



# BUSINESS WEEKLY

Restoring the primacy of choshen mishpat

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UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA



## STORY LINE

By Rabbi Meir Orlian

### PASUL ESROG

After Sukkos Mr. Hadar saw a sign in his shul, posted by Rabbi Posek. "I am collecting esrogim to teach students in my kollel about the laws of esrogim," the sign read. "The esrogim will be made into jelly afterwards and distributed as a segulah to relevant families."

Mr. Hadar brought the esrog to Rabbi Posek. As he took it, Rabbi Posek saw a clearly evident black spot towards the top of the esrog. "Is this the esrog you used all Sukkos?" he asked.

"Sure, made a brachah on it every day," answered Mr. Hadar. "Isn't it beautiful? Big and yellow and perfectly shaped, with ridges all around! Just has one black spot on it. That doesn't matter, does it?"

"Actually, the black spot is a significant problem," replied Rabbi Posek gently. "All the things you mentioned are hiddurim (enhancements) in the esrog, but an evident black spot towards the top renders the esrog pasul (invalid)" (O.C. 648:12).

Mr. Hadar was crestfallen. "What should I do now?" he asked.

"You tried your best," Rabbi Posek encouraged him. "There's nothing like learning the laws ahead of time. Now you'll know for next year."

"What about the money I paid?" Mr. Hadar.

"Take the esrog back to the seller and tell him that the esrog was pasul," replied Rabbi Posek. "See if he'll refund your money."

Mr. Hadar returned to the seller. "I found out today that my esrog was pasul," he said. "I'd like my money back."

"Now you're asking me?" asked the seller incredulously. "Sukkos was over a week ago! There's nothing to do with the esrog now."

"What difference does that make?" responded Mr. Hadar. "You sold me defective merchandise; I'm entitled to a refund."

"You had a chance to check the esrog all Sukkos," objected the seller. "If you chose not to check it, you forfeited your rights."

"I didn't forfeit any rights; I assumed what you sold was kosher," replied Mr. Hadar. "Can we consult Rabbi Dayan?"

"Happy to," said the seller. "But I don't see any reason to return the money now."

Mr. Hadar and the esrog merchant went to Rabbi Dayan. "I bought this esrog before Sukkos and was just told that it was invalid on account of an evident black dot," Mr. Hadar said. "Must the seller refund my money?"

"If the esrog was definitely pasul when you bought it before Sukkos, the seller has to refund your money," said Rabbi



## BHI HOTLINE

### PAYING FOR ONE'S LULAV

I asked my married son to buy me a lulav and esrog when

he shopped for his own set. I didn't pay him when he dropped it off, and now it is shortly before Yom Tov and it would be difficult to get the money to him.

**Q: Am I required to make an effort to repay him before Yom Tov, or may I wait until Chol Hamoed?**

A: Although generally one should make a concerted effort to pay at least a perutah (C.M. 190:2) to the seller before Yom Tov, in your circumstance it is not necessary.

On the first day of Sukkos it is essential to own the lulav used for the mitzvah. One does not fulfill his obligation with a borrowed one (O.C. 658:3). In order to own a lulav it is necessary to make a kinyan (proprietary act). According to the Torah, money effects a kinyan. But Chazal enacted the rule that the effective kinyan for a movable object is to lift it (hagbahah) or pull it (meshichah); transferring money is not effective. There is a debate, though, whether a Rabbinic kinyan is effective for Biblical matters. Some authorities criticize people who do not pay for their lulav before Yom Tov, because possession without payment constitutes only a Rabbinic kinyan; it may not be sufficient to fulfill the Biblical prerequisite that one must own the lulav with which he observes the mitzvah (Machaneh Ephraim Kinyan Meshichah 2, cited by Shaarei Teshuvah 658:1, Bikkurei Yaakov 658:5 and Binyan Shlomo 48. See also Minchas Pitim 658 and Mishnah Sachir 97). Some hold that bringing the lulav into one's home (kinyan chatzer) is a proprietary act that satisfies the prerequisite of ownership (M.B.

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## STORY LINE

Dayan. "The merchandise was defective, so the sale was a mekach ta'us (faulty purchase)." "What about the fact that Mr. Hadar had ample time to check the esrog?" asked the seller.

"That point is relevant to the laws of onaah, mispricing," answered Rabbi Dayan. "If the aggrieved party, the one who was overcharged or underpaid, had sufficient opportunity to verify the price afterwards and did not do so, he forfeited his chance for redress" (C.M. 227:7-8).

"Regarding defective merchandise, though, even if the buyer did not check he is entitled to a refund, since the sale was faulty from the beginning," continued Rabbi Dayan. "However, if a common commercial practice (minhag hamedinah) exists not to return after a certain point, the practice is binding" (C.M. 232:3,19; Pischei Teshuvah 232:6).

"What if it's not clear when the esrog became pasul?" asked Mr. Hadar. "For example, a gouge could have happened during Sukkos."

"Then whoever holds the money has the upper hand," replied Rabbi Dayan. "Since Mr. Hadar already paid, we would assume it became pasul in his possession, and the seller would not have to refund the money" (C.M. 232:11,16).

"Does it make a difference whether the psul of the esrog was d'Oraysa or d'Rabbanan?" asked Mr. Ploni.

"When someone sold non-kosher food, there is such a distinction," answered Rabbi Dayan. "There, however, the customer had the benefit of eating the food (C.M. 234:2-3). In our case, the use of the esrog was to fulfill the mitzvah. Even if the disqualification is d'Rabbanan, Mr. Hadar could not fulfill his mitzvah properly. Therefore the sale is faulty, and he is entitled to a refund."



## MONEY MATTERS

### COPYRIGHTS AND PATENTS # 15

**A: Someone uploaded an illegal "cracked" copy of a program to the internet. Is it permissible to download it?**

**A:** There is an opinion that it is permitted to copy something made available over the internet. This is based on the concept of zuto shel yam regarding hashavas aveidah: An item that has been swept away by a river or the receding tide is considered ownerless, since there is no control over it and the owner abandons hope (ye'ush); in the same way, once the program is made public on the internet the owner has no control over it.

However, most authorities reject the comparison to zuto shel yam. There, the item is completely lost; here the creator still maintains ownership of his intellectual property and continues to sell legal copies of it. Furthermore, even the uploaded copy is not lost until people download it. In many cases, the creator can demand that the site remove the illegal copy.

Moreover, even in the case of zuto shel yam there is a moral obligation to return the washed-away item to its owner; and if the government demands that this be done, it is required halachically because of dina d'malchusa (C.M. 259:7).



## BHI HOTLINE

658:10), while others maintain that only paying for the lulav is effective — merely bringing it into one's home is insufficient (Mateh Ephraim 625:17, see Ketzos 198:1).

Others challenge the premise of this position and offer numerous reasons why the customer is Biblically considered the owner even if he did not pay for the lulav before Yom Tov (HaElef Lecha Shlomo O.C. 373, Chasam Sofer Sukkah 30b, Erech Shai 658:6 and Imrei Binah Yom Tov 21). Poskim rule that l'chatchilah one should be stringent and pay at least a perutah to the merchant before Yom Tov (M.B. 658:10).

In your circumstance, however, all opinions agree that there is no need to go out of your way to pay your son in order to satisfy the prerequisite of ownership of the lulav since you really did perform an effective kinyan with money. When one sends an agent to purchase something on his behalf and does not give the agent money for the purchase, the money the agent spends on behalf of the principal is considered a loan to the principal, so it is the principal's money that was used to effect the transaction (C.M. 183). Since the agent spent money in accordance with the instructions of the principal, the principal is obligated to repay him, and since it is considered the principal's money, he has performed the necessary kinyan involving money (see Shach 183:2 and Ketzos 183:4). Therefore, when you sent your son to purchase the lulav for you, the kinyan was between you and the merchant, so all opinions agree that you satisfied the prerequisite of ownership. Although you must repay your son for the loan, that obligation is not an impediment to your ownership of the lulav.

For questions on monetary matters,  
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