

HALOCHOSCOPE

This week's question:

An institution accepted a charitable donation that turned out to be stolen. Must the charity return the item to its original owner? If the donation was cash, does this change? If the charity was aware that this donor's ethics were questionable, does its status change with regard to liability to return the money?

To explain: A thief must return what he stole. Under certain circumstances, the item need not be returned, but the thief must pay compensation. If the item was transferred to a third party, there might still be an obligation to return it. The third party might be obliged to give it directly to the owner, and then claim his money back from the thief. Or there might be a way to claim the money from the owner, and to let the owner then claim the money from the thief. Even if he is not a thief, often one is required simply to return an item that belongs to someone else, based on the *mitzvah* of *hashavas avaida*, returning lost articles. Cash might have different rules, since it is not an individual item. A *tzedakah* collector may not knowingly accept *tzedakah* from a thief, and it is considered stealing. Under some circumstances, a person is not obliged to pay, but should do the ethically correct thing, to fulfill his obligation to Heaven. The question is whether a *tzedakah* organization has this obligation to do this with money entrusted to them for the poor?

The issues:

- A) Hashava**, returning an object to the owner; *Tashlumin*, compensating with money; *Takanas hashuk*, when a third party is involved
- B) Accepting *tzedakah* from questionable sources; whether the transfer takes effect**
- C) The liability and the discretion of a *tzedaka* organization**

A) Hashava

The Torah requires a thief to return a stolen object intact. However, there are situations when the thief has taken possession of the object and must instead repay with money. In many situations, this works to his disadvantage. If the item has increased in value, the owner stands to gain by the return.

To be liable to return the item, it must be intact. If it underwent a change, it could now be considered in the possession of the thief. He must repay the value. In addition, there is a requirement that the owner has given up on his loss. The Talmud debates whether *yiush*, giving up, alone, relinquishes claims of ownership. In the case of *hefker*, when one disowns an item, or *avaida*, a loss, the finder takes possession after *yiush*, usually. He acquires an item that has no current owner standing in the way. A theft takes place before *yiush*. At the point the thief would normally take possession, the removal from the owner's possession, the owner is in the way. We follow the view that *yiush* alone does not work. In combination with a change, it works to gain possession of the item. Automatically, the thief is obliged to pay the value of the item at that moment. [Actually, this moment is the matter of Talmudic debate, and further debate by the poskim.]

There are three types of change. By physically altering the item irreversibly one makes it no longer possible to return it intact. Sometimes, an item can be changed in a minor way to change its function, such as making an animal hide into a bedspread. Thus, its name is changed in the process. The third type of change is a change of owner. The thief sells the item to a third party, after *yiush* has taken place. With the transfer of ownership, the thief creates a situation where he is no longer liable, or able, to return the actual item. If this is attempted before *yiush*, all that has happened is that the owner's item is now in the hands of someone else. It still belongs to him, and, in fact, the thief is liable for its safety as well. At the same time, the new party is obliged to return the item as though it were an *avaida*, lost item, found before *yiush*. This applies whether or not the third party knew about the theft. If the third party was aware of the theft, it is forbidden to purchase or accept the item as a gift. He is almost as liable as the thief. It is even forbidden to purchase anything from a known thief.

There are differing views on a case where the change of ownership came about through an illegal act, such as when a third party stole it from the thief. In many such instances the advantage lies with the original owner. If the item is intact, he may claim its return. If it is changed, he may choose to demand payment from whomever he wishes. This could help if one of them is poorer than the other, or if one is very tough.

When returning the item, there is much debate about how one fulfills his obligation. Ideally, the person holding it is responsible for its safety. Therefore, he could not leave it unsecured. Ideally, the owner should be notified that the item is returned. A thief might be embarrassed to do this. Special considerations are made to spare a thief discomfort as an incentive to repent. In some instances, one may return an inanimate object to the property of the owner, where he will see it at some time.

Tashlumin, paying the value of an item is considered a *mitzvah* in its own right. To properly fulfill this, a real assessment must be made. Some maintain that unlike a daylight robber, a thief has no *mitzvah* of *hashavah*. He must return the item anyhow, because it belongs to the owner. Some maintain that while he might not be obliged in the *mitzvah* of *hashavah*, he is obliged in the *mitzvah* of *tashlumin*. As mentioned, there are situations when the third party must make payment. However, if the item was taken from the first thief intact, after *yiush*, then was eaten or otherwise used up by the third party, the owner may not claim payment from the second person. If the stolen item was cash, the issue is the wear and tear. In earlier times, each coin had its own value. Nowadays, there is no difference between the actual money and its replacement, unless the owner had special reasons for keeping certain denominations. However, if the actual item is still intact, it still belongs to the owner, and must be returned. If it has already been mixed with other coins or notes, or if it was already spent or changed for other cash, the original thief is really liable. One cannot hold the new holder of the funds liable, since there is no clear evidence that that was the money taken (unless all parties can identify it).

Takanas hashuk is a Rabbinical institution to protect unsuspecting buyers. Someone buys an item before *yiush*. He then discovers that the seller had stolen it. He may claim the value from the owner before he returns it. The owner must then claim the money he paid the third party from the thief. To implement the institution, the third party must show evidence of how much he spent. For example, let us say that an institution

bought a *sefer torah* or silver decorations. It turned out that the seller had stolen it. Such items have no fixed value. The institution must show how much it paid in order to claim its value from the true owner. After *yiush* many details change. If the item was purchased before *yiush*, but only discovered to be stolen after *yiush*, the poskim debate whether the third party need return the item at all, even if he can claim the money from the owner.

If there were multiple sellers, all of whom made a small profit, the owner pays the full amount to the last buyer, collects the original amount from the thief, and the small amount of profit from each seller along the way. *Takanas hashuk* does not apply when the third party knew that it was stolen. The exception to this is when the third party did it with the intent of retrieving it for the owner. He knew that the owner had no other way to retrieve it, so he bought it from the thief. The poskim debate whether *takanas hashuk* applies to a known thief selling items of unknown origin. Some say that a buyer must suspect that the items are stolen. *Takanas hashuk* applies to cash if it is still intact. Checks are a *shtar*, document. Ideally, the institution was never made to protect one who purchases a document, except documents that are bought and sold all the time. In modern times this might apply to someone who cashes a check, then discovers the theft. If it has not been deposited, the owner can simply cancel it. There is no need for *takanas hashuk*. If it was deposited, the issue is whether to treat it as an item, a document, a commonly sold document, or cash. *Takanas hashuk* would apply when the third party paid money. There is some discussion on whether it could apply to a gift-type situation; the third party did not lose out of pocket. [See Shemos 22:3 Vayikra 5:25, Chinuch 103, Baba Kama, perek 7 & 9-10, esp. 66a, 69a, 11b-112a, 114b-115a, 118a, Poskim. Tur Sh Ar CM 348-377, esp 356-7 360-1 368, commentaries. Pitchei Choshen IV:3, 4:3 9 10 12.]

B) Accepting tzedakah from questionable sources

Just as it is forbidden to purchase from a crook, it is forbidden to accept gifts and *tzedakah* from him. In addition, before *yiush*, a thief does not own what he sells or gives. Therefore, the gift has no standing. It still belongs to the original owner. The *tzedakah* is inadvertently holding a stolen item. It is also forbidden to accept from one who does not think he is stealing, but is really giving away someone else's money, such as a child. In some situations, the *tzedakah* may assume that this belongs to the donor himself. In some of these situations, the *tzedakah* might be permitted to keep the money afterwards. In some cases, the *tzedakah* will be violating the theft. If the money does not leave the possession of the owner until the *tzedakah* removes it, the *tzedakah* or its agent committed the theft. In either case, the item or the money must be returned to the rightful owner.

If the *tzedakah* did not realize that the donor was a crook, an intact item must still be returned. If it was money, before *yiush* it still belongs to the owner. However, we have pointed out that if the money was exchanged for other cash, it is likely that the *tzedakah* cannot be held liable. If the crook has none of his own money, all of his money really belongs to someone else. However, no given victim can claim the money from the *tzedakah*. The Talmud debates how to fulfill *hashavah* in such situations.

[The definition of robbery or thievery can be expanded in some situations. The Torah forbids withholding payment of a loan, wages or a purchase. Suppose one received an investment and promised a certain return. He knew that he might have to use this money for something different, and would not be returning it. He could be considered a

thief, even though the money was given to him willingly. If he then used this money to pay an earlier investor, the third party now has stolen money. Thus, accepting from one who is later found to have been conducting a scheme like this might be considered accepting stolen goods. The issue of returning them arises, if the money is intact.] [See Baba Kama 68b-69a 113a 119a, Poskim. Tur Sh Ar YD 248:4 CM 369:1-5, commentaries. Tzedakah Umishpat 1:16-21, Pitchei Choshen 1:31-32..]

C) Discretion of the tzedakah

Assuming that the *tzedakah* is not *halachically* liable to repay the funds to the victim, there might be a less binding obligation. This can come in various forms. Some obligations cannot be enforced by the *Bais Din* or the courts, but in Torah law there remains a real obligation, *latzais yedai shamayim*. In other cases it is considered *lifnim mishuras hadin*, an extra piety. This is considered an act of kindness. In some situations it is considered ethical, somewhere between the two. This would be a responsibility, but not due to monetary laws. For example, it might create a *kiddush Hashem*, sanctification of G-d's Name, if one shows how ethical a believer behaves. A *tzedakah* is a manager for funds that belong to others. These are either the poor or the community. Do the administrators have discretion to return the funds when there is no real obligation to do so?

First, it must be determined what type of *gabai tzedakah* is in charge. Some *gabaim* have full discretion with the full backing of the community. Due to their position, they may change the usage of the public funds. Some funds might be such that the poor as a group do not own them yet. Other types of *gabai* are in no position to make any changes in usage. Once donated, the money is in possession of the poor. Taking this money to give it away, for whatever noble purpose, is just stealing again! Some administrators of such funds are invested with certain discretionary powers. They make decisions based on the need for goodwill and the like. In such cases, the money could be returned, if it is felt that this will create a better reputation, or prevent a negative reputation. In many such situations, there is a requirement to return it, not to compensate the victim, but to prevent future losses to the *tzedakah*. [See Tur Sh Ar YD257:1-3 259 HalochoScope XIV:12 A.]

In conclusion, if the charity was aware that this was questionable, it does not even count as a donation. It must be returned. Otherwise, the item should be returned as though it were a lost article. If it can be shown that the owner had given up on it, or in cases where it is not intact anyhow, the *tzedakah* may keep the money. However, depending on the power of discretion of the administrators, they might be required to return it.

On the Parsha ... *And they shall take the gold .. [28:5] The wise of the heart who will be making the vestments shall receive the materials from the donors. [Rashi]* Why were the artisans also the collectors of the materials? The collection could be done by other *gabaim*! One could say that they should do the *mitzvah* from beginning to end. Or perhaps it was done this way to reduce the suspicion of pilfering and wastage. The artisans would know exactly what was needed at any time. Indeed, from here we derive that *gaba'ai tzedakah* should always be appointed in pairs – 'they' is the plural form – to avoid suspicion. [Baba Basra 8b.]

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