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Bank Accounts, CD's, Bonds, Life Insurance Plans and Stocks

ראוי or מוחזק

Overview to הלי פי שנים- The Double Portion

The Posuk in Parshas כי תצא states כי את הבכור בן השנואה יכיר לתת לו פי שנים בכל אשר ימצא לו וגו׳ "For the firstborn, the son of the hated one you shall recognize, by giving him a double portion, in all (assets)that is found with him….".Chazal deduce from this Posuk a limitation to the halacha of "Pi Shnayim" - The Double Portion. Although the Torah entitles the "Bechor" – the firstborn son - to twice the inheritance of each one of his brothers, this benefit is only applicable to assets which are "found with him", namely, assets which are actually in the possession of the deceased at the time of death. These assets are referred to by Chazal as - מוחזק"*Muchzak*". ראוי-"*Ro'uy*", on the other hand, refers to possessions that have not yet actualized, even in the event that they are already owed.

Modern day financial and estate planning has created many uncertainties with regard to this issue. In order to do justice to these complex matters, and to try to sort out the opinions of the many פוסקים that already deal with these שאלות, we must first familiarize ourselves with a few fundamental הלכות of ראוי and מוחזק.

1. If the deceased had lent money to others in his lifetime, the loan is considered ראוי and the בכור will not receive פני שנים even if the borrower has not yet spent the money. Under the principal of מלוה להוצאה ניתנה - a loan is given to be spent, the monies are considered belonging to the borrower, and therefore any funds that are returned as repayment, are considered ראוי. This applies even if the loan has already become due prior to death.

2. A loan is considered ראוי whether it is a מלוה בשטר or a מלוה בעל פה- a documented loan or merely a verbal loan, based on trust.

3. If the deceased was holding a משכון –a collateral against that loan, it is considered מוחזק, even if the משכון was received at the time of the loan. (The גמ' says in the name of Rav Yitzchok "בעל חוב קונה משכון- the lender acquires the collateral". The Gemoroh proceeds to explain that Rav Yitzchok's rule, which considers the lender, in a few specific dimensions, as owner of the collateral does not apply to a *Mashkon* received at the time of the loan. The reason for this is it was not taken as a potential form of collection rather as a mere guarantee). The ש"ך explains this by calling it "שעבודו בידו" - his debt is in his hand. Therefore, even though the lender does not own this collateral in any way it is still concidered מוחזק since he is "holding" his debt.

4. Based on the above explanation, the ש״ך disagrees with the רמ״א concerning the משכון of a gentile. The רמ״א's opinion is that since the concept of בע״ח קונה משכון does not apply to an עכו״ם it is considered ראוי. The ש״ך argues by saying that all that is necessary to be considered מוחזק is שעבודו בידו and not קנין as we see from משכון בשעת הלואה. Therefore even in the case of a loan to a גוי it would be considered מוחזק.

5. A פקדון ie. any object that the deceased owned which was left in the custody of his friend to be guarded or was lent or rented out is considered to be מוחזק. This is based on the principle of כל היכא דאי׳ ברשותא דמרי׳ איתא which means that wherever it is, the object is still considered to be in the possession of the owner (enabling him to transfer ownership etc.).

6. The רמ״א states, "He who had a partnership with others is called a מוחזק".

A. <u>עיסקא</u>

The Gemora (Bava Metzia 104a) talks about the Rabbinic תקנה referred to as עיסקא. An עיסקא is the authentic partnership after which the modern day היתר עיסקא was drafted, in which ראובן finances a project which שמעון will manage with the profits being split equally. The גמ׳ says in the name of נהרדעי "That עיסקא is one half loan and the other half פקדון". רש״י explains that the risk of loss is assumed one half by the "lender" and the other half by the recipient. The גמרא proceeds to explain these words

with a double מחלוקת where the גמרא states two assumed applications of נהרדעי's words and רבא contests them both.

1) "Therefore it is permitted for the recipient to take his portion and purchase beer with the proceeds of the loan" – in other words, the recipient may use these funds for anything he wishes, and need not invest these particular coins in the agreed venture. רבא disagrees, declaring that the very reason we call it עיסקא is so that the lender can tell the borrower "I've given this money solely for the use of investment". רש״י explains the lenders argument to mean "I would like you to have an equal interest in this investment, thereby giving me a sense of security."

2) ר׳ אידי בר אבין states, "And if the recipient dies the proceeds become ״מטלטלין״-as a movable object- in regard to his children." This refers to the הלכה that a debtor may not collect his debt from any מטלטלין of the deceased. Seeing that נהרדעי stated that one half of the עיסקא is a loan, this means the recipient has acquired these monies. The lender, therefore, should no longer be able to collect his debt from the יתומים. This would apply even to collecting from the עיסקא itself. רבא argues again and says "It is for this very reason we call it an עיסקא so that if he dies it shall not be rendered מטלטלין by his children."

At this point there is a fundamental מחלוקת between רש״י and the ריי״ף as to what exactly was רבא's rebuttal. רש״י explains that although this is a regular loan, these מטלטלין are not subject to the דין that מטלטלי דיתמי לא

משתעבדי לבעל חוב - movable objects of the orphans are not משעובד to the debtor. The reason that they are not subject to the above-mentioned הלכה is as follows. The entire basis for this דין is that lenders generally do not rely on מטלטלין as a source of collection, for they know that מטלטלין can be hidden or sold and done away with; therefore they are not משעובד (as opposed to real estate which cannot be moved, and therefore even if sold to others is still משעובד to the lender). Therefore, explains רש״י, since the lender gave these monies solely for the purpose of investment, as previously mentioned that the borrower may not purchase beer etc., he was certainly relying on this עיסקא for payment, and therefore he may collect from the יתומים.

The ריי״ף however explains רבא's argument, with the following words, "For the deceased had given (these monies) solely to invest it, therefore when he died, it returns to its owner". From these words it seems that the ריי״ף understood the mechanics of the עיסקא in an entirely different manner from רש״י. From רש״י's explanation of the Gemoroh it is clear that he views the "loan" portion of the עיסקא as an authentic loan, which is merely not subject to the rule of מטלטלי דיתמי. The ריי״ף on the other hand does not view it as a הלואה (loan of money) at all, rather as a פקדון (as if it was a loaned object) - although the borrower is permitted to use the object it remains at all times in the possession of the lender. He therefore explains רבא's argument to be saying that the reason the lender may collect from the orphans is because it was only acquired by the borrower to invest (to use for its "fruits" or dividends). The actual money however always belonged to the

lender. When he dies, it thereby returns to its owner, which implies that it will return automatically seemingly without being subject to the collection process.

With these two opinions in mind we can begin to understand the extreme diversification of opinions regarding the question of ראוי – עיסקא or מוחזק . The שבות יעקב, based on the above גמרא, rules that not only is the פקדון portion considered מוחזק but even the מלוה portion is considered מוחזק. He brings as a basis to his פסק the words of רבא - who rules that the lender may take back the עיסקא from the יורשים. Seemingly, he understood the גמרא as we explained according to the ריי״ף, that even the מלוה portion is considered a פקדון.

The רדב״ז and the פני יהושע both rule that the פקדון portion would be rendered מוחזק and the מלוה portion would be ראוי like every מלוה. It would seem that they understood רבא's words as we explained according to רש״י, that the מלוה is indeed a מלוה.

Others, including the דברי ריבות are of the opinion that even the פקדון portion is considered ראוי. They base their פסק on the fact that when the גמרא explains why a מלוה is considered ראוי it uses the explanation " לאו הני זוזי שבק אבוהון- not these exact monies did their father (the deceased) leave over". Since the same thing can be said even about the פקדון portion of

every עיסקא, it is considered ראוי, since it is termed "מחוסר גביינא" - lacking collection.

B. <u>BANK ACCOUNTS IN JEWISH BANKS</u>.

Bank accounts in Jewish-owned banks circumvent the prohibition of usury based on the היתר עיסקא. Based on the above, one might have assumed that with regard to the question of a firstborn son getting a double portion in the father's estate, whether the account is considered ro'uy or *muchzak* would be dependent on the previous מחלוקת. However, two of the leading פוסקים of our day rule that contemporary bank accounts would not be subject to the same ruling as the היתר עיסקא. Interestingly, though, they give exactly opposite rulings to each other.

הרב שלום משאש the former רב הראשי of ירושלים in his ספר תבואות שמש suggests that even the פוסקים who rule that bank accounts are at least one half ראוי would agree that in the modern day banking system it is entirely מוחזק. The reason for this is that with every other type of loan there is a risk that the borrower will tell the lender to come back (to collect) another day. This is not the case with a bank, where you can come any day and demand your deposit. This is especially true in the modern day banking system, where you can access your entire assets at any time of day by withdrawing them from a cash machine. Thus the funds are definitely considered a פקדון. ר' מנשה קליין שליט"א concurs with this ruling.

הרב יעקב בלוי שליט״א, member of the בד״ץ עדה החרדית writes in his series on הל׳ חושן משפט (called פתחי חושן) a contrary opinion. He suggest that since it is known by all that the proceeds of personal deposits are in turn lent out by the bank to others, this is enough of a basis to give the entire account a דין of ראוי. There is no difference whether the deceased lent the monies, or if he gave them to a financial institution that would in turn lend them to others.

ר׳ עובדי יוסף שליט״א also goes to great length to dispute the words of the תבואות שמש. He uses the argument that this is similar to a מלוה, as the גמ׳ says ״לאו הני מעות שבוק אבוהון״ - these are not the same monies which their father left over, and since it is מחוסר גובייא – the money has not yet been collected at the time of death, it is considered ראוי.

C. <u>BANK ACCOUNTS IN GENTILE BANKS AND CD'S.</u>

Although the reasoning of the תבואות שמש would apply even where there is no היתר עיסקא, in a gentile bank there is even less reason to entertain a possibilty of מוחזק. Therefore, since ר׳ משה פיינשטיין זצ״ל and יבד״ח הרב וואזנער and many other פוסקים assume that it has a דין of ראוי, it seems clear that the most we can suggest on behalf of the בכור is a ספק. The consensus is that in the event that one is in doubt whether a certain situation is considered ראוי or מוחזק the בכור is considered being מוציא from the יתומים, in which case the דין is המוציא מחבירו עליו הרא׳, and all the brothers would split the second portion.

Therefore regarding a regular account in a gentile bank and certainly a Certificate of Deposit, which is definitely set up as a מלוה (although one could technically withdraw his deposit prior to the expiration date, and would be merely subject to penalties, even so the setup is definitely one of מלוה) a בכור would not be able to take פי שנים away from the other brothers.

D. LIFE INSURANCE POLICY:

In the event that the designated beneficiary was the בכור himself, there is no question that he would receive the entire death benefit (exactly how and why "designation" works halachically, in spite of the fact that it is a שלא בא לעולם דבר is beyond the scope of the present discussion.) Similarly in the event that all the sons were listed as beneficiaries, or even if the wife was designated alongside the sons, the דין would seemingly also be that the בכור does not receive anything extra. (Whether it is permitted to deprive the firstborn of his double portion in such a manner is also beyond the scope of the present discussion). What would be, however, if there were no designation? To simplify matters let us discuss a case where the wife has already passed on and there are no daughters - the sons are thus the only parties involved.

1. TERM LIFE INSURANCE: Term life insurance is definitely considered ראוי - since this asset is worthless until death, there is no greater example of ראוי than an asset that only emerges as of death.

2. WHOLE LIFE INSURANCE: Although in regard to whole life insurance the deceased was considered to have had equity during life, there doesn't seem to be any reason to regard this benefit as מוחזק any more than a bank account.

There is a possible difference, however. As mentioned above ר׳ בלוי שליט״א explains that the reason a bank account is considered ראוי is because it is known that the bank's intention is to lend the monies to others. It is therefore considered as if he himself lent the monies, making it ראוי. Subsequently one might suggest that with a life insurance company that would generally <u>invest</u> the premiums paid in stocks etc. which may be considered מוחזק, the premiums paid would have a status of מוחזק.

However, this is not the case. ר׳ בלוי שליט״א was merely explaining why even those who render the classic עיסקא to be מוחזק, would agree that even a Jewish bank account, albeit על פי היתר עיסקא, would still have a דין of ראוי. A gentile bank, on the other hand, is anyway considered ראוי in which case whole life insurance has a דין of ראוי according to all.

E. <u>PENSION PLANS:</u>

Again we will only discuss at this point an instance in which no beneficiary was named and there is no wife or daughters to consider. There is no difference between a pension plan and a bank account, for even if the deceased were to have worked and his employer hadn't paid his wages prior

to his death, the insurance payout is exactly like a מלוה and the בכור would not receive פי שנים.

F. CORPORATE, GOVERNMENT BONDS:

When using the following definition: "Obligations of the government on private companies to repay with interest monies that were lent to it", it is seemingly obvious that at most such bonds would be considered a מלוה בשטר which is very clearly considered ראוי. Although they can be sold or traded on the open market, seeing as they don't represent anything tangible (as opposed to stocks, which represent ownership of a portion of a specific company), they must be considered a loan and would have a דין of ראוי. (One may try to suggest that the actual bond, being that it has a cash value and can be traded, could be viewed as a משכון. To substantiate such a suggestion one must contrast a bond to every שטר which can also be sold on the open market, albeit not as easily as bonds).

G. STOCKS:

As stated previously in the name of the רמ״א, a partnership is considered מוחזק; therefore at first glance stocks would seemingly have a דין of מוחזק since the stockholder owns an actual piece of the relevant company. The פוסקים however raise a doubt in the event that the shareholder can not in any way actualize his portion of the company, and even more so if he does not even have any right to vote on issues.

דיין ווייס in his sefer מנחת יצחק writes a lengthy תשובה dealing with the question of whether a shareholder of a company which produces חמץ must sell his shares to a gentile for the duration of פסח. In this תשובה he goes to great length to dispute the שואל who argues that since the shareholder cannot exercise his ownership of the said company in any way, it is not considered a true ownership, thereby making the investment merely a loan. He quotes a section of American Law that states that a shareholder has no right to collect his share of the company from any holdings of the company. Similarly, a debtor of the company may not collect his debts from any shareholder of the company. Also the liability of any shareholder is limited to the value of his shares, in contrast to a standard partnership in which each partner is liable for the entire partnership. In spite of this דיין ווייס concludes that one must sell his shares over פסח. It would appear that the same question is applicable to the דין of פי שנים. Therefore according to דיין ווייס the בכור would receive פי שנים. In addition one could add that the argument that even if it was considered a loan the actual stock certificate can be deemed a משכון since it has an inherent value, which would further the argument that it is considered מוחזק (albeit only according to the opinion of the ש״ך, since it is a משכון from an עכו״ם-see overview section 4).