

# HALOCHOSCOPE

**This week's question:**

**Is a *pruzbul* needed to protect accounts receivable of a service provider?**

**The issues:**

A) *Shemitas kesafim*, debt cancellation at the end of a *shemita* yaer

B) *Pruzbul*, transferring debts to avoid cancellation

C) The status of money owed to a store, worker or service provider

**A) *Shemitas Kesafim***

*Shemitas kesafim* is a *mitzvah* associated with *shvi'is*, the seventh year of the agricultural cycle. During this year the land must 'rest'. This is connected to the sanctity of *Eretz Yisroel*. The produce of *shvi'is* has sanctity and one may not profit from it, even if it was grown without violating the laws of *shvi'is*. One must also abandon all crops grown during this year. This is *shemitas*, cessation, *karkaas*, of the lands. The Torah further commands us to cease (*shamot*) to collect debts. The differences between *shmitas karkaas* and *shmitas kesafim* are mainly that the land *mitzvah* applies throughout the year. *Shmitas kesafim* only applies at the end of *shmita*, when the debt is practically totally canceled. *Shmitas karkaas* applies only in *Eretz Yisroel*. *Shmitas kesafim* applies everywhere. Two *mitzvos* apply to debt collection. *Lo yigos* forbids demanding the payment. *Shamot* is a positive *mitzvah* to cancel the debt.

*Yovel*, the jubilee, every fiftieth year in the cycle is another *mitzvah* closely related to *shvi'is*. It also comprises agricultural cessation in addition to other *mitzvos*. *Yovel* only applies when the bulk of Jews live in *Eretz Yisroel*. According to many, as soon as the Ten Tribes of the Northern Kingdom of Israel were exiled, *yovel* no longer applied. Some poskim maintain that it also requires a proclamation by the *Sanhedrin*, the 'supreme *Bais Din*'. Thus, *yovel* is not practiced nowadays. There is some indication in the Talmud that *shmita* also only applies Scripturally when *yovel* can apply. However, the passage can be interpreted differently. Accordingly, the poskim debate the severity of *shmita* nowadays. Though the majority consider it Scriptural, many later authorities prefer not to definitively decide it this way. Rather, they consider it *safeik de'oraisa*, a doubt on a Scriptural issue. In practice, this usually necessitates stringency. The Talmud debates whether *shmitas kesafim* is linked to regular *shmitas karkaas* on a Scriptural obligatory level. Most poskim consider it conclusively Rabbinical nowadays, and a minority even rule that it does not apply at all.

Only debts that come due by the time of *shmitas kesafim* are canceled. One opinion maintains that debts due before *shvi'is* begins are canceled at the onset of *shvi'is*, and those due by the end are canceled at the end. Loans made during *shvi'is* or due after its beginning may be collected throughout the year. In another view, *lo yigos* applies at the onset of *shvi'is*, but *shamot*, canceling the debt totally, only applies at the end. If a bor-

rower offers payment after *shmita* has passed, the lender must tell him 'I am *meshamet*, the debt was annulled.' The borrower may then insist on giving the money as a gift. The lender may accept it, and even encourage the borrower to insist.

There are three main views on how Scriptural *shmitas kesafim* works. An examination of *shmitas karka'os* will help in understanding this. The Torah's commandment is to declare the produce *hefker*, ownerless. All rights of the owner are thus relinquished, permitting anyone else to take it. The poskim debate what happens if the owner fails to make the *hefker* declaration. In one opinion, if the owner neglects what is his personal duty, the produce remains in his possession. This is known as *mitzvah akarka'ata degavra*. The other opinion considers it *afka'ata demalka*, Hashem removes it from his possession anyhow. All produce in *Eretz Yisroel* is automatically ownerless. There is an additional *mitzvah* on the owner to make it *hefker*, but failure to do so will not prevent *hefker* from taking effect. According to the latter view, the fruits are *hefker* and exempt from all tithes. According to the former view, taking the produce amounts to *gezel*, stealing, and it is not exempt from tithes. According to the first view, a gentile's produce is not *hefker* during *shvi'is*. Gentiles are excluded from personal *mitzvos*. According to the latter view, produce in *Eretz Yisroel* is *hefker*, regardless of whether the field belongs to a Jew or not.

There are also differing views on *shmitas kesafim*. In one view, it is *afka'ata demalka*, Hashem cancels the debt – it simply expires. The borrower may, or should return it as a present. A second view maintains that there is no cancellation at all. The lender has a negative commandment of *lo yigos* forbidding him to actively claim the loan. If the borrower volunteers to pay, the lender has an obligation to say 'I am *meshamet*'. This is to remove the appearance of a violation of *lo yigos*. The borrower still owes the money. He is actually obliged to insist on repaying the loan. Keeping it is like stealing. After fulfilling his obligation, having said '*meshamet ani*', the lender can force the borrower to pay.

A third view considers *shmitas kesafim* a personal *mitzvah*, *akarka'ata degavra*. The lender is obligated to actually forgive the loan, known as *mechila*. Then, obviously, it is indeed canceled. If he fails to do so, the borrower still owes the debt. All the details mentioned for the second view now apply. [See Mishpatim 23:10-11, Behar 25, Re'ay 15:1-6. Shvi'is 10, Moed Katan 4a, Gitin 36a-37b, Baba Metzia 106a, Erchin 31b, Poskim. Teshuvos Rosh 74:7. Yereim 164 (278). Sefer Haterumos 45:8. Rambam, Raavad, Shmita 1:11 4:15 25, commentaries. Chinuch 84 326-335 475 477. Tur Sh Ar YD 331, CM 67, commentaries.]

#### **B) Pruzbul**

Since it is possible that a borrower will not pay on time, a loan made close to the time of *shmitas kesafim* has a risk of being canceled. Even those who do not consider it canceled agree that *shmita* restricts the lender's control of his loan. This could lead potential lenders to hesitate or to refuse to lend people money as *shmita* approaches. The Torah warns strongly against this attitude. One thinking of withholding a loan violates a negative *mitzvah*. Nonetheless, this became common practice close to *shmita*. This both created hardship for borrowers and involved lenders in a violation.

To correct this situation Hilel instituted the preparation of a *pruzbul* by anyone with outstanding debts when *shmita* is about to annul them. *Pruzbul* is Persian for a *takanah*, fix for the situation. It also hints at a 'fix' for the rich, saving them from sin, and for the

poor, assuring their ability to borrow funds. The lender hands his debts to *Bais Din*, giving them power of attorney to collect them. The restriction on collecting debts canceled by *shmita* applies only to individuals. Thus, a debt in the hands of *Bais Din* may be collected, and is not canceled. The lender is now assured that he will be able to collect his debt as it will not be canceled. The ideal *pruzbul* involves either going before a *Bais Din* and making an oral statement of transferal, that *Bais Din* then records and signs, or the lender signs a document in their presence. Many poskim consider an oral declaration sufficient, with nothing signed.

According to one view, debts transferred to *Bais Din* are Scripturally exempt from *shmitas kesafim*. How could Hilel institutionalize avoiding *shmita*, albeit to strengthen *mitzvah* observance? Forgiveness and cancellation of debts is monetary law. In such issues *Bais Din* have the power to decide ownership if and when they see the need. They utilize this *hefker bais din hefker* to remove money from one party and give it to another. In our case, they remove it from the possession of the borrower and give it to the lender. Another view maintains that *shmitas kesafim* in these times is itself a Rabbinical institution. The Rabbis have the authority to adjust their own laws. According to this view, *pruzbul* would not work when *shmitas kesafim* applies Scripturally.

*Pruzbul* was instituted for normal debts. Normal loans are expected to be backed by real estate in the possession of the borrower. The debtor must therefore have a nominal measure of real estate. If the debtor does not own any, the lender may give him some, even in absentia, for the purposes of *pruzbul*. A third party acts on behalf of the borrower, *halachically* acquiring the real estate. In some *Batei Din* normal procedure includes giving all debtors a nominal amount of land. It is questionable whether this always works, or is always done correctly. It is advisable for the creditor to make his own arrangements by giving his debtors some of his land.

*Pruzbul* only works for debts due at the time of writing. Debts due later, or new loans, could not be transferred, since the borrower owes nothing until it is collectible. Post-dating it does not help. Some say it even spoils the *pruzbul* for outstanding debts. Therefore, one always waits to write the *pruzbul* on *Erev Rosh Hashanah*. Any debts due up to and including that day are thus protected. [See Re'ay 15:9-11. Shvi'is 10:3-7. Gitin 36a-b, Poskim. Tur Sh Ar CM 67, commentaries.]

#### **C) Money 'owed' for purchases or services**

When a purchase is made, a *kinyan*, formal act of transaction, transfers ownership. By taking possession of the item, the buyer undertakes a *hischayevus*, obligation to pay for it. This is not a debt. A loan is made for a time period. During that time, the money belongs to the borrower. He has undertaken a *shibud*, lien, to repay the amount when it comes due. A *hischayvus* is really due immediately. The purchaser is not in violation of holding money that does not belong to him by withholding payment, unless the seller demands the money. The seller can sell *behakafah*, on credit and trust. He does not set a time for payment. If and when the seller does demand the money, the purchaser could be considered stealing by not paying. To avoid this, sellers often convert the *hakafah* into a loan. Some say this is done by setting a due date. Others say that when the seller writes up the account in a book, he has formally converted it into a loan. *Shmita* does not cancel a *hischayvus* or a *hakafah*. After conversion, the debt can be canceled. However, if the

due date is set to after the time of *shmitas kesafim*, it can not be canceled. An installment plan is also considered a loan. However, the different installments might be considered separate debts with their own due dates, by some poskim.

When one hires labor, he owes the money when the term of payment is over, whether it is daily, nightly, weekly or monthly. Delaying payment involves two violations, a negative *mitzvah* not to keep the money until morning and a positive *mitzvah* to pay the same day. He must be especially careful after the laborer comes to demand payment. If one actually withholds the payment totally, he violates *lo sa'ashok*. The details of these *mitzvos* are beyond the scope of our discussion. The point is that a wage is not a loan. It is not canceled by *shmita*. However, in this case, too, the obligation can be converted into a debt, by setting a later due date. If this was done, it is canceled by *shmita*.

Providing a service can be one of two ways: one could do a job, such as a barber cutting hair, or one could work on an item, such as fixing a garment. In the latter case, the Talmud debates the nature of the payment. It could be viewed as a wage. One could view the item as being part owned by the worker, due to his work. Therefore, the payment could be viewed as part sale part loan. The conclusion is to consider it a loan. When contracting on a job, the payment is either like an acquisition or it is the same as working on an item. Either way, it is not considered a loan. Therefore, it is due immediately, but is not canceled. However, if it was converted into a loan it can be canceled. The usual manner of billing accounts nowadays would seem to be considered conversion to a loan. If no due date is set, but the account is recorded, it would hinge on the aforementioned opinions. Accordingly, it is advisable to write a *pruzbul* on these accounts, and to delay it so that it is effective on the bills due on Erev Rosh Hashana as well. [See Shvi'is 10:1, Bava Metzia 45b 110b-113a, Poskim. Tur Sh Ar CM 67:14 203:3 339, commentaries.]

*On the Parsha ... blessing – You will loan to many nations, but you will not [need to] borrow ... curse – [The stranger amongst you] will loan to you and you will not loan to him ... [28:13, 44.]* Being a lender seems to rank very high on the list of blessings, and being a borrower is considered a terrible curse. Why does the Torah make it this way? On the simple level, having to borrow money is humiliating. However, the Torah does not mention this as a curse. Rather it mentions not being a lender. Furthermore, a lender, too, is risking losing his money, especially if the borrower is somewhat cursed! Clearly, needing to borrow is not as bad as not being able to lend! It seems that the Torah is actually teaching us three lessons. First, that it is Hashem Who determines whether one will be in the position of a lender or of a borrower. Second, that the lender should realize how much of a blessing it is to be able to lend others money, so much so, that it is the symbol of superiority. Then people will be willing to do it even if it involves risk, because they will appreciate their blessing. Third, that the humiliation of borrowing has far more to do with the borrower having to acknowledge that he is not able to lend, than with his need to borrow. This should teach sensitivity to the lender when using his blessing.

♫ In honor and in memory of my mother, Yitela bas R. Shimon a"n, Henriette Silver. ♫

**Sponsored by the Leibowitz family in honor of Jonathan's birthday on the 20<sup>th</sup> of Elul.**

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