BOURBON SHE'AVAR HA'PESACH

RABBI ELI GERSTEN
RC Recorder of OU Pask and Policy

A BOURBON company applied to the OU for kosher certification. All the ingredients in bourbon are kosher, so it seemed that this would be an easy application. However, one of the junior shareholders was Jewish. Since the company has been in business for several years, all the whiskey had already passed through Pesach and a mechiras chametz had not been done. Although the Jewish partner owns a relatively small percentage of the company, about 5%, it would seem that their entire inventory of approximately 700 barrels would become chametz she'avar alav ha'Pesach. Since whiskey ages for years, their current inventory will remain in their warehouse for many years to come. Logistically, it will be impossible to give hashgacha on two sets of bourbon, one kosher and one non-kosher stored side by side. Is there any way to salvage this certification?

ARE STOCKHOLDERS SHUTTFIM?
The OU follows the opinion of Rav Moshe Feinstein zt”l (Igeros Moshe Evan Ha’ezar I:7) that a corporation is a shutfus of its shareholders. However, small shareholders who cannot influence policy are only viewed as investors. Rav Moshe explains that a small investor can purchase shares in a corporation that is open on Shabbos, since there is no intent to actually acquire ownership. The shares are viewed only as a method of sharing in the profits. However, large shareholders, whose opinion can shape policy, do have intent to acquire ownership and are shutfim in the company. In this case, in addition to owning 5% of the stock, the Jewish partner is also one of the managers of the company. Therefore, he is a shutaf in the company and his share is chametz she’avar alav ha’Pesach.

Perhaps one can make a halachic argument to permit this bourbon. The portion of each barrel that is Jewish owned is only 5%. The Mishnah Berurah (Shaar Ha’Tzion 448:4) cites the Chemed Moshe that if the majority ownership is non-Jewish, the Jewish portion is batel and is not subject to the k’nas of chametz she’avar Ha’Pesach. This is also the opinion of the Zecher Yitzchok (R’ Itzla Ponovitcher Siman 8). However, Mishnah Berurah concludes that this halacha is unclear, implying that one should not rely on the beter of majority non-Jewish ownership alone. Rav Schachter cited the Aryeh D’ai’lei and other pokim that disagreed with the idea of applying betul to ownership.

The policy of the OU has been to rely on the opinion of the Zecher Yitzchok only in conjunction with a mechira between the partners (i.e. the Jewish partner sells his minority stake in the company to the non-Jewish partner for the duration of Pesach). However, the OU does not permit a majority Jewish owned company to arrange a mechira in order to stay open on Pesach, since this type of mechira appears to be lacking in gemiras da’as (sincerity). Although, Rav Moshe Feinstein zt”l (Igros Moshe O.C. 1:149) wrote that the mechiras chametz of a Jewish owned supermarket is valid even if it remains open and continues business as usual, Rabbi Genack had been told by Rav Soloveitchik zt”l not to permit such sales, unless there are other mitigating factors. In a case when the non-Jew is the majority owner, because the Zecher Yitzchok and others would anyways permit the chametz after Pesach, we may rely on a mechira between partners so that the company can remain open. Rav Schachter concluded that lichatchila we should not certify the bourbon based on the Zecher Yitzchok alone, since no mechira had been done.

MIN B’MINO

However, in this case, there is another consideration. The grain used to make bourbon must be at least 51% corn, and in this particular case, the amount of corn was about 70%, with the remaining 30% made up of rye and barley. Since rov of the bourbon is not chametz, perhaps min ha’Torah we should view the chametz as batel b’rov. If min ha’Torah, the chametz portion of the bourbon is batel, then there was no violation of the Torah prohibition of Bal Yira’eh U’Bal Yimatzei. Although mi’derabbonon one would not be permitted to own bourbon on Pesach (since the chametz is not batel b’ishish), but the k’nas of chametz she’avar ha’Pesach, which is only if one violates the Torah prohibition, would not apply.

However, the Aruch Hashulchan (OC 442:20) is very clear that this argument is not correct. He writes that even a potato alcohol which contains only a small portion of wheat is osur min ha’Torah. Presumably, he does not view the portion of the alcohol produced
by the potatoes and the portion produced by the wheat to be min b’mino, but rather min b’she’aino mino, which is not batel min ha’Torah unless it there is shishim. Rav Belsky zt”l said the same applies to bourbon. Rav Belsky said that corn alcohol and wheat alcohol have different tastes and must be considered two separate minim. Therefore, bourbon is osur min ha’Torah, and the k’nas of chametz she’avar ha’Pesach should apply. Furthermore, the Aruch Hashulchan writes that even if the chametz would be less than shishim, it would still be osur, since the alcohol is hu’amad with chametz. Although we pasken that a davar hama’amid is only osur mi’derobbonon, the poskim write that this case is an exception, and the k’nas of chametz she’avar ha’Pesach applies. Therefore, it would seem that we may not certify this bourbon.

YEISH BREIRA

Nonetheless, there is a basis to provide certification of the bourbon. The Mishnah Berurah (448:2) cites the ruling of the Shagas Aryeh that if a Jew and a non-Jew jointly own chametz and it becomes chametz she’avar ha’Pesach, if the partnership is dissolved and the non-Jew takes his portion of the merchandise as his share of the business, that portion is permitted and is not subject to the k’nas. Chametz she’avar ha’Pesach is only an issur d’robbonon. Regarding issurim d’robbonon we say yeish b’reira (the portion that they take was always their portion). Therefore, since retroactively we view this as having always been the non-Jews portion of the chametz, it was never subject to chametz she’avar ha’Pesach.

Therefore, Rav Schachter ruled that if the partners would divide the barrels of bourbon and the non-Jewish partners would take 95% of the bourbon, those 665 barrels would be permitted. Only 5% of the barrels, the 35 barrels that would belong to the Jew, would become osur. Because the Zecher Yitzchkok would hold that all the barrels are permitted, we need not insist that these barrels be destroyed. If he wishes to rely on the lenient opinions and sell or trade away his 35 barrels, he may do so. He can then reinvest that money and buy back his 5% stake in the company.

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LO BASI

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