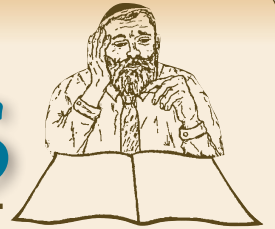


THE Daf HaKASHRUS



A MONTHLY NEWSLETTER FOR THE OU RABBINIC FIELD REPRESENTATIVE

לא באתי אלא לעורר

BOURBON SHE'AVAR HA'PESACH

RABBI ELI GERSTEN

RC Recorder of OU Psak 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 *mehiras 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 SHUTFIM?

The OU follows the opinion of Rav Moshe Feinstein zt"l (Igeros Moshe *Evan Ha'ezer* 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' Itzila Ponovitcher Siman 8). However, Mishnah Berurah concludes that this *halacha* is unclear, implying that one should not rely on the *heter* of majority non-Jewish ownership alone. Rav Schachter cited the Aryeh D'bai P'lei and other *poskim* that disagreed with the idea of applying *bitul* to ownership.

The policy of the OU has been to rely on the opinion of the Zecher Yitzchok only in conjunction with a *mehira* 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 *mehira* in order to stay open on Pesach, since this type of *mehira* appears to be lacking in *gemiras da'as* (sincerity). Although, Rav Moshe Feinstein zt"l (Igeros Moshe O.C. I:149) wrote that the *mehiras 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 *mehira 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 *mehira* 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'derobbonon* one would not be permitted to own bourbon on Pesach (since the *chametz* is not *batel b'shishim*), 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

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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 Yitzchok 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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