

FOR MOSHE IT'S SHABBAT; FOR CHAIM IT'S SHABBAT; BUT FOR CHRIS IT'S NOT SHABBAT: AN ANALYSIS OF JUDGE KRIVOSHA'S "RELIGIOUS LEASE" AND AN ALTERNATE PROPOSAL

Rabbi Ben Zion Bergman

This paper was approved by the CJLS on June 14, 1995, by a vote of eleven in favor, one opposed, and eight abstentions (11-1-8). Voting in favor: Rabbis Kassel Abelson, Ben Zion Bergman, Stephanie Dickstein, Elliot N. Dorff, Arnold M. Goodman, Susan Grossman, Aaron L. Mackler, Lionel E. Moses, Mayer Rabinowitz, Gordon Tucker, and Gerald Zelizer. Voting against: Rabbi Judah Kogen. Abstaining: Rabbis Jerome M. Epstein, Samuel Fraint, Myron S. Geller, Alan B. Lucas, Paul Plotkin, Avram Israel Reisner, Joel E. Rembaum, and Joel Roth.

The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.

שאלות

There are many businesses which find it necessary to remain open on Shabbat and Yom Tov. Certain manufacturing operations, for example, that utilize intense foundry-like furnaces, if fires would have to be banked on Shabbat, would require an inordinate amount of time to fire up again to the required temperature. The loss of available working time would then be considerable with resultant economic consequences that would make it virtually impossible for that business to survive in a competitive market. Many retail establishments, as well, would find it hard to survive in a competitive market place if forced to remain closed on Shabbat, the day on which most retail consumers find it most convenient to shop for their major needs.

Is there a way in which a Jewish-owned business may remain open on Shabbat and Yom Tov with the Jewish owner not being in violation of the halakhah?

תשובות

This question has a history. Several years ago, Rabbi David Lincoln, then a member of the CJLS, responded to this question. That **תשובה** was based primarily on two **תשובות** of Rabbi

Moshe Feinstein. The solution was the creation of a partnership between the Jewish owner and a non-Jew, in which the non-Jewish partner operates the business on Shabbat and Yom Tov with the Jewish owner absent. The partnership agreement also stipulated that the profits or losses accruing on Shabbat and Yom Tov would belong exclusively to the non-Jew, with the Jewish partner receiving the profits or losses of an equal number of weekdays immediately subsequent to the Jewish holy days.

When Rabbi Lincoln presented his *חישוב* to the CJLS, Judge Krivosha pointed out that certain adverse consequences could arise in a partnership arrangement. Specifically, if the non-Jew is a partner, upon his death his partnership interest would become a part of the assets of his estate and would devolve to his heirs, who might not, and probably could not, serve as the managing partner on Shabbat and Yom Tov. Similarly, if the non-Jew becomes divorced, his partnership interest could become part of the marital assets subject to distribution between husband and wife. In either of these events, the Jewish owner would have lost some portion of his/her business and is back at "square one" vis-à-vis the problem of operation on Shabbat and Yom Tov. Judge Krivosha then suggested that he would attempt to solve the problem through a rental agreement rather than a partnership. He has submitted the attached document entitled "Religious Lease".

Analysis

There are a number of questions that arise in connection with Judge Krivosha's proposal:

(1) Basic to the proposal is the question whether one can rent a business. One can rent premises, equipment, or any other physical asset. But among the assets of a business are such abstractions as good-will. Can one rent another's good-will, itself the product of another abstraction, i.e. reputation? Even more basic to the question itself is the fact that a business, as an entity, is an abstraction that transcends its assets. A business is an entity created to enter into transactions with other entities with the purpose of (hopefully) generating profits. As such, most crucial to the operation of a business is the instrument and vehicle through which funds flow. Without it, a business is not a business. In Judge Krivosha's proposal, however, the bank accounts of the business are specifically excluded from the rental agreement. The basic question, then, is what is being rented and leased? (Additionally, if the business *qua* business is not in its entirety under the dominion of the tenant, then the tenant is, in reality, only a worker operating it for the Jewish landlord.)

(2) A question ancillary to the one above is: How does one rent consumable and expendable inventory? In a normal rental agreement, the lessee agrees to return the leasehold to the lessor, at the termination of the lease, in reasonably the same condition as at the commencement of the lease. If the business deals with "widgets", this might be possible. But many, if not most, businesses may deal with unique merchandise and/or materials which cannot be replaced exactly, and certainly not within the period of the lease, which is usually only a little over twenty-four hours.

Even if, *arguendo*, a business is leasable, I run into a problem of consideration that operates on two different levels:

- A. In the proposed agreement, there is no possibility of loss to the tenant. Since the rental is specified at $x\%$ of gross revenues, the tenant is retaining $100-x\%$ for him/herself. In essence, since the gross revenues (merchandise sold, etc.) are the result of the landlord's investment, the landlord is only getting his/her principal back with a possible overage that might serve to cover utilities, taxes, and

other overhead expenses. But the tenant has no possibility of out-of-pocket loss. Furthermore, if the percentage accruing to the landlord is more than these overhead costs, then the Jewish landlord is specifically profiting from work done on the Sabbath, which is precisely what we are trying to avoid.

- b. The only consideration that we can consider as the non-Jewish tenant giving for the leasehold is his work. But the way in which the agreement specifies the rental payment, viz. x% of the gross receipts, is tantamount to the non-Jew working on commission. The purpose of the arrangement with the non-Jew is to create a situation where he/she is working for him/herself. While the agreement is worded as a lease establishing a tenant-landlord relationship, that may in truth be illusory.

(3) As Rabbi Lincoln has indicated, one of the halakhic issues that must be dealt with is **אמירה לנוררי** (instructing the non-Jew to do work on the Sabbath). While one may on a weekday, by indirection (a hint of some sort), indicate to a non-Jew the work you wish to have performed on the Sabbath, one may not instruct the non-Jew directly. Article 8 of the rental agreement specifies that "Landlord shall exercise no management rights." However, it includes, by reference, Article 4 which specifically binds the tenant to the rules, procedures, prices set, etc., previously determined by the landlord. Such rules of operation, etc., being conveyed to the tenant could be considered as violative of **אמירה לנוררי**.

(4) Another problem with the rental agreement is its failure to deal with the problem of carry-over of work begun by the landlord on a weekday that has to be continued on Saturday or work begun by tenant on Saturday that has to be continued into the weekdays. These problems certainly exist in manufacturing operations but can occur also in a retail establishment.

The **תשובה** of R. Moshe Feinstein and its corresponding partnership agreement stresses the obligation of the Jew to continue the work begun by the non-Jew but must give the non-Jew the option to refuse to continue the work begun by the Jew. The issue again is **אמירה לנוררי**. If the non-Jew elects to do so, in a partnership situation, he/she is compensated in proportion to the contribution to the finished product.¹

It should be pointed out that what is being sought is not a fictitious designation of the status of the business on Shabbat and Yom Tov a la **מכירת חמץ** (the selling of the hametz). The two situations are not analogous. In hametz, the issue is the ownership status of the **חמצן** which can be designated in many ways. One can change the ownership of property by sale, gift, bequest, etc. All it requires is some legal formality and the status then remains static until further change. Nobody touches the hametz. In our case, the problem is to change the ongoing business operations (not a static condition) which require acts performed by a non-Jew which are forbidden to the Jew on the Sabbath. The means must be found to have these acts performed by a non-Jew on his/her own behalf and **אדעתא דנפשיה** (at his or her own option).

In the partnership scenario, the non-Jew is a bona-fide partner and not a fictitious one. (Indeed R. Moshe Feinstein makes a point of distinguishing this from **מכירת חמץ**, saying the use of a similar sales agreement, which may have been used for fields and flour mills in Europe, is not to be used for this purpose.²) The non-Jew is a partner on Wednesday as

¹ See 'אגירות משה, ד', ס' י', צ'.

² See end of 'אגירות משה, ד', ס' י', צ'.

well as on Shabbat. The only unusual wrinkle in the partnership agreement is the manner in which the profit/losses are allocated.

Proposed Solution

Fully cognizant of the problems raised by Judge Krivosha regarding the partnership agreement, I believe those problems are obviated in the following proposal which is halakhically valid.

Instead of a partnership agreement, the business should be incorporated as a closed corporation. The non-Jew is then sold shares in proportion to the total shares, equivalent to the proportion of holy days to the days of the year. (I'm not sure how R. Moshe Feinstein arrived at twenty-five percent, unless he also included *חול המועד* plus a brief time before sundown on Friday and holiday eves plus brief time after sundown on Saturday and holidays.) The shares are paid for by a promissory note held by the Jewish owner. In the sales agreement (and possibly in the Articles of Incorporation) it is stipulated that the shares are not transferable or assignable and in the event that the minority shareholder is incapacitated, divorced, dies, or does anything that would affect the status of his shares, the shares must be tendered to the corporation for cancellation of the debt. In a separate agreement, the Jewish major shareholder and the non-Jewish shareholder agree to the terms specified in Rabbi Feinstein's agreement, including the allocation of profits and losses and distribution of dividends as the distribution to the non-Jew representing the profits of the Jewish holy days and the dividends distributed to the Jewish shareholder representing the profits of the other days.

Incidentally, one can make a case that such a method of distribution exists constructively. If I own shares of GM (which I do not) or Boeing (which I do), I am one of the owners of that corporation, infinitesimal as my percentage of ownership may be. Now these corporations operate on Shabbat and Yom Tov and consequently my share of profits (dividends) represent and include the profit of work done on holy days. I know of no *פוסק* (recognized halachic decisor) who has forbidden Jews to own stock in publicly held companies. Therefore, there must be a constructive stipulation operative in Jewish Law that profits accruing to Jewish shareholders are the profits generated on days other than the Jewish holy days.

This arrangement has several advantages. In any given situation, the non-Jew would be a trusted employee who is in the major management cadre. He/she therefore knows the business and its methods of operation and does not have to be told. Furthermore, he/she is motivated to exert best efforts since he/she shares in the profits. Also some of the profits of the non-Jew can revert to the Jew as interest on the note. Another advantage is that although it would be possible, it would be onerous to calculate the specific profits/losses attributable to specific days. In that case, distributions can be apportioned by *הבלעה* (proportionately).

Conclusion

To enable a Jewish-owned business to remain in operation on Shabbat and Yom Tov without the Jewish owner being in violation of Shabbat or Yom Tov, the business should be incorporated as a closed corporation. A trusted non-Jewish employee who knows the business should be sold a number of shares proportionate to the total number of shares in the same ratio as the Jewish holy days to the days of the year. These shares would be paid for by a promissory note. The shares are not transferable and in the event of incapacity, divorce or death of the minority shareholder (the non-Jew), the shares revert to the corporation for cancellation of the debt evidenced by the promissory note which would be

reconveyed. In a supplementary agreement, the minority shareholder and the majority shareholder would agree to the attribution of profits/losses and distribution of dividends as accruing to the minority shareholder for work done on the Jewish holy days and the remainder attributable to the Jewish majority shareholder for efforts expended on the other days of the year.

ADDENDUM (SUBMITTED JUNE 14, 1995)

The issue of the halakhic validity of the “Shabbat Lease” proposed by Judge Krivosha vis-à-vis my proposed corporation was debated over several meetings of the CJLS with no vote taken, awaiting a formal **תשובה** to be presented by Rabbi Joel Roth, giving a halakhic rationale for the validity of Judge Krivosha’s proposed lease.

During the course of the discussions, I continued to maintain that, in addition to certain problematic terms and conditions in Judge Krivosha’s proposal, a lease by its very nature is an invalid instrument with which to effectuate the desired result. The problem with a lease is that title does not transfer to the lessee. Therefore, if the business under consideration is a retail or wholesale establishment, any sale by the lessee of the business inventory is either commission of a theft, or is valid only if the lessee is acting on behalf of the Jewish lessor, since the lessee does not own the property. And since **שלוחו של אדם כמותו**, the Jewish lessor has engaged in a sale on Shabbat, which he is not allowed to do. If the business is engaged in the manufacture or fabrication of merchandise in which the non-Jewish lessor would be converting the raw material or altering the product in some way, as a lessee, he has no right to make changes in the property of the lessor, unless he is doing so at the instruction and behest of the Jewish lessor, in which case, the Jewish owner has, through an agent, committed a Sabbath violation.

Judge Krivosha has attempted to justify the sale by the non-Jew of the lessor’s inventory by analogy to merchandise on consignment. The example he used was that of a dairy consigning milk to a grocery, in which the grocer has the right to sell the milk, with the dairy receiving its payment for the milk sold and taking back the unsold milk. But this really does not change the issue in regard to the sale on Shabbat. Merchandise delivered on consignment does not become the property of the consignee. Its legal status is that of a “bailment for sale” (in reference to Sachs, D.C. Md., 31 F2nd, 799,800.). The consignee (the grocer in this example) is then a bailee. In Jewish law, his status would be that of a **שומר חיים**. (The fact that he makes money by selling the milk at a price higher than that which he has to pay the dairy, does not make him a **שומר שכיר**, since he is not being compensated for his guardianship of the milk.) And in Jewish Law, a **שומר חיים** does not have the right to sell or alter the **פיקודן**. Even in the case where the bailment is in danger of depredation, there is a **מחלוקת** as to whether the **שומר** may sell in order to salvage some value for the bailor. (See Bava Metzia 38a *et seq.*) Therefore, the sale by the non-Jewish lessee, even if the merchandise is considered to be on consignment, is a sale in which the consignee (the non-Jewish lessee) is acting as the agent of the Jewish lessor.

During the discussion, Rabbi Roth attempted to counter the argument by making the statement that there is no **אייסר** for someone doing something for a Jew on Shabbat. This is surprising since, in addition to ignoring the whole issue of **אמירה לנכרי**, it also ignores a basic halakhic principle, alluded to supra, that **שלוחו של אדם כמותו**. What is even more surprising is that if that were indeed true, there would be no need for R. Moshe Feinstein’s partnership agreement; no need for my solution by means of a corporation; nor need for Judge Krivosha’s attempted (albeit unsuccessful) solution by means of a lease. All that would be necessary

would be to hire non-Jews exclusively for Shabbat. Yet there is no authority who proposes that as a valid means by which a Jewish business can continue to operate on Shabbat.

It must be borne in mind that the issue is the validity of the leasing of a business *qua* business. There is no problem with the lease of premises or equipment. But premises and equipment are assets of a business; they do not constitute the business *per se*. As I point out in the body of my paper, the business is an entity that transcends its assets. In that connection, it must be pointed out that Rabbi Roth's citation from the Mishnah B'rurah is not on point. The Hafetz Hayyim is dealing with the lease of a bathhouse and not a business. The Hafetz Hayyim's bathhouse is analogous to R. Moshe Feinstein's mill which R. Feinstein goes out of his way to point out is not to be used as an example. In those cases, the non-Jew is operating his own business. He is not operating the Goldberg Milling Co. or the Finkelstein Spa Co. on Shabbat. He is not milling Jewish grain nor bathing persons on behalf of the Jewish owner. He is only renting the facilities in which he is conducting his own commercial enterprise. Furthermore, the citation is not on point since it is specifically dealing with a lease for the entire year. Indeed, the last statement in the citation states specifically: "And the permissive types of leasing must be done in the context of an overall lease (*הכלאה*) which includes the weekdays as well. It would be forbidden to lease even a field for Shabbat alone, even where the arrangement is generally well known." It is therefore difficult to understand how Rabbi Roth arrives at the conclusion that a lease is an appropriate mechanism for a Shabbat contract between a Jew and a non-Jew.

I therefore must conclude that the only way in which a Jewish business can operate on Shabbat is either through a Partnership Agreement as proposed by R. Moses Feinstein or by creation of a Closed Corporation as I have suggested. Rabbi Feinstein's proposal is subject to the problems which Judge Krivosha brought to the attention of the Law Committee. My proposal avoids those problems. It must be admitted, however, that the "corporate" solution also has a price. As a corporation, there would be double taxation. The corporation would be taxed on its profits and then the individuals receiving the dividends distributed from those profits would also be taxed. But that is a price that an observant Jew must be willing to sustain. The alternative is to operate in violation of Shabbat or go out of business.