The Challenges of Selling the Hamets

One of the best and most informed documents to learn all the details and debates around the modern selling of Hamets is a response written by rabbi Eliyahu Zini, a famous Sephardic rabbi who is also a professor of Mathematics in the Technion , Haifa.

Rabbi Zini explains that the precedent for selling Hamets is learned from a
Tosefta that says that if a Jew is in a ship, bringing with him some hamets goods, and his ship is late and will not arrive before pesah, as planned, the Jew could give his Hamets to a non Jew, and he is permitted to acquire the Hamets back from him after Pesah is over.

This case was considered by the rabbis an exceptional case, since this person is in the middle of the ocean and has no other resource than sell all his merchandise.

Rabbi Zini brings many sources, specially from the time of the Geonim, which sustain the opinion that the Tosefta refers to an exceptional case. He points out for example, that the Mishna and the Gemara discussed at length all the different ways to dispose of Hamets (burning, throwing it to the sea, feeding it to birds, etc.) and never mentioned, discussed or conceived selling the Hamets as one of the ways of disposing of Hamets. Moreover, following the modern way of selling the Hamets, all the rules the rabbis instituted like bediqat hamets or bitul hamets, will be meaningless and unnecessary. Following the Tosefta, Sephardic rabbis authorized a food-store owner to sell his Hamets to a non Jew, since it is an exceptional case, and even then, they authorized to do so under very specific conditions.

Rabbi Zini also explains that in the case of the Tosefta there was a transference of the goods from the Jew to the non-Jew, in other words, the non-Jew takes possession of the Hamets goods (□□□□□) which is an unequivocal legal act of acquisition. Rabbi Zini brings several sources which assert that if the goods would remain in the house of the Jew, that is an unequivocal sign of ha'arama (in this case, "a bogus sale"). This requirement, that the goods will be transferred to the house of the non Jew, is brought as a prerequisite for the valid selling of the Hamets by Terumat haDeshen, which is the source of the Bet Yosef. Once and again Rabbi Zini brings the Geonim and Rishonim who quoting the Tosefta emphasize that the selling would be valid only if it is not a phony sale (□□□□□ □□□ □□□□□).

The next element which would be considered a sign of □□□□□ or a bogus transaction for most rabbis, is that the Tosefta discusses an exceptional case, where a person is in the middle of the ocean, in a ship that was probably delayed for a few days and could not arrive at home before Pesah. And, as Maimonides points out, □□□□□□□ □□□ □□□□□ the time for getting rid of Hamets had arrived and this person has no other resource. In halakhic terms this is known as she'at hadahaq, extreme unpredicted circumstances, the equivalent of bedi'abad. However, when one deliberately plans to sell the Hamets every year as a way of circumventing the Mitsva of disposing of Hamets, according to rabbi Zini, this is an unequivocal sign that the sell is insincere and therefore invalid.

Another point brought by rabbi Zini is that when valid and binding this selling transaction implies that the buyer owns the Hamets and he is entirely responsible for it. The whole point of the sell is that once the non-Jew pays the down payment, the Hamets belongs to him. The balance is made into a debt (similar to a promissory note), and the fact that the buyer did not pay the balance yet, does not affect his

ownership of the Hamets. In these conditions the entire responsibility for those good is the buyer's. Thus, for example, if during Pesah the whisky that I sold to the buyer and I kept in my house was stolen or broken, I should not care, because the goods are under the buyer's responsibility and therefore he will pay me back for those destroyed goods once Pesah is over. As we know, this is not the case in the practical terms of the modern selling of Hamets. Most people would definitely care that the Hamets ("their" Hamets) will not be stolen or damaged, which again, is a sign that they consider this Hamets, their property.

The main opinion among modern Halakhic authorities who accepts as valid this selling of the Hamets is the Hatam Sofer (1762–1839). And as we said, relaying just in this opinion, against the opinion of most rabbis, would be an exceptional leniency. Especially for Sephardic Jews who never followed this practice. Even among Ashkenazi rabbis this type of sell was criticized. The champion of this cause was no other than the Gaon of Vilna (1720-1797) who considered that whoever sell his Hamets with ha'arama is violating two Biblical prohibitions (bal yera-e, and bal ymatse) and failing to comply with one positive Biblical commandment (tashbitu).

To read the complete article of rabbi Zini go to this link:

http://www.orvishua.org.il/heb/files/art/1144659147.pdf