

An Individual Mandate?

Counting Sefirat Ha'Omer Yourself / Part 1

By Rabbi Moshe Pinchasi

There are a few instances in which the Torah commands us to count: counting the years of *Yovel*, counting the days of *Ziva*, and, of course, counting the *Omer*. Each counting is conducted in a different manner. With regards to *Sefirat Ha'Omer*, the *Gemara* in *Menahot*[1] derives from the expression "*U'Sfartem Lachem*" – "and thou shall count for yourselves" – that each person has an individual obligation to count. This seems to imply that one must verbally count the *Omer* themselves and not rely on a community counting[2].

The Rashba's Opinion

Indeed, the *Rashba* was asked[3] why the custom is that the *Hazan* recites *Sefirat Ha'Omer* out loud, although the public recites it again themselves. The *Rashba* answered that one can fulfill his obligation to recite the *Beracha* of *Sefirat Ha'Omer* by hearing it from the *Hazan*, and only the counting itself must be recited by each individual[4]. This too is the opinion of the *Levush*[5], and the *Hok Yaakov*[6] who compares *Sefirat Ha'Omer* to the obligation of taking *Lulav* and *Etrog*, in which the Torah also uses the expression of "*Lachem*" – "for yourselves" – implying an individual obligation. Just as one must take a *Lulav* an *Etrog* himself, so too one must recite the *Sefirat Ha'Omer* himself.

However, the *Poskim* note that the *Rashba* seems to contradict what he writes in a different

Teshuva[7] regarding hearing the *Sefirat Ha'Omer* from the *Hazan* before reciting it, that "as long as [the individuals] have in mind not to fulfill the *Mitzvah* via the counting of the *Hazan*, then they must recite the *Beracha* again, as all *Poskim* agree that when one has a specific intent not to fulfill a *Mitzvah* with a certain action, then he does not fulfill that *Mitzvah*". The *Magen Avraham*[8] points out that in this latter *Teshuva* the *Rashba* is implying that one can fulfill his obligation to count *Sefirat Ha'Omer* via listening, contrary to what he writes in the former *Teshuva*.

The Individual Mandate

To answer this seeming contradiction, the *Hok Yaakov* writes that the *Rashba* never meant to say that the community fulfills their obligation to count by hearing the counting from the *Hazan*, only that they fulfill their obligation to recite the *Beracha*. The counting, however, must still be recited individually. The *Pri Megadim*[9] agrees with this understanding, and this seems to be the opinion of the *Rama* as well. Thus, the *Pri Megadim* writes, that even if one had the intent to fulfill the *Mitzvah* when he heard the counting of the *Hazan*, one should nevertheless count again themselves

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(albeit without a *Beracha*, as per the opinions that one has already fulfilled their obligation).

HaRav C.P. Scheinberg in *Mishmeret Hayim*[10] suggests that the reason one cannot rely on hearing the *Sefira* from someone else is because counting the *Omer* is meant to show one's anticipation for the acceptance of the Torah, as the *Hinuch* writes[11]. Therefore, it is imperative that one counts himself rather than relying on hearing it from someone else.

On the Other Hand...

Still, the *Pri Hadash*[12] writes that while it is preferable to count on your own, one can fulfill the *Mitzvah* by hearing it from others[13]. This too is the opinion of the *Mahatzit HaShekel*[14]. The *Hattam Sofer* and the *Hida* in *Birke Yosef*[15] also agree with the *Pri Hadas* while adding that the individual mandate to recite *Sefirat Ha'Omer* is only meant to exclude the option of a *Bet Din* counting on behalf of the community (as is done with regards to counting the fifty years of *Yovel*). [16]

Additionally, the *Hattam Sofer* argues that one cannot compare *Lulav* and *Etrog*, in which the *Mitzvah* is a physical act which cannot be performed vicariously, to *Sefirat Ha'Omer* which should be subject to the general rule in which hearing is considered like reciting – “*Shomea K'Oneh*”.[17]

As to the opinion of the *Rashba*, the *Hida* understands that he never meant to imply that one cannot fulfill the *Mitzvah* via listening, only that it is customary to recite the *Mitzvah* individually out of “*Hibuv Mitzvah*” – showing love for the *Mitzvah*. The *Be'ur Halacha*[18] writes that this is the opinion of most *Rishonim* and *Aharonim*. *L'Halacha*, the *Mishna Berura*[19] concludes that one should preferably recite the *Sefirat Ha'Omer* themselves, and that if

one heard it from the *Hazan* – with the intention to fulfill the *Mitzvah* – one should nevertheless recite the *Sefirat Ha'Omer* on their own without a *Beracha*.

No Intention

Hacham Ovadia Yosef, in *Hazon Ovadia*, raises a possible issue with regards to hearing the *Sefirat Ha'Omer* from the *Hazan*. He cites the opinion of the *Shulhan Aruch HaRav* who goes to the other extreme and writes[20] that one who hears the *Sefirat Ha'Omer* from the *Hazan* – without neither of them having any intent that the *Hazan's* counting should “count” as the listener's count – can no longer count with a *Beracha*; unless

he specifically had in mind *not* to fulfill the *Mitzvah*[21]. Accordingly, Hacham Ovadia advises to stipulate that one intends not to fulfill the *Mitzvah* by listening to the *Hazan's* count, or, alternatively, to recite the counting along with the *Hazan*. [There are various customs as to whether the *Hazan* recites “*BiR'shut Moray V'Rabbotay*” before counting, and whether he counts first or the community counts first. We hope to address these issues in our next article, *Be'Ezrat Hashem*.]

Sources

[1] דף ס"ה ע"ב [2] וכ"כ בבא"ה"ל (ס"א ד"ה ומצוה) להוכיח מדברי רש"י שם ד"ה לכל דס"ל כן, ועיי' בחזו"ע (הל' יו"ט ע"ב רכט) שכי' להעיר ע"ד דא"י מוכרח [3] שו"ת ח"א סי' קכו [4] וכן נראה מחידושי למנחות יעו"ש ד"ה וקשיא [5] סי' תפט ס"א [6] סק"ד [7] שם סי' תנח, הו"ד בב"י (סי' תפט), וברמ"א שם ס"ג [8] סק"ב [9] א"א סק"ב [10] ח"א, עניני ספירת העומר, אות ד [11] מצוה שו', וז"ל: לפי שכל עיקרן של ישראל אינו אלא התורה וכו', נצטוו למנות ממחרת יו"ט של פסח עד יום נתינת התורה, להראות בנפשינו החפץ הגדול אל היום הנכבד הנספך, ע"כ. ובביאור דברי החינוך עיי' מש"כ הגרש"ד פינקוס זצ"ל בשיחות הגרש"ד על ספירת העומר בדרוש 'שבע שבתות תמימות תהינה' [12] סי' תפט ס"א [13] ואין להקי' ממש"כ בתשובה (סי' קכו) דהש"צ יכול להוציא בברכה ואח"כ היחידים יספרו, דמשמע שאינם יכולים לצאת בספירה עצמה, דאיכא למידחי דהשיב כן הרשב"א מפני שהשואל סבר דא"א לצאת יד"ח בברכת ספ"ה מהשי"צ משום דבעינן וספרתם לכם, וע"כ השיב לו הרשב"א דבברכה 'אפי' לכתחילה' יכול היחיד לצאת בברכת השי"צ, אבל בספירה לא מצי למימר דלכתחילה' יכול היחיד לצאת יד"ח מפי השי"צ משום דלכתחילה כ"א סופר לעצמו, ואין דעת השי"צ להוציא את הרבים יד"ח בספירה, אבל אה"נ אם רוצה הוא לצאת יד"ח הספירה ג"כ והשי"צ יכול להוציא שפיר דמי [14] ע"ד המג"א שם [15] סק"ו [16] כמש"כ תוס' במנחות (דף סה: ד"ה



וספרתם), ועי"ע בשו"ת חת"ס (חאו"ח סימן רא) [17] ע"י כפות תמרים עמ"ס סוכה דף מא: ד"ה גמ'. [18] ד"ה ומצוה [19] סק"ה [20] סעיף יב [21] ובפרט דלשיי הפר"ח (סי' תפט ס"ד) ש"י השו"ע היא דבמצות דרבנן א"צ כוונה [ומוכח להדיא מדברי השו"ע דס"ל דספירת העומר בזה"ז היא מדרבנן], ואף שהגר"י טייאב בערך השלחן (סי' ס סק"א) כי דאף למ"ד דמצות אינם צריכות כוונה היינו דוקא כשמזכיר הברכה בפיו, אבל אם רוצה הוא לצאת בשמיעה לכו"ע צריך כוונה לצאת, וא"כ לדבריו כיון שאין השומע מכין לצאת תו ליכא למיחש למה ששומע הוא את הברכה והספירה מהש"צ, מ"מ אין כן דעת השו"ע הרב.

aware or unaware of the defect it doesn't apply. Thus, if, according to your knowledge, all of your merchandise is defect-free, you would be relieved of *Genevat Da'at* issues.

Those that sell defective goods, such as used items, expired items, or the like, should either clearly declare to the buyer the defects, or make it clear that you know that the item has defects. You can then leave it to the buyer; he can buy the item at his own risk, or he can choose to inspect it before buying, because you are selling it "as is". According to some *Poskim*[2] when the buyer could check for the defect, and it is standard practice to check for defects, the seller need not declare the defects at all. This would be the case with examples such as the sale of used cars where the seller allows the buyer to have it checked by another mechanic and it is the type of problem that can easily be found by a competent mechanic.

Mekah Ta'ut refers to sales of defective merchandise where the seller must accept returns.

Regarding the issue of *Mekah Ta'ut*, according to strict *Halacha* it is insufficient to declare that it has defects and that the sale is on the condition that the buyer forgoes the right to nullify the sale on the basis of the defects. Rather, the seller must clearly identify the defects and the amount that it decreases the value of the item. Nonetheless, according to some

Poskim[3], when the seller declares that the item is being sold "as is", and the *Minhag* – custom of that locale – is that items sold "as is" are non-returnable, the buyer can't return it based on *Mekah Ta'ut*. It would seem that today in America this is the custom. This *Halachic* limitation to *Mekah Ta'ut* is especially true when the buyer could have checked the item to find the defects before the sale and



Accepting Returns

Enacting a *Halachically* viable return policy

By Dayan Yehoshua Grunwald

Q: I have a store and it is too costly to accept returns from everyone that claims that the merchandise was defective. What can I do to resolve the issue of *Mekah Ta'ut* (a mistaken purchase)?

A: There are two distinct issues with sales of defective merchandise: one of *Genevat Da'at* (tricking the buyer) and a second of *Mekah Ta'ut* (a mistaken purchase). [In some cases, such sales can also incur the violation and obligations of *Ona'ah* (overcharging or underpaying), but that is not our discussion here[1].] *Genevat Da'at* applies prior to the sale, as one cannot to trick the buyer to get the sale, and *mekach ta'os* applies after the sale (the seller must accept return of the sale due to the defect). Both issues must be satisfied to avoid *Halachic* violations.

Genevat Da'at refers to selling items that are defective without notifying the buyer. This is a violation of tricking the buyer. According to some opinions this is a Biblical violation and according to others it is only a Rabbinic violation. *Genevat Da'at* will only apply if you have knowledge of the defect and the buyer doesn't; if both of you are either

didn't, since, according to some *Poskim*[4], whenever the buyer could have checked the merchandise and didn't, he forfeited his rights to claim *Mekah Ta'ut*[5].

In instances where the case falls under the realm of *Mekah Ta'ut* there is no difference whether the item has a manufacturer's warranty/guarantee or not; regardless the seller is obligated to accept the buyer's return.

Additionally, wherever the *Halacha* of *Mekah Ta'ut* exists, the seller must return the form of payment or cash to the buyer; it is insufficient to give only store credit to the buyer in exchange for the item being returned.

It follows then that if a storeowner wishes to avoid the issues of *Genevat Da'at* and *Mekah Ta'ut*, he should reveal all defects that he is aware of, unless it is a defect that can easily be detected and the norm of that locale for that type of sale is for the buyer to check for defects. Additionally, the seller should post a clearly visible disclaimer that:

- A- All sales are "as is" and returns are solely up to the seller's discretion, or
- B- All sales are "as is" and returns will only be for defective items where the refund will be in the form of store credit only, or

C- For all items that have warranties the sale is "as is", and as such the buyer forgoes his rights to return the items to the seller through the laws of *mekach ta'os* and will only return the merchandise to the manufacturer.

In absence of such disclaimers the seller must follow the laws of accepting returns for all defective goods in exchange for the given payment or cash.

On a final note, at times there can be claims that although the sale was subject to the laws of *Mekah Ta'ut* however, the defect, perhaps, didn't exist at the time of sale and only came about after the sale. Such claims should be dealt with by a competent *Halachic* authority.

Sources:

[1] See *Sefer Ulam HaMishpat* 232;4. [2] *Sefer Hilchot Mishpat* pp. 273 [3] *Radva"z* vol. 4;136. It would seem that when the seller is the *Muhzak* (in possession of the item) he can rely on the *Radva"z*, see *Mishpat Shalom* 232;7 [4] *Maggid Mishne* cited in *S'm"a* 232;10. Numerous interpretations are given in the *Poskim* for the *Maggid Mishne*. The *Aruch HaShulhan* rejects the *Maggid Mishne* entirely (at least without another reason to combine with). *Maharsha"m* also rejects *Maggid Mishne*, but combines it with other reasons [5] See *Maharsha"m* (*Shu"t*, vol. 10;128) that writes clearly that one can rely on *Radva"z* when the buyer could have also checked to find the defect

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