

May One Try On *Shatnez* When Purchasing Garments?

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Vaad L'Mishmeres Shatnez

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The Mishnah in *Kilayim* (Perek 9, Mishnah 2) states “And he should not wear *kilayim* (*shatnez*) even on top of ten garments, even to evade the tax.”

In Perek 9, Mishnah 5 the Mishnah states “Sellers of garments may sell (*kilayim*) in their normal manner, but may not have intention in the sun to protect from the sun or in the rain to protect from the rain. Pious individuals (sellers) throw over (the garments that are *kilayim*) on a stick.

The Gemara in *Bava Kama* (113a) states that according to Rabi Shimon in the name of Rabi Akiva one may wear *kilayim* to evade tax, and is based on the Talmudic concept of *davar she'aino miskavein muttar* (action done without intent is permitted). Thus, the Mishnah in *Kilayim* (Perek 9, Mishnah 2) which forbids wearing *kilayim* to evade tax is of the opinion that *davar she'aino miskavein ossur* (action done without intent is forbidden) and is not according to the view of Rabi Akiva.

The Gemara in *Shabbos* (29b) states that the Mishnah in *Kilayim* (Perek 9, Mishnah 5) which states that a seller of garments may sell in their normal manner is according to the opinion of Rabi Shimon who opines that *dovor she'aino miskavein muttar*.

This brings into question, how could the Mishnah in Perek 9, Mishnah 2 be of the opinion that *davar she'aino miskavein ossur* and then in Mishnah 5 be of the opinion that *davar she'aino miskavein muttar*?

The Vilna Gaon in *Shnos Eliyahu* answers by asking why the Gemara in *Bava Kama 113a* states that Rabi Shimon in the name of Rabi Akiva says that one may evade tax by wearing *kilayim* because *davar she'aino miskavein muttar*, when it is Rabi Shimon himself who is of the opinion throughout the Talmud that *davar she'aino miskavein muttar*? Why does he need to quote Rabi Akiva?

Answers the Vilna Gaon, “*Aval ha'emes yoreh darko* (the truth shows its way). Rabi Shimon himself agrees that when one performs the prohibition physically even if he does not have intent it is prohibited. He only opines that it is permitted when one does not perform the action himself. In the Mishnah where he is wearing the garment in a regular manner but he has no intent the Gemara must say that it is the opinion of Rabi Shimon in the name of Rabi Akiva that even in this instance it is permitted, because Rabi Shimon himself is not in agreement.”

Continues the Vilna Gaon, “regarding the Mishnah which discusses the sellers of garments, referring to sellers who carry it on their shoulder but are not wearing it, there it is Rabi Shimon himself who opines that this is permitted. Although he is carrying it on his shoulder and technically putting on, since it is not possible in a different manner and he must carry it on his shoulder in order for the buyers to see them, therefore it is permitted.”

HaRav Yitzchok Frankel who wrote notes on the Vilna Gaon's commentary explains, that by wearing *kilayim* the prohibition is the wearing itself, whereas when the *kilayim* is being carried on oneself (*ha'alaah*), the prohibition is only the benefit one receives from it.

HaRav Frankel further explains, that the concept of *davar she'aino miskavein* would only apply to when you are not actually doing the prohibition itself. When one is doing the prohibition itself than what he has in mind cannot nullify his action.

Harav Frankel says further, that by wearing *kilayim* where the actual wearing is prohibited than what he has in mind cannot nullify his action. However by *ha'alaah* where he is not actually doing the prohibitive act, for by *ha'alaah* the prohibition is deriving benefit from the *kilayim*, than the concept of *davar she'aino miskavein* would apply. So is the opinion of Rabi Shimon according to the Vilna Gaon.

This explanation of the Vilna Gaon is corroborated by the *Bais Yosef* who explains the Rambam in this manner.

Tosafos opines that we may say that the two Mishnayos are in disagreement. Hence, according to Rabi Shimon who opines the *davar she'aino miskavein muttar*, one may actually wear *kilayim* in order to show to buyers or to evade tax. Since we rule in accordance with Rabi Shimon's opinion that *davar she'aino miskavein muttar*, the halacha would be that one may wear *kilayim* in order to show buyers and the like.

The *Shulchan Aruch Yoreh Deah 301:6* rules like the Rambam and forbids wearing *kilayim* as a seller, for the concept of *davar she'aino miskavein* doesn't apply to actually wearing *kilayim*. A seller would only be permitted to carry the *shatnez* garments on himself (*ha'alaah*). Hence, trying on *kilayim* as a customer would be forbidden. This is also the opinion of the Vilna Gaon.

The *Rema* brings the opinion of *Tosafos* and permits a seller to wear *kilayim*. One would assume that the same ruling would apply to a buyer of a garment and trying on *kilayim* would be permitted.

The *Rema* however, does not say that we follow the lenient ruling. One may therefore contend that it would be proper to follow the stricter opinion when possible as brought down in the *Pri Megadim* in his *peshicha*.

There may be another consideration to forbid trying on *shatnez*. Even according to the opinion of *Tosafos* who says that according to Rabi Shimon who opines that *davar she'aino miskavein muttar*, one may contend that in a manner where it would surely bring benefit it is called a *psik raishah* (lit. cutting of the head; meaning- that it is like cutting off the head of a bird that it will surely die and is considered as if ones intent was for the bird to die even if this was not his intention) and should be prohibited. Such is the ruling of *Tosafos* and the *Shach*. When a person wears *shatnez* especially a jacket or the like there may be a *psik raishah* of acquiring benefit of looking good in it or the like. This issue may even be a stronger consideration when trying on the jacket as a potential customer.

A further concept to ponder is that of the *Chochmas Odom*. The *Chochmas Odom* forbids trying on *shatnez* as a customer, even according to the ruling of *Tosafos* who opines that a seller may wear *shatnez* in order to sell his wares.

The *Chochmas Odom* writes the following (106:20): "it seems to me that according to everyone it is forbidden if he wants to buy it (i.e. the *shatnez* garment) and wants to wear it for a short time to see if it his size because he has in mind to wear it. Therefore those that buy hats that are sewn with *shatnez* and also garments are forbidden to wear for size even temporarily."

In the footnotes which are called "*Binas Odom*" he explains that a barber's garment worn over one's garment is clearly forbidden if it has a neck hole. However if it does not have a neck hole it is permitted.

He explains that for ones clothing not to get dirty from one's hair is not considered benefit which is forbidden when carrying the garment on oneself. However, when it has a neck hole which is then considered wearing, it would be forbidden even according to other opinion of *Tosafos* since he has in mind to wear the garment for whatever benefit.

Continues the "*Binas Odom*" that however, if one has no intention to wear it just to evade the tax or to show its size to customers then it would be permitted according to the opinion of *Tosafos*.

Seemingly, the *Chochmas Odom* believes that a buyer has intention to actually wear the garment as much as the wearer of a barber's garment. Therefore, a buyer trying on clothing is as forbidden to wear *shatnez* as a person who is getting a haircut is forbidden to wear a garment of *shatnez* over his garments.

The *Shiltei HaGiborim* in the end of first *perek* of *Beitzah* seemingly disagrees with the *Chochmas Odom*. He writes that according to the ruling of the *Rema* that one may wear garments to evade tax, it would also be permissible to try on garments for size because he has no intention to derive benefit. Obviously, if a person tries on the garments and wants to derive benefit from the garment, for instance if he wants to see if he enjoys the feel of the garment, it would be forbidden.

Another aspect to further study, which is beyond the scope of this article, would be the opinion of the *Shach* and *Taz* who understand the *Rambam* differently than the *Bais Yosef* and the *Shulchan Orach*. They understand the *Rambam* that one may even actually wear garments of *kilayim* to sell but may not wear garments of *kilayim* in order to evade taxes. The *Magen Avraham* in *siman* 19 seems to follow the ruling of the *Rambam* as understood by the *Shach* and *Taz*. The question would be, "what would the *Shach's* and *Taz's* opinion according to the *Rambam* be in regard to a buyer trying on *shatnez*?"

In conclusion, the consensus among many *Rishonim* and *Acharonim* is that it definitely would be wise for one who is purchasing garments (that one can assume have *shatnez*) not to put himself into a questionable halachic situation and try on such garments.