we can assume the lender/investor did indeed agree to the deal and only was signing onto forgiving the *shvuah* he therefore lost his right to the interest/profits.

CONCLUSION:

The above mentioned reasoning led the *bais din* to conclude that the Shtar *Mechilah* is valid retroactively. *Bais din* reached this conclusion after finding a Teshuva from the Divrei Chaim that confirmed their position in a similar case. A final corroboration of this ruling was the simple fact that Reuven accepted the larger monthly payments from the lenders, even though he knew that he only had a right to do so if he truly forgave the interest. It could certainly be argued that this creates a clear conclusion that he really did forgive the interest.