Taking Only from Profit

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In our last session, we addressed one scenario of preferred equity (where the investor takes precedence in receiving his money back over others) and issues of *ribbis*, the prohibition to take interest from another Jew. Today we will address a different question related to preferred equity and *ribbis*.

Question: If an investor using preferred equity enters a deal where he will not receive any additional money back unless there is a profit, does it still violate the prohibition of *ribbis*?

Answer: *Ribbis de'oraisa* applies only when one receives payment for giving a loan. But if the lender only receives payment (in addition to return of the principal) where there is profit, then it is downgraded to *ribbis derabanan*. This is based on the rule in the Mishna that one may not accept *tzon barzel* from a Jew, meaning that when one receives an investment of sheep from another, from which one may take the offspring but assumes full responsibility for the value of the sheep at the time of the acquisition. Thus, if the sheep decrease in value or die, the investor still receives the full value back. This case is *assur* as *ribbis derabanan* (since the guarantee of full security on the investment is somewhat similar to interest payment on a loan).

In our particular question, some contemporary *poskim* suggest that one can be lenient based on the opinion of the *Rema* (as interpreted by the *Shach*) that partners may split profits or losses however they wish, even if the division is not equal. Once two individuals are partners, the money invested is not considered a loan, but rather money that is subject to profits, gains, and losses according to the desire of the partners.

Let's take the example used in the previous session where one partner invests $50 and the other invests $100, and they agree that if there is a loss of $100, then both lose $50 equally, despite the fact that one invested more than the other. Technically, if they are truly considered halachic partners, then they really should split the loss according to the amount invested, and the one who invested $100 should lose more than $50. Nevertheless, the *poskim* who are lenient argue that it is permitted for the partners to agree that one of them receives more profit or less of a loss than the other, as that is simply considered the terms and conditions of the partnership on how to deal with the losses.

The Noda Biyehuda (in the *Derashos* of the Tzlach for *Shabbos Shuva*) though says that if one of the partners takes **full** responsibility for the money upon himself, then the money invested by the other is automatically considered a loan, as he will be basically guaranteed to receive all of his money back (like a loan). So in our case, where the investor is insured as preferred equity that "his money comes first," it would seem that the Noda Biyehuda would classify it as *ribbis derabanan,* despite not receiving additional money if no profit is made (and it is not clear that any Acharonim argue on him).

Although one should consult one's own halachic authority in this case to

ascertain his opinion about such investments, it is important to note this issue can be avoided through the following solution – take responsibility for some of the money, or at least for cases of *geneiva v'aveida* (theft and being lost), and add a condition that if there is some loss, the loss should be verified with two kosher witnesses. One who does not do is considered according to the Noda Biyehuda as one who is *shavkei heteira v'achlei issura,* puts aside a permitted option and instead employs a forbidden option. Meaning if there is an option that is definitely permitted, why take a chance on potentially doing it the wrong way.