



## Tel Aviv – Yafo District Court

**October 25<sup>th</sup>, 2022**

**Taxation Appeal 61226 – 06 – 17 CA Software Israel Ltd. v. Tel Aviv 3 Assessing Officer**

**Taxation Appeal 64191 – 06 – 18 CA Software Israel Ltd. v. Tel Aviv 3 Assessing Officer**

**Taxation Appeal 58418 – 06 – 19 CA Software Israel Ltd. v. Tel Aviv 3 Assessing Officer**

**Before Her Honor, Judge Yardena Seroussi**

**Appellant:** **CA Software Israel Ltd.**

**Represented by Att. Daniel Paserman, Shirin Gabbai Metzger,  
Adi Haya Raban of Gornitzky GNY Law Firm**

**v.**

**Respondent:** **Tel Aviv 3 Assessing Officer**

**Represented by Att. Arik Liss and Adi Chen  
of the Tel Aviv Attorney General (Civil)**

## **Judgment**

Before me is an appeal concerning an Income Tax charge for a sales transaction between the Appellant and its parent company. The essence of the appeal concerns the valuation of the merchandise sold, and in particular, the question what was the life expectancy of the Intellectual Property that was sold and what was its expected growth.

### **Relevant background and the main points of the Appeal**

1. The Appellant is a software company founded in 1990, under the name Memco Software Ltd. (hereinafter: “**Memco**”). At the end of the 1990’s Memco was purchased, in a chain transaction, by CA Inc., a global giant which heads a group of more than 200 software companies and

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development sites all over the world (hereinafter: “**the Global Corporation**” and “**the Group**”, as applicable). After the purchase by the Global Company, the Appellant’s name was changed to CA Software Israel Ltd. and over the years additional Israeli software companies, that the Global Corporation purchased, have been merged into it.

2. At the time of the purchase, the Appellant owned four programs for data protection, which were developed in the 1990’s, with the support of the Ministry of Industry’s Chief Scientist, and with the assistance of grants from the latter (hereinafter: “**Memco’s Software**”). The central program in Memco’s Software was the SeOS program, which was launched in 1995, and which was later called “CA Access Control”, in accordance with the access restriction action that it performed (hereinafter: “**the SeOS Program**” or “**the Software**”). The essence of the SeOS Program was to prevent unauthorized access to the resources of the operating system, by blocking in the operating system’s kernel. Memco’s Software and all their developments will hereinafter be called “**the Intellectual Property**”.
3. Shortly after the purchase, the Appellant’s activity and revenue were concentrated on four levels:
  - 3.1. Marketing and distribution in Israel of products owned by the Global Corporation, for 65% of the sales revenue, while the balance of the revenue (35%) was transferred to the Global Corporation.
  - 3.2. R&D (Research and Development) services for the Global Corporation in return for the refund of the cost plus a profit margin of 12.5% (Cost + 12.5%), while the Intellectual Property that was developed in that framework was owned by the Global Corporation.
  - 3.3. R&D and maintenance of the Memco Software, while the results of the R&D are owned by the Appellant (hereinafter: “**Self R&D**”).
  - 3.4. Revenue from the royalties on the Intellectual Property owned by the Appellant. The Memco Software was marketed and sold throughout the world by the Global Corporation; the Global Corporation received 65% of the sales revenue, and the Appellant received 35%.
4. In 2010, the Appellant sold the Intellectual Property that it owned to the Global Corporation, for the sum of NIS 111,300,000, in accordance with the valuation that was conducted (hereinafter: “**the Transaction**”).
5. According to the position of the Respondent, the value of the FAR (Functions, Assets, Risks) that was transferred in the Transaction is much higher than the value reported by the Appellant. As this is a Transaction between related parties, the Respondent must intervene in the value of the Transaction and determine that the true value is NIS 667,000,000. The Appellant objects to the Respondent’s stance and claims that the Intellectual Property was sold at the market price according to various valuations that it presented.

6. Furthermore, the Respondent determined that, as the Appellant had not actually received the full compensation for the Transaction, the sums that had not been transferred to the Appellant should be considered to be a loan given to the Global Corporation, and so the Appellant should be charged for revenue, in the form of conceptual interest, from the Global Company (hereinafter: “**the Secondary Adjustment**”). The Respondent determined the rate of interest at 2.2585% per annum, in accordance with a previous loan between the Appellant and the Global Corporation. This is the source of this Appeal.
7. It will be made clear now already that, notwithstanding the Respondent’s claims concerning the FAR transfer, the decision regarding the **nature** of the merchandise transferred, whether it is activity or only Intellectual Property, has no relevance, and the main dispute is the **value** of the merchandise. As stated in Section 16 of the complementary economic opinion submitted by the Respondent: “**It is important to point out that in effect, whether the merchandise is the activity (including most of the company’s FAR in the field of cyber) or whether it is “only” software, the result is identical: the company, which in the past had been very profitable, adopted a “Cost +” model, and in that way forewent most of its profits which were moved to a related company overseas. The value of the merchandise is received from the capitalization of those diverted profits, both in my opinion and in the expert opinion by Baron, irrespective of how one defines the merchandise. This loss of profit is the object quantified both in my opinion and in the Baron expert opinion, irrespective of how one defines the merchandise.**”. *See also* the Appellant’s attorney’s words on page 8, lines 9 – 27, of the minutes dated December 7<sup>th</sup>, 2021: “**A large part of the hearings centered around the question whether this was FAR at all, or not a FAR sale... but, for the purpose of this matter it does not really matter, because, in the end, the method in which what was sold is valued, whether what was sold is FAR, or whether what was sold is IT, as we claim, the economic methodology, in the end, is the same... We say that technology was sold, they say FAR was sold, in the end, the economic methodology, and we will see that later, is very similar, and so, at some stage, the main point of dispute, and the main point of the hearings were concerned with the valuation**”.

And also, the Respondent’s attorney, on page 20, line 22 – page 21, line 4, of the minutes dated December 7<sup>th</sup>, 2021: “**As my colleague quite rightly said, again I suppose that there were nuances between us, but... the two experts that appeared before the Court today, use quite similar methodology; they say ‘Let’s look and see how much the company is worth after the Transaction was conducted’... Also, the case is narrower in terms of the disputes and in terms of what the Honorable Court is required to rule, for there is no question whatsoever whether there was a Transaction; there was a capital gains Transaction, there is no dispute about that, but two experts come here and say, ‘Let’s look and see how much**

**the company is worth after the Transaction was conducted, and let's see how much it would have been worth in the theoretical occurrence that no transaction would have been conducted, and so, in that sense also, I am going with my colleague".**

8. However, as will be made clear later, there is a factual dispute whether a certain module – Privileged User Password Management – PUPM) belonged to the Appellant in the first place. And from that comes the question whether it was transferred as part of the sale of the Intellectual Property. However, the relevance of this dispute also is confined to the matter of its value – whether this module should be taken into consideration when assessing the value of the Intellectual Property that was transferred.
9. That is to say, there is no practical significance to the question whether the merchandise was FAR or Intellectual Property, and the central dispute between the parties is what the value of the merchandise is; also, in determining the value, reference must be made to the future benefits and profits that will be derived from the merchandise.
10. Therefore, I will refer below to the merchandise as the sale of Intellectual Property owned by the Appellant, and I will discuss its value. That is, I will discuss the pricing of the Transaction, and not the characterization of the Transaction, which has no practical significance to the matter before us.
11. To the crux of the matter, the main difference between the parties, in the valuation, emanates from the parties' significant difference regarding two matters:
  - 1) What is the life expectancy of the Intellectual Property in general, and of the SeOS software in particular; and
  - 2) What is the expected growth rate of the Intellectual Property – is it positive as in the opinion of the Respondent, or negative as in the Appellant's opinion (see, for example, page 30, lines 16 – 23 of the minutes dated December 12<sup>th</sup>, 2021).
12. In other words, while the Appellant relates to the Intellectual Property, together with its future fruits, as a sort of "dead business" – Intellectual Property whose time has passed and whose value is waning, the Respondent relates to the Intellectual Property as a living business – a yielding asset with the potential for continued profit.
13. In order to prove their argument, the parties have submitted expert opinions on their behalf, both an economic opinion on the value of the activity that was sold, and also a technological opinion on the nature of the Intellectual Property that was sold, its lifespan and its relevance to the market. On behalf of the Appellant the economic opinion of Mr. Danny Baron (hereinafter: "**the Baron Opinion**"), and the technological opinion of Rafi Biton and Stav Fischitz, on behalf of Cynance (hereinafter: "**the Cynance Opinion**") were submitted. For the Respondent, Mr. Eyal Shevah's economic report (hereinafter: "**the Shevah Opinion**") and Mr. Avi Shavit's technological report (hereinafter: "**the Shavit Opinion**") were submitted.

14. Accordingly, most of my judgment will deal with ruling between the opinions and the postulation embodied in them.

## **Summary of the Appellant's arguments**

15. The Appellant argues that the Respondent's valuation is divorced of the facts and the state of the market. The Respondent assumed a sharp rise in revenue, an infinite lifespan and permanent growth. But the Appellant proved that because of changing trends in the dynamic data protection market, the Memco Software was left behind. Therefore, the Appellant estimated that the Memco Software had a limited lifespan of a few years and very small revenue.
16. Three of the four Memco programs were negligible – both in their importance and in the revenue that they yielded, and, in effect, their life was already over. It was Intellectual Property that was superfluous; its ownership had been transferred as part of the Group's policy alignment that all its Intellectual Property would be in one place. Hence, the marginal weight given to those programs in the valuation.
17. At the center of the Transaction is the SeOS program that is worth more than 80% of the total. In its early years the program created a “Golden Age”; it was considered to be a successful security solution, and it enjoyed limited competition. However, as is natural in a dynamic technological market, over the years changes occurred which altered the picture for the program and made it clear that the “Golden Age” was in the past.
18. So, at the time of the Transaction, the sales data clearly showed a negative growth trend in the sales of the SeOS program; operation systems provided solutions free of charge, at a level that was sufficiently good; “Identity Management” solutions reduced the Appellant's market share; IBM abandoned a similar program. All these were a solid foundation for the Appellant's assumptions in determining the value, that sales would continue to suffer from negative rates of growth and that the lifespan of the program was limited to approximately another five years.
19. In the valuation that he conducted in the year 2017, Shevah reviewed the Memco Software laconically, and did not bother to become familiar with its commercial background or its position in the market, at the time of the Transaction. In 2021 Shavit was recruited to try to justify, after the event, Shevah's faulty data. But Shavit's Opinion was also wrong, as he did not examine the Memco Software, he did not use it, did not see the code and did not talk to the programmers.
20. Unlike Shevah and Shavit who were far from familiar with the products and the market, the company brought the following witnesses: Mr. Nir Barak (hereinafter: “**Barak**”); Barak had dealt in the development of the software since 1997, had been the team leader, and he had only

left the program when the team was closed down in 2013; Mr. Ilir Bazhico (hereinafter “**Bazhico**”) who deals in the Global Corporation’s sales of data protection products; the expert Fischitz, who “lived and breathed” the data protection field and its market, and who deals in the field. These witnesses taught us that that the software suffered from a lack of the innovation, needed to survive in the market, and more importantly, from a sharp decline in demand.

21. In Shavit’s Opinion, documents from the Israel Innovation Authority were enclosed, which the Respondent did not have when making his assessment and which were not disclosed to the Appellant, until after submitting its evidence. These were in the main applications for tax benefits, that the Appellant had submitted, for the approval of the Ministry of Industry’s Chief Scientist, under Article 20a of the Income Tax Ordinance (New Version), 5741 – 1961 (hereinafter, as applicable: “**the 20a Application**” and “**the Ordinance**”). The Respondent and his experts relied on these applications, even though they were not in their possession when issuing the assessment and during its presentation.
22. The Appellant’s rights have been harmed by this conduct. The scope of the claim has been altered and broadened; the Appellant was not given the right to argue, nor did it have any opportunity to point out the Respondent’s error. This is not one of those exceptional cases in which new arguments can be allowed. Despite that, attention has been paid to the litigative damage caused to the Appellant and also the damage to the importance of the assessment and presentation process.
23. In any case these are documents that are inadmissible as evidence of the veracity of their content, as the Rule of Administrative Evidence, determined in Article 10(b) of the Court Regulations (Income Tax Appeals), 5729 – 1978, allows the Respondent to bring inadmissible evidence only if he has based his assessment on it. As has been previously stated, these documents were not even in his possession at that time and were not used as the foundation of the assessment. The belated presentation of the documents by Ms. Sharon Segal was creative but does not retroactively make right the oral evidence.
24. Nor will the Respondent’s retroactive attempt to make his assessment dependent on the 20a Application help him. The documents do not express what he tries to read into them. The Appellant’s descriptions in the 20a Application, referred, in general, to the Group’s products which it had developed, but did not necessarily own.
25. Moreover, it was only during the cross-examination that the Respondent’s experts explicitly claimed that the sales Transaction also included additional technology – Privileged User Password Manager – PUPM, but the reality is that PUPM is based on Intellectual Property that came to the Global Corporation from another company. PUPM was never owned by the Appellant. The question whether PUPM was part of the merchandise affects Shevah’s

valuation, for, as he said in his honesty, if PUPM was not part of the Memco Software, then it is possible that the results of the valuation that he had conducted would be different.

26. PUPM is mentioned in the 20a Application for the year 2009, only because it was marketed together with the program in a software bundle. The content of the marketing catalog relating to the description of the bundle made its way to the document by “Copy Paste”, without any differentiation between the components of the software bundle. The description of the R&D activity in the 20a Application for the year 2009 was taken word for word from the Foreign Resident R&D Application for the year 2009. In all this hodge-podge, no differentiation was made between the program and PUPM, and also, in the 20a Application for the years 2004 – 2008, there is no reference to the development of PUPM in the description of the R&D activity, even though its development began in those years. The above-mentioned process was aimed at clarifying facts in order to reach the true assessment, irrespective of the manner in which the forms had been completed.
27. Unlike the theoretical components of the 20a Application for the year 2009, the heart of the Application is the list of its own R&D expenses that were required, in accordance with the relevant list of workers. Even if something became mixed into the 20a Application for the year 2009, that did not have any real effect on the Appellant’s tax debt. The R&D expenses that were approved were in any case from the “Memco Department”, and minimal innovation was enough to receive approval under Section 20a.
28. The experts were divided in their opinions as to the rate of growth that was expected at the time of the Transaction. Baron thought that a decline in revenue was expected, together with negative growth, partly for the following reasons: use of historical data of the revenue from Memco Software; a lack of sufficient investment in R&D according to the research conducted and the BCG research; and the above-mentioned commercial background.
29. The Forster Report on which Shevah based the valuation of the growth (hereinafter: “**Forster report**”), cannot be the base of the valuation of the Memco Software, as it deals mainly with technology that is different to that which was sold; the Forster report was published before the global, sub-prime crisis; the growth rates expected in the Forster Report do not apply to the Memco Software, even prior to the time of the Transaction; this is not a research project of statistical significance or precise valuation based on an analysis of the revenue; and the Report was written with reference to new technologies and products, in the early stages of their adoption in the market.
30. The feasibility studies that Shevah conducted are also unreasonable. The comparison to CyberArk is erroneous, and the multiplier method is not at all appropriate for our case. The implementation of the multiplier method itself is also less than perfect. The Appellant also argues against the rate of capitalization and the profit determined in Shevah’s Opinion.

31. The Chief Scientist positively approved the price of the Transaction at the Appellant's request and after conducting an examination. The Chief Scientist has an interest in the sales price and is presumed not to allow knowledge to be exported at a price that is not appropriate. The Respondent's silence is deafening.
32. Another significant indication that the value is reasonable can be inferred from the true data of the sale of the Memco Software. It can be inferred, retroactively, that the Appellant's assumptions, which came true, were reasonable. As the Appellant foresaw, the Memco Software did not enjoy growth, but the opposite was true.
33. With regard to the matter of the secondary adjustment, even if the Respondent's claims with regard to the primary adjustment were accepted, this is an adjustment for tax purposes only, without any implication or relevance in the "real" world, beyond the domain of taxation. Therefore, it does not create an inter-company debt for which interest can be attributed to the Appellant.
34. The burden of proof and the burden of producing evidence must be placed on the Respondent's shoulders, for the following reasons, among others: by virtue of Article 85a(c)(2) of the Ordinance; because of the assessment that encompasses within it the claim of artificiality in accordance with Article 86 of the Ordinance; in accordance with the guidelines that warn against exploitation of the burden of truth and instruct both parties to back up their positions with evidence; with attention to the significant broadening of the scope and the litigative damage to the Appellant; and in particular because of the new claims that force the Appellant to refute that it did not own PUPM, in terms of proving a negative fact.

### **Summary of the Respondent's arguments**

35. The Respondent believes that the Appeal should be dismissed. The Appellant's arguments are vague and general, without them having any documentary foundation. None of the Appellant's witnesses was involved or up-to-date with the Transaction in real time, and all that they know is hearsay, or conjecture based on what happened. Not a single one of the Appellant's witnesses tried to base what he said on real-time, or any other, documentation. The Appellant's witnesses relied on information that was passed on to them from the Appellant's representatives, and they did not mention even once that they have no connection to the Appellant.
36. Baron's opinion is also entirely based on what is said in the Appellant's declarations. Also, Baron's Opinion entirely ignored the fact that the Appellant had previously presented the Respondent with a number of different opinions.

37. The Appellant's attempt to support its version with the Cynance Opinion is not clear. Fischitz did not bother to speak with any representative of the Appellant and his entire opinion relies on conversations that he held with Barak, and Bazhico's declaration, without making any attempt to check or to verify those facts. Barak did not hold a senior position with the Appellant and was not familiar with all of its activity in the relevant period.
38. The Appellant submitted the 20a Application for the year 2009, from which it is clearly evident that the Appellant invested more than NIS 20 million, in the 2009 tax year, in R&D activity. It can also be inferred from the Application that it was submitted to the Chief Scientist with respect the CA Access Control product which was considered to be one of the Group's ten leading products, with great potential. Based on that Application, the Appellant received tax benefits worth NIS millions, including in the tax years in dispute.
39. The 20a Application is very detailed, signed by the Appellant's then VP Finance, and also by the person who was Global VP R&D and responsible for the development of the CA Access Control product. The Application was submitted by two large accountants' offices which are still active today.
40. The 20a Application should have been in the possession of the Appellant when the assessment processes in the year 2013 began, approximately two years after submitting the annual report to the Respondent. However, the Appellant chose not to present the 20a Application during the assessment discussions, nor any other real-time documents. It is likely that prior to the Appellant's senior executives signing the Application in which it declares that it has a broad market and that its product holds a significant place in the Group, they saw documents, financial data and forecasts concerning those products. But those fundamental documents were not presented to the Respondent, nor to the Court, and not a single witness was brought with an explanation of the complete nondisclosure factual picture.
41. Under these circumstances, it is not all clear why the Appellant is complaining that the Respondent did not present it with its own 20a Application, prior to the Appeal process. The presentation of the 20a Application at the Appeal stage derives exclusively from the Appellant's failure and from its attempt to hide real-time documents.
42. It is conceivable that the Appellant, in real time, presented the Chief Scientist with a representation that served its interests, stating that it has innovative activity and a wide market, and now, the Appellant wants to renounce the manner in which it presented the things in real time, and without any document or proper reason. Under those circumstances, the Appellant cannot argue against the 20a Application.
43. The 20a Application was the foundation for the approval of the implementation of the regulations of the Ordinance, and so it must be deemed a document on which the Appellant

based its reports as submitted to the Respondent. The 20a Application was submitted as evidence to the Court also by a witness of the Appellant. Ms. Segal.

44. The Appellant asked to complete its evidence after the Respondent had submitted its evidence, partly in connection with the 20a Application. But even then, the Appellant chose not to shed any light on the matter with documents or relevant witnesses who were involved in the Transaction, in real time. The Appellant did not call those that drew up the 20a Application or those who signed it to give testimony, nor the accountants' firm that applied to the Scientist. All the witnesses that were brought on behalf of the Appellant were unable to add any further details regarding the contents of the 20a Application.
45. Vague declarations from workers who were not involved in the Transaction in real time, and who were not in sufficiently senior positions to see the entire picture, are not enough. Under those circumstances, not a single witness can say what agreements were made between the Appellant and the Global Corporation, and all that remains is to rely on the only real-time documents that were presented, the sales agreement and the 20a Application, documents which speak for themselves.
46. This is also true of the Appellant's arguments regarding the PUPM module which was presented as its own R&D in the 20a Application. Furthermore, even if the Appellant is right in its arguments and the PUPM module is not part of its own R&D, that is no reason to deny the contents of the 20a Application regarding the innovation and the success of the CA Access Control product, and its being a significant component in the Appellant's self-developed products. The matter becomes even more valid in light of the fact that in the Appellant's 20a Applications for the years 2004 – 2008, also, there are similar claims about the size of the market and the centrality of the product, irrespective of the PUPM module.
47. Baron's expert opinion is the Appellant's third valuation in connection to the Transaction. The study of the three different valuations shows significant differences between them in their fundamental, factual assumptions. The Appellant has not given any explanation of these differences.
48. Regarding the rate of growth, the BCG article to which Baron referred to support his claims is an article which was published on the web site of the company that wrote it; it is devoid of academic backing. In his cross-examination it became clear that Baron could not say which companies were examined for the article, and he did not know whether they were similar in their characteristics to the Appellant. Baron conducted an independent investigation of his own, and for this investigation also, he was unable to provide fundamental details on the characteristic of the companies included in it. He even manipulated the Appellant's data, by dividing the Appellant's expenses by the total Group revenue, instead of the total revenue of the Appellant itself.

49. As the Appellant has not proved the rate of growth that it claimed, in the Appeal, we must accept the rate of growth set by the expert on behalf of the Respondent, who used the study by Forster which refers directly to the growth forecasts of companies similar to the Appellant.
50. Regarding the merchandise's lifespan, the Appellant presented a valuation from 2016, in which the lifespan of the merchandise is infinite. In the Appeal, the Appellant claimed that the lifespan of the merchandise is restricted, but when Baron was asked about the 2016 valuation, he refused to relate to it. The above is sufficient to reject the Appellant's arguments. Moreover, the products are still being sold, and the Appellant's arguments contradict what is stated in the 20a Application. On the other hand, the conclusions of the Shavit Opinion were not refuted.
51. With regard to the secondary adjustment, the matter was discussed in Civil Appeal 943/16 **Contira Technologies Ltd. v. Tel Aviv 3 Assessing Officer**, paragraph 76 (Nevo, April 22, 2018) (hereinafter: "the **Contira Case**"), where it was determined that if the entire consideration is not reported, the sum that was not reported should be seen to be a debt bearing interest, and the assessed person should be charged for his conceptual income. This ruling also fits the case before us.

### **The Appellant's Arguments in Response to the Summary**

52. In its concluding response, the Appellant repeated the main points of its arguments, while referring to the Respondent's arguments in the latter's concluding statement. With reference to the secondary adjustment, the Appellant claimed that in the Contira Case there was no discussion on the question of the consent to secondary adjustment. However, Civil Appeal 6914/15 **Aharoni v. Kfar Saba Assessing Officer** (April 22<sup>nd</sup>, 2018), there was a discussion, and it was decided that there should be no secondary adjustment on additional income for tax purposes only. Article 85a of the Ordinance authorizes the Respondent to ensure only that the assessed person will be taxed according to market value, and not that the consideration should actually be paid.

### **Discussion**

53. At the outset, I will point out that the burden in the proceedings lies with the Appellant. This is a standard Tax Appeal, in which the default is that the burden of proof lies with the party being assessed (for example, Civil Appeal 6726/05 **Hydrola Ltd. v. Tel Aviv 1 Assessing Officer**, paragraph 24 (June 5<sup>th</sup>, 2008)).

Also, Article 85a(c)(2) of the Ordinance to which the Appellant referred, determines that the proof of evidence lies with the Assessing Officer, only if the party being assessed hands over

all the documents and all the data that it has concerning the Transaction, together with the way in which the Transaction price was determined. In our case, the Appellant did not hand over to the Assessing Officer all the documents and the data, and there is sufficient proof in the real-time valuation (Appendix 8 to Segal's Affidavit), which was laconic and lacking in detail concerning the way in which the Transaction was determined. The Appellant brought its witnesses almost without any real-time supporting documents at all. I find it hard to believe that a Transaction worth tens of millions of NIS was based on the documents and the data that the Appellant presented, and I believe that it should have had additional documents.

Contrary to the Appellant, I did not find that the Respondent claimed that the Transaction was artificial. It is the value of the Transaction that is in dispute. Nor does the Appellant bear the burden of proving a negative fact, as the Appellant could have proved, positively, its claim that the PUPM was purchased by the Global Corporation from another body.

From the substantial perspective, this is precisely the situation in which the party being assessed possesses the best knowledge of the particulars of the Transaction, and it is he who is supposed to be in possession of all the relevant documents. On the other hand, the Respondent has no knowledge of the Appellant's business. For example, if the Respondent had not asked the Israel Innovation Authority to receive documents that were drawn up by the Appellant itself, they would probably never have been found.

Under such circumstances, the Appellant holds the burden of proving that it is its valuation that best reflects the situation.

54. And to the crux of the matter, the Appellant sold its Intellectual Property to the Global Corporation at a certain price. Our concern is whether that price reflects the market value of the Intellectual Property, according to the "Arm's Length Principle", or whether this is a price determined by the special relations between the parties, which does not reflect the market value and artificially reduces the tax to be paid.
55. As can be proven from the parties' above-mentioned arguments, the dispute over the value of the Intellectual Property revolves around one central question: what is the relevance of the Intellectual Property that was sold, in 2010. Was it expected to flourish and to remain relevant for many years, as the Respondent thinks, or is this dying Intellectual Property, which only has a few more years.
56. Both parties brought well-known technological and economic experts, each of whom supported his position enthusiastically. In the dispute between the experts, particularly in the context of the valuations, there is a "built-in" difficulty in looking for the truth. The words of the (then) Vice President, His Honor Judge Rivlin, in a minority opinion, in **Permission for Civil Appeal 779/06, Kital International Holdings and Development Ltd. v. Maman** (August 28<sup>th</sup>, 2012) (hereinafter: "**the Kital case**"), in paragraph 30 of the judgment.

“The above-mentioned valuation was conducted on the assumption that the opinion of the expert who analyzed the company’s value is agreed upon and that there is no argument about the company’s value as a “living business”. However, that assumption is far from being realistic, and there are few cases in which there are no differences of opinion about the value of a company. The built-in need for relying on expert opinions is likely to raise difficulties. Prof. Procaccia insisted: “Anyone who is well versed in the practicalities of this subject is aware that the number of valuations is the same as the number of experts, and they are often extremely different from each other. The reason is not, or at least not only, the experts’ willingness to adjust their valuation to what their client wants, but also because valuation is not a precise science”. And further: “Any calculation, as accurate as it might be, is based on estimated data, and cannot produce anything other than estimated results”. Procaccia, pp. 303,325 footnote 43)... For sure a valuation with so many future data, in companies that conduct wide-ranged business activity, is far from being a “Precise Science” (see: Civil Appeal 9709/10 Ran v. Israel Credit Cards, Supplementary Financial Partnerships, Ltd. (in liquidation) March 28<sup>th</sup>, 2012)). This difficulty is sharper still when the parties do not bear the cost of extreme values to the Court, as they are not required to abandon the price that is offered to them. While valuations conducted for transactions on the market require the investors “to put down their money”, on the subject of their valuation, the valuations conducted for judicial hearings only, does not involve the same accountability from the parties involved. The litigating parties might therefore be dragged into “extreme and unrestrained valuations” C594). The method of presenting the results might also suit the interests of one of the parties... There might be “bending” of the formulas of the valuation, *inter alia*, through a strategic choice of the data placed in the equation such as the length of a period taken into account for evaluating the company’s profits, or the capitalization factor used for a calculation (Haviv-Segal pp. 617 – 627)”.

57. The above is especially true for a Discounted Cash Flow (DCF) valuation, which is based on assumptions and speculations and opens a wide door for manipulation, as per the interests of the parties. It even brings about, in practice a significant increase in the differences between the parties’ valuations (Civil Appeal 10406/06 **Atzman v. Bank HaPoalim Ltd.** paragraph 62 (December 28<sup>th</sup>, 2009); and the **Kital** case, paragraph 67 in the judgment of Judge Danziger). The valuations in this case are also evidence of that.

58. In the **Kital** case, in paragraph 68 of the judgment, His Honor, Judge Danziger presented two mechanisms to reduce the fear of “biased” valuations, the **first** institutional and long-term: setting a procedural rule, under which the Court will, at the end of the adversary process, choose one of two opinions that the parties submitted and will not “get immersed” in the opinions of both parties in an attempt to weigh them up and to balance them; and the **second** is relevant to certain cases and circumstances: the appointment of an expert on behalf of the Court.

59. In our case, I have not found a reason to appoint an expert on behalf of the Court, as stated above. The difference in the opinions emanates from the question of what is the lifespan and what is the potential growth of the Intellectual Property at the time of the Transaction. These are factual questions, on which the Court has to rule according to the evidence brought before it.

60. I will not conceal the fact that I had a lot of doubts on the question of the expected lifespan of the Intellectual Property at the time of the sale. Naturally, this bench does not have the prior know-how in the field of software and the two opposing technological experts remained adamant and certain, each in his own position.

61. However, one document tipped the balance in favor of rejecting the Appeal – the 20a Application for the year 2009. This is an official, real-time document, in which the Appellant describes the technology that it owns and its potential, in order to receive various tax benefits. In that document, the Appellant testifies about itself as its developments being innovative and having great potential. Thus:

61.1. In Section 2 of the 20a Application, under the heading, “**The Company’s** (the Appellant’s YS [Judge Yardena Seroussi]) **Application and Research Subject**”, it is written that “**The Company Requests the Chief Scientist’s Approval of its own R&D expenses – development of software in the field of data protection – which it bore in the year 2009**” (the emphases are mine unless stated otherwise – YS).

61.2. In Section 3.1. of the form, under the heading “General Background”, it is written that “**The Company’s income is divided into three: Income from Providing Research and Development Services to the Group’s Companies (R&D services sector)... and income from the sales of the Company’s products overseas (the IP address belongs to the Company) (Self R&D sector)...**”

Further to Section 3.1. of the form, under the sub-heading “**Description of the Company’s Research Activity**”, it is written in Section A that “**Our Application refers exclusively to the R&D expenses component in this category (self-development)**”. That is to say, the 20a Application deals with the Intellectual Property owned by the Appellant and the R&D conducted on it.

61.3. In Section 3.3., under the sub-heading “**Market Size**”, and after the Appellant reviewed the size of the market of the **entire Group**, which is “**Unlimited in its size**”, the following was written, with reference to the Appellant’s products, i.e. with reference to **the Appellant’s Intellectual Property**:

**“Furthermore, the products developed in Israel are among the Group’s core products. For example, the CA Access Control product is considered one of the Group’s ten leading products. The size of the market for the Group’s products is enormous and could reach more than a billion dollars”.**

61.4. In Section 5 of the Application, under the heading “**the Company’s products**” it is written that, “**The products developed in the Company are in two fields of activity: in the field of Data Protection: CA Access Control...**”. And later, the PUPM is described as part of the CA Access Control product.

61.5. In Section 6 of the Application, under the heading “Description of the R&D Activity in 2009”, it is written that “**The activities performed in the various development units, are composed, mainly, of development activity of new versions and/or new products and the repair of faults in existing products**”, and later in the same section it is written thus:

**“We wish to point out that practically all the R&D expenses in the year 2009, are for the CA Access Control product. Below is a description of the development activity, divided by products, which was conducted in the company in the 2009 tax year:**

1. IT Security Solutions

CA Access Control

Main new features developed in 2009 – 2010: Privileged User Password management (PUPM)...

Innovation

• PUPM...

Technological Challenges

• PUPM ...”.

62. It can also be proved that in its attempt to receive various tax benefits, the Appellant presented its products, and not the Group’s products, as innovative products with a high potential, whose market size could reach over a billion dollars. The Appellant also presented the PUPM as a main component in its own R&D activity for that year. These statements by the Appellant, regarding its products, are in stark contrast to what it is trying to put across today, in retrospect.

63. Let it be said that there is no dispute that the Appellant received the tax benefits that it demanded on account of its arguments in the 20a Application for 2009. Therefore, I believe that, even if the Appellant is not prevented from arguing against the contents of the document, at the very

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least, it has a heavy burden to refute its contents. The words of my colleague, His Honor, Judge Kirsch, in Tax Appeal (Tel Aviv District Court) 12491 – 02 – 17 **Elitam Ltd. And King George Inc. v. Value-Added Tax (VAT) and Purchase Tax, Tel Aviv**, paragraph 63 (January 15<sup>th</sup>, 2020) are relevant to our case:

**“According to Court rulings, the previous representations and reports of an assessed person or a dealer, in particular to the tax authorities, but also to third parties in general, might create an obstacle or an estoppel with regard to the manner of presentation of its economic activity, assets and future liabilities: see Sections 64 – 65 of the Tax Appeal 447 – 09 – 14 Eliyahu Nabok, Gabriel Glazer v. the Israel Tax Authority, given by me on May 5<sup>th</sup>, 2016, together with the documents gathered there. The emphasis is placed on past reports, number of justifications and intentions: on the evidential plain, past representations are likely to be the best evidence for the way in which the economic reality is perceived in real time, and of the citizen’s intentions. On the constitutional plain, the establishment of an estoppel prevents the re-opening of settled matters and contributes to stability and certainty, and protects the interest of dependence; on the “anti-planning” plain, an estoppel, as stated above, is likely to prevent intentional, pre-planned changes in the classification of things as part of a program to reduce tax; on the moral plain, the establishment of an estoppel prevents the opportunist representation of things, that change with time according to the benefit that might be produced from a change in representation”. See also Tax Appeal (Tel Aviv District Court) 28658 – 11 – 15 **President Taxis v. The Tel Aviv VAT Director**, paragraph 142 (December 31<sup>st</sup>, 2020).**

64. I believe that the Appellant failed to lift the heavy burden imposed on it and failed to prove its position. The Appellant, including in the Baron Opinion and the Cynance Opinion, relies, in its arguments on the lifespan of the Intellectual Property, mainly on the evidence and the **post factum** explanations of its witnesses (and see, for example, Section 18 of the Cynance Opinion, pp. 5 and 6 of the Baron Opinion, Section 51 of the Appellants concluding remarks).
65. Notwithstanding the fact that all the documents should have been under its control, the Appellant did not present any relevant, real-time document which might support what had been said and which might provide information about the lifespan of the SeOS program (see, for example, p. 32, lines 3 – 6, and p. 61 lines 22 – 25 of the minutes dated December 12<sup>th</sup>, 2021). The Appellant was satisfied with calling past workers to testify, with hindsight, about what happened. When considering a late testimony that describes earlier events as opposed to real-

time documents that the Appellant itself created, my opinion leans toward the contents of the real-time documents.

66. However, I was impressed by the skill of the Appellant's witnesses and how they related what had happened from their point of view. However, these are witnesses that were not in key positions, and by virtue of their positions were unable to relate, certainly not from their personal knowledge, all that happened. So, for example, it is not clear what happened with the Intellectual Property that was sold, including the code and the patents – did they continue to develop it outside of Israel? Was any other use made of it? What exactly was taken from it? Was it planned to be continued with other software, etc.? Even if I suppose that the software was not marketed standalone it cannot be deduced from that, as the Appellant is trying to argue, that it has no great value as an essential, complementary product in a bundle of products (see p. 27, lines 2 – 24, and p. 95, lines 1 – 31 of the minutes dated December 12<sup>th</sup>, 2021); or as irreplaceable software in existing systems (and see Section 37 of the Cynance Opinion); that does not mean that other overseas subsidiaries did not continue to develop the Intellectual Property that had been purchased or other products based on the Intellectual Property that had been purchased, including the code and the patents.
67. The Appellant itself argues in Section 79 of its concluding remarks, regarding the expected lifespan of the software at the time of the Transaction, that "**it is not the technical / technological lifespan but the commercial lifespan**". From this point of view, the Appellant concentrated on presenting the technological relevance of the software, however, it did not bring any authorized body that could testify from the commercial angle regarding its value at that time. And it is emphasized, as stated above, that the commercial facet is not limited to the standalone sale of the software to end users, and the software could have commercial value in many other contexts.
68. The Appellant should have presented real-time documents that could shed light about the lifespan of the Memco Software, such as End of Support, End of Life, End of Sale documents and similar, or any other document that could show the Appellant's intention regarding the products. If the Appellant does not have access to such documents (which in itself is quite puzzling) at least it should have shown some respect and called witnesses in senior management and comprehensive positions, that could have answered all the questions and explained from personal knowledge what the mood was, at the Appellant, or the Global Corporation at that time, and in particular regarding the SeOS program. As the witnesses that it chose to call could only testify from their narrow angle, and the Appellant did not present any relevant real-time documents, it can only blame itself.
69. This is especially true in connection with the Appellant's attempt to contradict the contents of the 20a Application for 2009. The Appellant raised conjectures and guesses as to why it was

stated there that the size of the market for software developed by the Appellant itself was over a billion dollars and why the PUPM was described there as the Appellant's own development (see what was said by the Appellant's Representative on p. 442, line 16 of the minutes dated January 9<sup>th</sup>, 2022: **"We are guessing, you do not know and I apparently do not know, we are both guessing"**). However, we cannot accept its arguments against the document based on conjecture and guessing, and the Appellant should have brought a witness on its behalf who had been involved in the wording of the document, to explain the multiple questions that arise from the document and to deny what is explicitly stated in the document.

70. So, for example, the Appellant claims that the descriptions refer to the Group's products in general and to products that the Appellant developed but did not necessarily own. I think otherwise. The wording of the 20a Application for 2009 is clear and according to the 20a Application the market value of the products to which the Application refers, that is the Appellant's Intellectual Property including the PUPM, could reach more than a billion dollars. If the Appellant wants to withdraw what is said in the Application, instead of confirming what is explicitly written there, it should have proved that through those who wrote the document.
71. Regarding the Appellant's claim that the 20a Application was similar to the Appellant's Application for recognition as a body performing R&D for a foreign resident for the years 2008 – 2010 (exhibit 12), it is not impossible that both the products developed in Israel as part of the Appellant's own R&D, and the products developed in Israel for the Global Corporation, are among the Group's core products, and it is possible that PUPM was developed in Israel both as part of the Appellant's own R&D, and as R&D services for the Global Corporation.
72. This, probably, was what the Appellant meant when wording the applications, when, based on its descriptions of its developments, their innovation and their potential, it applied for tax benefits for its own R&D and also for R&D services for the Global Corporation.
73. In any case this claim does not help the Appellant. Even if the contents of one of the applications does not reflect the real situation, it is not impossible that it was the Application for recognition as a body performing R&D for a foreign resident for the years 2008 – 2010, and the Appellant has not proved otherwise.
74. The Appellant claims that the description in the 20a Application for the year 2009 regarding PUPM was copied from a marketing catalog. The Appellant adds that this can be learned from the 20a Application for the years 2004 – 2008 in which the description of PUPM does not appear, despite the fact that at that stage they had already started its development. However, the Appellant ignores the fact that that only shows that the description was copied intentionally, in 2009, to receive tax benefits. Otherwise, there would not be any reason for the description of the PUPM "suddenly" to appear on the form for 2009, after not being copied onto the form for 2004 – 2008. This is no error, but a calculated, planned act. One can assume that the Appellant

was interested in showing progress and innovation in its activities in the years 204 – 2008, and so it decided to present the PUPM.

75. I have not found any fault in the submission of the Appellant's documents, including the 20a Applications, through the witness Ms. Sharon Segal. Ms. Segal claimed to be a representative of the Appellant and attached to her affidavit documents of a similar nature (for instance, sales agreements, distribution agreements, applications to the Chief Scientist and approvals from the Chief Scientist for the sale of Intellectual Property, etc.). If the Appellant believes that the Appellants documents cannot be submitted through her, she should also not have attached the documents to her affidavit, and so, in effect, the Appellant did not produce any witness who was able to represent it factually.
76. It is pointed out that the Appellant was given full opportunity to deal with what arises from the 20a Applications, including the submission of supplementary affidavits, so no litigative damage was caused to the Appellant nor is there any prohibited broadening of the scope. Moreover, no complaint can be made against the Respondent that the documents were not presented in his objection, as they were not in his possession at that time. The documents should have been in the possession of the Appellant, and it was the latter that should have disclosed them in the first place, while the Respondent was exposed to them during the Appeal. As the documents make a significant contribution to the clarification of the correct taxation and as the Appellant was given an opportunity to react to them, they can be attached.
77. Further support for my conclusions regarding the value of the Intellectual Property, at the time of the Transaction, can be found in an application made by the Appellant to the Chief Scientist, seeking to sell the know-how (Appendix 5 to Segal's affidavit). In the same document from 2008, about two years after the Transaction, the Appellant estimates a continued growth in revenue from Memco Software, for the next five years, that is up to 2013, except for the Audit program. That document does not indicate that, at that time, the Memco Software was reaching the “end of the road”, and that is particularly true of the SeOS software, whose income for the year 2013 was estimated by the Appellant at almost \$ 135,000,000 (p.231, line 27 – p. 232, line 8 of the minutes dated January 6<sup>th</sup>, 2022).
78. It is also true of the Global Corporation's valuation which was the basis of the Transaction (Appendix 8 to Segal's affidavit). The latter estimated the income from Memco Software in the last year of the valuation to be approximately \$ 70,000,000. This is also surprising regarding the lifespan of the software, as it is not clear why, when there is a forecast of profit for each and every one of the years, the very same valuation does not take into account further years of sales and revenue.
79. A further indication can also be found in the Appellant's average income for sales. When the company has an operational profit of approximately NIS 70,000,000 on average, each year, it

is reasonable to assume that its activity will not be sold for slightly more than NIS 100,000,000 (see, for example, p. 243, lines 25 – 26 of the minutes dated January 6<sup>th</sup>, 2022). Furthermore, the Appellant was purchased for a sum of \$ 400,000,000, so a valuation of the company at around the sum of \$ 185,000,000 seems reasonable (p. 235, lines 1-2 of the minutes).

80. And so, support has been found for the Respondent's valuation, in comparison to the multipliers performed by Shevah and in comparison to CyberArk, in accordance with the conversation that Shevah held with the Appellant's representatives (p. 28 of Shevah's Opinion).

81. I did not find the Appellant's claim, that it did not invest sufficiently in R&D to continue growing, very convincing. To maintain the proportion between income and R&D expenses, the Appellant increased its income from Intellectual Property royalties three-fold. However, assuming that we treat the Appellant and to the Global Corporation as two separate companies, with separate legal identities, then the Appellant's investment in R&D needs to be pro rata to its own income, and not pro rata to the entire Group. Thus, there is no reason for that multiplication.

The Appellant, which owns the Intellectual Property, and which decides as to the investment in its development, is supposed to do so only in proportion to its own income, and the comparison made by the Respondent's representative, with an identical company, which works with an external marketer who charges 65% of the consideration, is, in my view, correct (pp. 47 – 52 of the minutes dated December 12<sup>th</sup>, 2021. And also, the expert Baron admitted, on p. 52, lines 23 – 24 of the same minutes that "**You can make any calculation that you want, to reach any result that you choose**". In examining the ratio between income and R&D expenses, one should relate to the companies as separate bodies, which conduct themselves according to the "arm's length" principle.

82. Furthermore, the expert, Baron, multiplied the income by three, based on his knowledge of the marketing agreements between the companies. However, it is possible that there are similar arrangements between other companies in the sample, and it is not impossible that the same multiplication should have been performed in relation to those companies too. The expert Baron has no way of knowing what the total revenue is from the sales of the products of the other companies, as he is not aware of the arrangements between them and their distributors, in the way that he is aware of the matter before us. Therefore, I do not believe that there is anything to be learned from the independent investigation that he conducted.

83. Regarding the BCG study, although it is an independent study, and its general conclusion is logical, it is not clear how relevant it is to our specific case, as it was conducted in 2019, with reference to unknown software companies and it is possible that they have different characteristics than the Appellant (p. 39 of the minutes dated December 12<sup>th</sup>, 2021). I accept the article's basic assumption that there has to be investment in R&D to create growth, but the

question in the case before us is how much: what is the ratio required between investment and income in a company like the Appellant, and to that question there is no relevant answer in the article.

84. The Chief Scientist's approval of the sale of know-how does not alter my conclusion. Firstly, it seems that the Appellant referred, in the Application for the sale of know-how, only to the value of the know-how that was developed up to 1999, as of 2008. Thus, all the data of the grants for the expenses relate to the years up to 1999, and if it would have referred to the sale of the entire know-how, including the knowledge developed from 1999 onwards, the Appellant should have referred to the expenses up to 2008 (p. 224, line 10 – p. 228 line 27 of the minutes dated January 6<sup>th</sup>, 2022). **Secondly**, and this is the main point, even if it was the value of all the know-how up to 2008, and even if the Chief Scientist approved the value, and this is an important indication, the Scientist's approval is no guarantee that this is in fact the proper value, and it is possible that the Scientist made a mistake. The expert Shavit even explained in this context that often the Chief Scientist does not even check the valuation thoroughly, where the R&D center remains in Israel, and all the grants that he awarded are returned with interest (pp. 445 – 450 of the minutes dated January 9<sup>th</sup>, 2022).
85. And so, from the Scientist's approvals for the sale of know-how (Appendix 6 to Segal's affidavit) it appears that it was important to the Scientist that the grants would be repaid with interest, without any clear emphasis being placed on receiving the part from the sale of the know-how as per the formula that is determined in Article 19b of the Encouragement of Technological Research, Development and Innovation in Industry Law, 5744 – 1984. It will be pointed out, in this context, that the Appellant itself was unable to explain precisely the meaning of the Scientist's approval of the sale of know-how and its significance (p. 222, lines 11 – 14, p. 223, line 27 and p. 224, lines 5-7 of the minutes dated January 6<sup>th</sup>, 2022: **Att. Paserman: Yes, that I know. I understood that, that no payment would be imposed; I don't understand it completely, but it seems that they... they repaid the royalties, they repaid the royalties when they discovered it... No, I am also guessing. We will both guess, then I don't know... I don't know, but the Scientist thought that those numbers seemed to be reasonable. Once again, I don't know what the negotiations were. We don't know, I am afraid, but**). Also see p. 447 line 12 of the minutes dated January 9<sup>th</sup>, 2022). Furthermore, it must be made clear that Article 19b including the formula that appears in it is canceled, and in its place Section 15 (41) was legislated, in which the Research Council and Committee are given independence to determine and arrange the sums that will be paid for the transfer of know-how outside of Israel.
86. I wish to point out that I was attentive to the arguments of the Appellant and its experts, and I also think that the rates of growth in the Forster report, on which the expert relied, were a little

too “optimistic”, in light of the SeOS software’s age, relative to the constantly developing data protection market, in light of the uncertainty as to the location of the SeOS software on the S-Curve (p.268, line 14 – p. 270, line) and in light of the expert Shevah’s confirmation that the forecasts in the Forster report deal, mainly, with different technology than that of the SeOS software as a standalone (pp. 260 – 261 of the minutes dated January 6<sup>th</sup>, 2022).

Moreover, the fact that the Respondent’s position in the Appeal regarding the growth rates relies in the main on the 20a Applications has not escaped my attention, even though the latter were not before him when he issued the assessment (for example, pp. 255 – 256 of the minutes). This illustrates the Respondent’s arguments regarding the “objective” value of the Intellectual Property, that is, the size of the market for the products if the Appellant had not said about itself that as of 2009 the size of the market for the products that it owned could have reached more than a billion dollars and that the PUPM was developed by its own R&D.

87. However, I must make it clear that there is nothing in the above to change my conclusion that the Appeal is to be rejected and the Respondent’s valuation accepted. Since I reached the conclusion that the Appellant did not meet the burden of proof and that the lifespan of the Intellectual Property and the growth rates in the Appellants valuations do not match the facts at the time of the Transaction, I accept the contents of the expert Shevah’s valuation in their entirety, in accordance with the guidelines of His Honor, Judge Danziger in the **Kital** case (see paragraph 58 above).
88. Regarding the secondary tax adjustment, I believe that in principle, what the Appellant claims is correct, and even if the value of the Transaction, for tax purposes, is higher, it does not mean that the Global Corporation must actually pay the Appellant the difference. The “primary” adjustment was performed in relation to an action that did take place – the transfer of the Intellectual Property to the Global Corporation. Therefore, we should also note its fiscal significance vis-à-vis the tax authorities and to the fear of various tax plans. However, the “secondary” adjustment was performed with reference to an action that did not take place and was not required to have taken place – payment for the Intellectual Property that was transferred. There is a reason that the provision of Article 85a(a) of the Ordinance deals exclusively with reporting to the tax authorities about a transaction that did in fact take place: **“The Transaction will be reported according to the market conditions and the tax will be charged accordingly”**. Therefore, it is doubtful whether the secondary adjustment should have been performed based on a payment that was not made, and there is no obligation for it to be paid, as this is a kind of “fiction on fiction” and it is not obligatory in the law (compare **Civil Appeal 6914/15 Aharoni v. Kfar Saba Assessment Officer**, paragraphs 27 and 42 (April 22<sup>nd</sup>, 2018)).

But, since the ruling was set in the **Contira** Case, in an almost identical matter, I have no option other than to reject the Appellant's arguments in connection to that also, and to call on the Supreme Court to study the matter thoroughly and to discuss the question of the authority for a secondary adjustment under Article 85a of the Ordinance.

89. The conclusion is, the Appeal is rejected.
90. Normally, and taking into consideration the size of the case, I might have imposed very heavy costs on the Appellant. However, because of the Respondent's conduct in the hearings, with the emphasis on the repeated delays in his concluding remarks, I have decided not to issue a costs order.

Throughout the proceedings, I often stressed that no delay would be allowed in the submission of the concluding remarks, among other reasons, so that it would be possible to write the judgment close to the time of the hearing and in the recess. I can only repeat what I said in my decision on June 23rd, 2022, in connection with the delay in the Respondent's submission of his concluding remarks: **"The Court has repeatedly emphasized the great importance, from the Court's point of view, of meeting the schedule set for the submission of written concluding remarks, and will give advance notice that it is allotting special days to write the judgment, taking into consideration the scope and the complexity of the matter discussed in the Appeals (see the emphasis in what the Court said at the end of the evidentiary hearings, minutes p. 457, lines 20 – 25 and also the Court's decisions on March 27<sup>th</sup>, 2022, April 13<sup>th</sup>, 2022 and April 15<sup>th</sup>, 2022). The practical significance of acceding to the Respondent's request in its entirety, that is granting him a period of almost four months to write his concluding remarks (when an extension of only two weeks was allowed for the Appellant) is that the task of writing the judgment will start about eight months after the end of hearing the evidence in the Appeals. As if that were not enough, the Respondent dared to place the Court before a fait accompli, when its Application for an extension was submitted one day before the date for the submission of his concluding remarks. In light of that, I determine that the Respondent's failure to submit his concluding remarks in time, under the circumstances described above, will be referred to in the judgment and in the judgment for legal costs".**

It should be noted that even after my decision above mentioned was given the Respondent did not submit his written summations on time, and he needed a further extension. Therefore, under the circumstances, there is no order regarding costs. The Respondent will pay attention to these words.

*Manual signature*

Yarden Seroussi, Judge

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