**November 1, 2018**

**Income Tax Circular No. 15/2018 – Tax Authority**
**Subject: <u>Business Restructuring in Multinational Groups</u>**

**<u>Contents:</u>**

## 1. General background

The term business restructuring (hereinafter: "**Business Restructuring**") refers to the common phenomenon of a cross-border restructuring of commercial or financial relations between related parties in multinational groups. A business restructuring usually involves a transfer, including elimination, of functions, assets and risks (hereinafter: "**FAR**") and of the profit potential inherent in them.

The common case is that of a business restructuring in an Israeli company, after its shares were acquired by a multinational group with which it did not have special relations (hereinafter: "**share purchase transaction**"), and it becoming a company in a multinational group.

There may be cases of a business restructuring in the business operation acquired by an Israeli company that belongs to a multinational group with which it did not have special relations (hereinafter: "**business operation purchase transaction** ").

In other cases, a business restructuring is imposed on an Israeli company that belongs to a multinational group, without a preceding share purchase transaction or business operation purchase transaction, or a long period of time after a share purchase transaction or business operation purchase transaction.

When the conditions created or imposed between related parties as a result of the material change in existing arrangements, differ from the conditions that would have been determined by parties with no special relations, the price should be determined according to the market price and conditions as stated in Section 85A of the Ordinance and be taxed accordingly.

Business restructuring has been comprehensively addressed in the transfer pricing Guidelines of the OECD[1] (hereinafter: "**the Guidelines**") and particularly Chapter IX of the Guidelines (hereinafter: "**Chapter IX**").

The Guidelines constitute an interpretative source for transfer pricing in general and business restructuring in particular, for tax authorities around the world and the Israeli tax authority. This circular is based on the Guidelines and uses the terms that appear in it.

Tax appeal 49444-01-13 Gteko vs. Kfar Saba Assessing Officer was recently published (June 6, 2017) (hereinafter: "**Gteko ruling**"), which constitutes an important precedent for certain aspects of business restructuring.

[1] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 2017.

## 2. The purpose of the circular

The purpose of the circular is to present the position that was formulated by the tax authority with respect to the principal issues that require explanations and guidance with respect to business restructuring.

The circular defines ways for identifying and characterizing business restructurings and offers methodologies that are accepted by the tax authority for valuation of the transferred, ceased or eliminated FAR.

Furthermore, this circular presents tax aspects with respect to business restructuring.

It is noted that this circular does not constitute a methodical guide for transfer pricing or valuations.

## 3. Definitions

**Business restructuring** – A transfer of FAR to related parties in a multinational group. A business restructuring includes the elimination or cessation of a business operation or part of it in an Israeli company and/or a material change in the arrangements that existed in the multinational group (see examples in Appendix A).[2]

**Market price and conditions** – In the framework of a business restructuring in a multinational group, the transactions are between parties that have special relations. Therefore, the market price and conditions will be determined according to Section 85A of the Income Tax Ordinance and Income Tax Regulations (Determination of Market Conditions) – 2006 (hereinafter: "**the Regulations**"). This definition corresponds to the "**arm's length principle**" in the Guidelines.

**Intangibles** – The term refers to something that is not a physical or financial asset, which is capable of being owned or controlled for use in commercial activities, and whose use or transfer would be compensated had it occurred in a transaction between parties that do not have special relations in comparable transactions. When determining market price, focus should be placed on identifying the conditions that would be agreed upon between parties that do not have special relations in a comparable transaction, and not on accounting or legal definitions.[3]

The availability and extent of legal, contractual, or other form of protection may affect the value of an item and the returns that should be attributed to it. The existence of such protection is not, however, a necessary condition for an item to be characterized as an "intangible" for transfer pricing purposes. Similarly, while some intangibles may be identified separately and transferred on a segregated basis, other intangibles may be transferred only in combination with other business assets. Therefore, separate transferability is not a necessary condition for an item to be characterized as an "intangible" for transfer pricing purposes.[4]

Examples of intangibles for transfer pricing purposes include, inter alia:

- Patents;
- Know-how and trade secrets;

[2] Chapter IX, Paragraph 9.1.
[3] Chapter VI, Paragraph 6.6.
[4] Ibid, Paragraph 6.8.

- Trademarks, trade names and brands;
- Rights under contracts and government licenses;
- Licenses and similar limited rights.

It is emphasized that this is a partial list and there may be other intangibles.

**Goodwill and going concern value** – Goodwill has a broad and non-uniform definition in professional literature. In accounting and valuation contexts, goodwill reflects the difference between the aggregate value of the business operation and the sum of the values of all the business's separately identifiable tangible and intangible assets. Alternatively, goodwill is sometimes described as representing the future economic benefits associated with business assets that are not separately identified and recognized. In still other contexts goodwill is referred to as the expectation of future trade relations with existing and future customers. The term going concern value is sometimes referred to as the aggregate value of all the assembled assets of a business operation over and above the sum of the separate values of the individual assets. It is generally acknowledged that goodwill and going concern value cannot be segregated or transferred separately from other business assets.[5]

The Guidelines do not deal with the precise definition of goodwill or going concern value for transfer pricing purposes and do not define when they will be considered intangibles. Nevertheless, it is important to recognize that an important and significant part of the monetary compensation paid between parties that do not have special relations when some or all of the assets of an operating business are transferred may represent compensation for something referred to in one or another of the alternative descriptions of goodwill and/or going concern value.[6]

*The position of the tax authority is that the compensation includes also parts that were classified as goodwill and/or going concern value.*

See example 2 in Appendix A (example 23 in the Guidelines).

**Group synergies**[7] – The potential value obtained from combining businesses, companies, tangible and/or intangible assets. In some circumstances group synergies contribute to the level of income earned by a multinational group. Examples of group synergies include: streamlined management, elimination of duplication of efforts and costs, economies of scale resulting from consolidated purchasing and finance systems, etc. Such features may have an effect on the determination of arm's length conditions for transactions with related parties and should be addressed for transfer pricing purposes as comparability factors.

*The position of the tax authority is since group synergy is not held or controlled by any of the parties, it constitutes an "intangible" for transfer pricing purposes. Therefore, the group synergy does not constitute an asset in itself, but affects the value of the intangibles.*

In the Gteko ruling[8] the court referred to the issue of characterizing the synergy and its effect on the value of the company's assets. The taxpayer raised two main arguments regarding the "excess" price that was paid for the purchased shares. The first argument referred to the fact that the purchaser has a

[5] Chapter VI, Paragraph 6.27.
[6] Ibid, Paragraph 6.28.
[7] Ibid, Paragraph 6.30.
[8] Gteko ruling, Paragraphs 57, 66, 74.

special advantage and therefore paid a consideration in excess of the value of the assets of the acquired company. On this matter the court ruled that "the fact that a certain purchaser has a special advantage when acquiring a certain asset does not mean that a different purchaser would not have a different special advantage, for which it too would pay 'excess' consideration'". In other words, it is possible that another purchaser would have paid excess consideration, and it cannot be said that the consideration is exclusive to the specific purchaser. Furthermore, the purchasing company would not have paid an excessive price if it believed that no other companies are willing to pay that price.

Therefore "…I do not believe that the fact that a certain purchaser has a special advantage in the purchase of a certain asset means that the price paid by it does not reflect the market price of the asset". The second argument was that the synergy is not an asset that is owned by the selling company, since it is an asset "outside the box". The court analyzed this argument, but did not address the classification issue, and ruled: "Moreover and principally, even if the synergy is not an "asset" that is owned by the selling company, there is no argument that it affects the value of its assets." The court summarized that whether or not it can be defined as a separate asset, the synergy indisputably influences the value of the company's assets.

**Market specific characteristics** – May affect may affect the arm’s length conditions of transactions in a certain market. For example, low prevailing labor costs, proximity to markets, favorable weather conditions and the like may affect the prices paid for specific goods and services in a particular market. Since these characteristics are not owned or controlled by any party, they cannot be defined as intangibles.[9]

**Assembled workforce** - May affect the arm’s length price for services provided by the business or the efficiency with which services are provided or goods are produced by the business. In the case of a business restructuring, a transfer of the assembled workforce will save costs and time on recruiting, screening and training employees. Even if there is no transfer of an assembled workforce, the fact that there is access to it may enhance the value of the intangibles.

It is emphasized that the transfer of an assembled workforce, including it being put at the disposal of another related business, may, according to the facts and circumstances, lead to a transfer of intangibles, such as know-how and the right to provide a service. When a transfer of assembled workforce takes place, it should be examined in the framework of the examination of the business restructuring, and an appropriate transfer price be determined that reflects the value of the right to use intangibles, as aforesaid.

In the Gteko ruling the court stated that:
"Indeed, employees cannot be "sold". They are not an 'asset' that belongs to the appellant, just like they are not an 'asset' of Microsoft after their transfer to it. However, like the synergy component, I do not see any real difficulty, neither in principle nor practical, to attribute to the appellant an 'asset' that is expressed in its ability to transfer its employees to another company as one unit, or almost as one unit. This ability has both a practical and legal aspect. Even if the appellant was not able to force the employees to transfer to Microsoft, it certainly was able to terminate their employment with it. It could have even prevented the employees from making use of the know-how and professional secrets when working for Microsoft. If it would have done so, all of the benefit that Microsoft saw in acquiring the appellant would have been lost".[10]

[9] Chapter VI, Paragraph 6.31.
[10] Gteko ruling, Paragraph 89.

And also:
"Under these circumstances I find it difficult to not consider the transfer of the employees to be an event in which the appellant relinquished a significant function with considerable economic value. This economic value is well reflected in the consideration that was paid in the share purchase transaction, and I do not see how it can be said that this value disappeared in the technology transaction and no longer exists".[11]

## 4. Identifying a business restructuring

### 4.1 Introduction

In order to determine the market conditions of a business restructuring it is necessary to perform a functional analysis, examine contractual arrangements and the options realistically available to the parties.

### 4.2 Functional analysis

The process of identifying a business restructuring begins with a functional analysis. The purpose of the functional analysis is to identify the change in the composition of the company's FAR and it is a necessary precondition for a valuation. The company's activity before and after the business restructuring has to be characterized: which functions did the company perform, which risks did it bear, which assets did it own before the change, from both a legal and economic point of view and which did it retain after the change. See example 3 in Appendix A.

### 4.3 Examination of the contractual arrangements[12]

Where the conditions of a business restructuring have been formalized by the multinational group in writing (contracts, correspondence and any other form of communication), those written agreements provide the starting point for identifying and characterizing the transactions that comprise the business restructuring.

The contractual arrangements may describe the roles, responsibilities and rights of the restructured entity under the pre-restructuring arrangements, and express the manner and extent of the change in those rights and obligations as a result of the business restructuring.

However, where no written agreements exist, or where the facts of the case, including the actual conduct of the parties, differ materially from the agreements, the actual transactions comprising the business restructuring must be deduced from the facts as established, including the actual conduct of the parties.

In the Gteko ruling[13], the court stated: "…the main question is what it is the essence of the transaction (or transactions) and not the clothing in which it was dressed by the parties…".

*This position is reflected also in the Guidelines and corresponds to the position of the tax authority.*

[11] Chapter IX, Paragraph 9.17.
[12] Chapter IX, Paragraph 9.17
[13] Gteko ruling, Paragraph 46.

According to the Gteko ruling, where the assessing officer believes that the essence of the transaction differs from the manner by which it was presented to him and that the transaction that its price needs to be determined according to transfer pricing rules on the basis of FAR, differs from the one that was presented to him, the burden of proof is on the taxpayer to prove that it is not a different transaction.[14]

**4.4 The options realistically available to the parties[15]**

The arm's length principle is based on the notion that parties that do not have special relations, when evaluating the terms of the potential transaction, will compare the transaction to the other options realistically available to them, and will enter into the transaction only if they do not find an alternative that offers a clearly more attractive opportunity to meet their commercial objective. In other words, parties that do not have special relations will enter into the transaction only if it does not make them worse off than their next best option.

Accordingly, the tax authority will examine whether there was a more attractive opportunity than the business restructuring that was performed.

There may be situations that the party in which the business restructuring was performed did not have a more attractive opportunity other than to accept the conditions of the restructuring. Insofar as rights or other assets or a going concern are transferred, compensation is required for such a transfer.

When there are more attractive options, including that of not entering into the restructuring, a party with which there are no special relations would not have agreed to the conditions of the business restructuring. In such cases, adjustments are required for the conditions that were imposed.

5. **Characterizing a business restructuring**

**5.1 Meaning of legal ownership versus economic ownership**

Legal ownership of assets and of intangibles in particular, does not in itself grant the owners the right to economic benefits from them.

The "contribution to the creation of intangible value" is what grants the right to enjoy their benefits. The "contribution to the creation of intangible value" is determined according to the contribution of functions performed, assets used and risks assumed by the owners and other members of the multinational group, to the development, maintenance and protection of the intangibles.

According to the Guidelines,[16] the legal owner will be entitled to receive all the economic benefits deriving from exploitation of the intangibles only if it in substance:

a. <u>Performs and controls all of the functions</u>, including the important functions related to the development, enhancement, maintenance, protection and exploitation of the intangibles. As regards internally developed intangibles or intangibles that serve as a platform for other developments, the particularly important functions will for example

[14] Gteko ruling, Paragraph 52.
[15] Chapter IX, Paragraph B.3
[16] Chapter VI, Paragraph 6.71

be: planning and controlling research and marketing plans, deciding the direction and priorities in creative decisions and innovative development, controlling strategic decisions regarding development plans of intangibles and managing and controlling budgets. As regards every intangible, important functions will include making important decisions concerning the protection and safekeeping of the intangibles and ongoing quality control over the functions performed by others (related parties or parties with which there are no special relations), which may have a real effect on the value of the intangibles.

b. <u>Provides all assets</u>, including funding, necessary to the development, enhancement, maintenance, protection, and exploitation of the intangibles.

c. <u>Assumes all of the risks</u> related to the development, enhancement, maintenance, protection, and exploitation of the intangibles.

*The position of the tax authority is that even if legal ownership was not transferred in the business restructuring, this fact will have no effect on determining the market conditions of the transaction. In any case the transferred FAR should be examined, whether or not there was a transfer of legal ownership.*

## 5.2 Sale versus provision of temporary right to use

A business restructuring may include a full transfer of the ownership rights of intangibles or provision of a right to use them for a certain period.

In order to correctly characterize the transaction, the transferred rights, their extent and their nature have to be clearly identified. If all or part of the ownership rights of intangibles were transferred then this is a sale transaction that will be classified as a capital transaction (hereinafter: "**sale transaction**"). Conversely, if only a temporary right to use the intangibles was provided (hereinafter: "**provision of a right to use**") then the transaction will be classified as an ordinary income transaction.

The rules for distinguishing between a sale transaction and the provision of a right to use are not unique to business restructuring. Over the years the courts have formulated a list of parameters for determining whether the owner completely relinquishes the major part of its share in the asset, all or part, and then the transaction should be classified as a capital transaction, or whether it is just the provision of a right to use for a limited period and then the transaction should be classified as an ordinary income transaction. In order to classify the transaction as a capital or ordinary income transaction, the characteristics we are familiar with from traditional commerce should be examined, such as:

- Is the owner transferring the major part of its share in the asset or relinquishing it?
- Is the owner being separated from all or part of the asset forever?
- Are the rights to use of the buyer almost unlimited?
- Does the buyer have an exclusive right to the asset?
- Does the buyer have the right to claim and protect its right?
- Does the buyer receive the source code of the intellectual property (in the case of software)?
- Is the buyer free, in principle, to make changes and modification and any application it wishes in its right to the asset?
- Is the buyer allowed to prepare an unlimited number of copies of the transferred asset?

- Is the buyer allowed to distribute the right to the public by way of selling, renting, lending, in any possible way?
- Is the buyer allowed to present the right in public?
- Is the buyer not subject to conditions such as destroying the right after a certain period of time or returning it to the seller?
- Were the rights to use the asset transferred for the same period as its economic life?

In the case of a business restructuring, emphasis should be put on the tests listed hereunder that are based on the unique characteristics of a business restructuring. In particular the following should be examined:
- What is the economic life of the transferred asset? If rights were transferred for a limited period of time, but this period is the same as the asset's economic life, this sufficiently indicates a sale of all the transferor's rights in the asset and not provision of a right to use.
- Does the recipient of the right receive rights in future developments of the transferred asset? In principle, the fact that the recipient is granted the right to the asset's future development, indicates that it was transferred rights to use the asset for a period corresponding to the economic life of the asset and therefore indicates a sale of the asset's ownership rights.
- Who manages and controls the functions related to the development and safekeeping of transferred intangibles?
- Who bears the risk and costs associated with safekeeping and developing intangibles? Insofar as it is concluded that the recipient of the right is the one that bears the risk and rewards associated with the development and safekeeping of the transferred intangible, the transaction is the sale of an asset's ownership rights.
- Who makes the business decisions regarding the assuming of risks, development and safekeeping of the intangibles.

Care should be taken that the following characteristics do not determine the classification of the transaction:
- The fact that in the contract the related parties defined the transaction as being the provision of a right to use is not sufficient for determining that this is indeed the real nature of the transaction and that it indeed only provides a right to use the asset for a limited period of time. The correct classification of the transaction should take into consideration all the relevant facts with an emphasis on the essential and economic nature of the transaction.
- Form of payment – The payment can be non-recurring or recurring. In addition, the payment can be predetermined or depend on the extent of use or the business results of its use by the buyer. It is customarily said that a non-recurring and predetermined payment is a characteristic indication of a sale transaction and vice versa. However, it is important to clarify that the method by which the parties determine the payment does not necessarily indicate the characteristics of the transaction or its classification (sale or provision of a right of use) and therefore the examination of the transaction's classification for the purpose of its taxation and transfer pricing will be done on the basis of examining all the particulars of the transaction including all its components as described above with an emphasis on the essential and economic nature of the transaction.

Furthermore, as far as tax relevance there is a difference between classification of the transaction as a capital transaction and classification as an ordinary income transaction: As is known, when an Israeli company transfers an asset to a company that is a resident of a treaty country, as part of a business restructuring, the provisions of the tax treaty have to be examined in view of the transaction's classification according to the provisions of the local law in Israel. The treaty will determine whether the income of the Israeli company is subject to foreign tax, and if it is, whether the tax applicable in Israel is entitled to a credit for the foreign tax that was paid, like in the provision of a right to use, or whether it is a sale transaction, and then will be charged tax only in Israel. The specific treaty should be examined for each individual case and be applied according to the transaction's classification. In the case of provision of a right to use, most of Israel's tax treaties provide for a limited tax rate, by way of withholding tax in the country of residency of the payer of the royalties, and the foreign tax withheld on these royalties being allowed as a credit, according to the provisions of the relevant treaty and subject to the provisions of the local law, against the tax applicable to such royalties in Israel. If the payer of the royalties is not the resident of a treaty country, only the provisions of the local law will apply. Conversely, if the correct classification of the Israeli company's income is a capital sale, then the capital gain of the Israeli company on the sale of the asset will be subject to only Israeli tax, and no foreign tax will be required and no credit of any kind will be granted.

## 6. <u>Determining the market conditions and valuation</u>

### 6.1 Introduction

A transfer of all the FAR is actually the transfer of a business operation or part of it. When all the assets are transferred it is sometimes not possible to realistically separate between the transferred intangibles. In such a transaction, it is important to identify the transferred assets, and it is important to identify cases of assets being artificially separated when there is really no possibility to separate them.

The value of the transferred business operation has to reflect all the elements having a value that would have been paid for if the transaction had taken place between parties not having special relations under comparable circumstances.
In order to reach a reliable estimate of the market (arm's length) price of the transferred business, a valuation should be made on an aggregate basis.

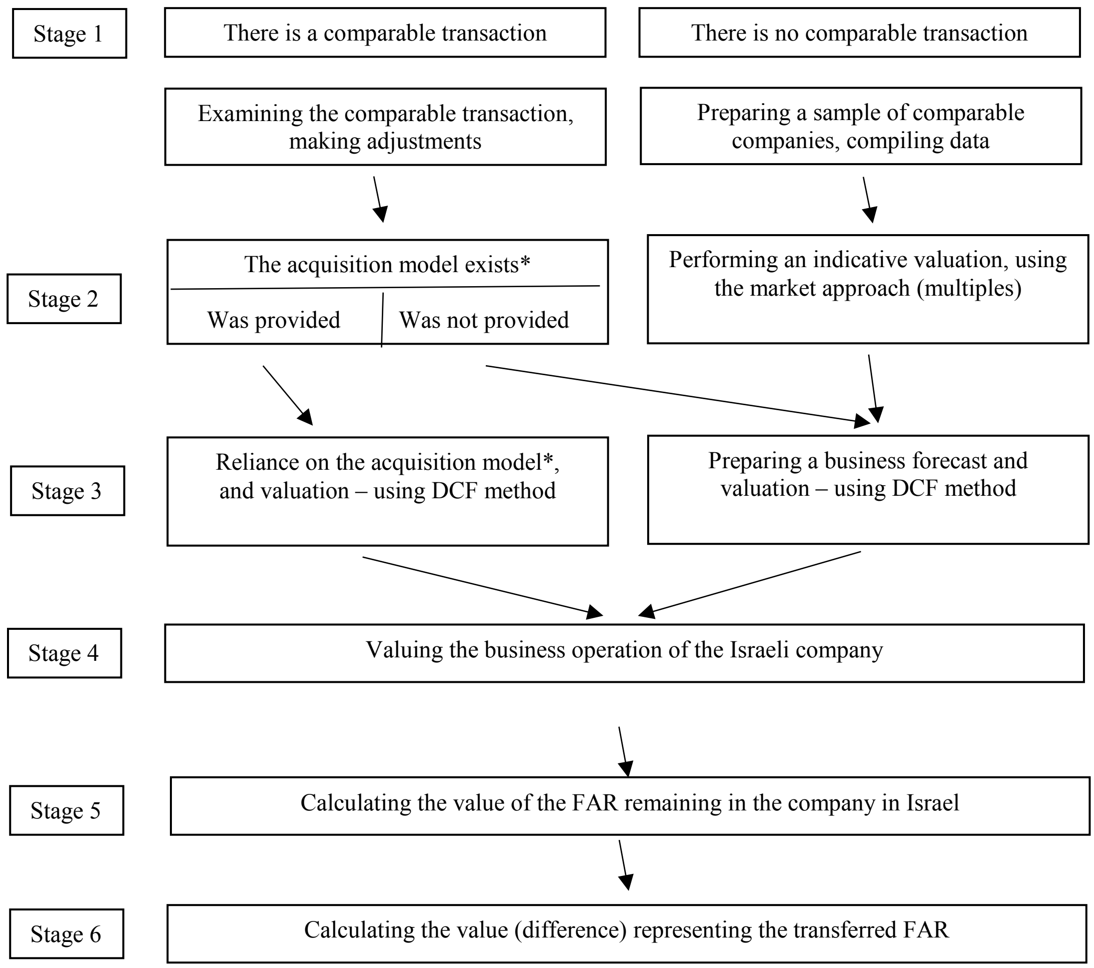
Valuation methods that are used in acquisition transactions between parties not having special relations, may prove useful to valuing the transfer of a business operation between related parties.[17]

*The position of the tax authority, which is supported by the Guidelines, is that no value disappears or is destroyed in an internal business restructuring of a multinational group.*

[17] Chapter XI, Paragraph 9.69.

### 6.2 Diagram of work stages

Presented hereunder is a description of the work stages according to the specific circumstances, as will be clarified in the next chapters:




* See explanation in Paragraph 6.3.6 "The forecast of the business operation – basis for performing valuations".

### 6.3 Cases that have a comparable transaction

**6.3.1** <u>The comparison method</u>

When a business restructuring is performed <u>near</u> a share purchase transaction or business operation purchase transaction of an Israeli company, by a buyer with which there are no special relations, the share purchase transaction or business operation purchase transaction may be a comparable transaction as to market (arm's length) price and provide comparable data.

In such cases, for the purpose of valuing a business restructuring, the **price comparison method** should usually be used, which is the preferred method of the Regulations[18] and

[18] Regulation 2(A)(1) of Income Tax Regulations (Determination of Market Conditions) – 2006.

the Guidelines. This method compares between the price in the transaction in question, and the price in a comparable transaction with a party with which there are no special relations.

Examples of comparable transactions are transactions between parties that do not have special relations, such as:

- Share purchase transaction;
- Purchase of business operation;
- Raising a significant amount of capital in a private company;
- Trading in shares on the stock exchange.[19]

The price in a comparable transaction between parties that do not have special relations is determined according to the information and expectations the parties had at a certain point in time before the transaction, reflects the market price and conditions (arm's length) and takes into consideration the uncertainty of the economic evaluations and forecasts the parties used to determine the purchase price.

It is emphasized that also when comparable transactions exist, significant adjustments are usually required for determining the market (arm's length) price of the transferred FAR in a business restructuring.

**6.3.2** Reference to the purchase price in a share purchase transaction

When a transaction to purchase shares and other rights precedes the business restructuring, and the purchase price is used for the comparison, information is required regarding the **total purchase price**[20] for all the rights that were acquired and the liabilities that were assumed by the buyer, and all the components of the consideration, if any, need to be taken into consideration. The total purchase price used needs to be determined in order to determine the market conditions at the time of the business restructuring.

In order to find out which rights were sold, the taxpayer and the buyer will be required to present detailed information regarding all the rights that were sold in the share purchase transaction, such as:

a. **Shares** of all types;
b. **Options that have vested** as at the date of the share purchase transaction;
c. **Options that have no yet vested and restricted stock units[21]** (RSU) that were sold for options and RSUs of the buyer;
d. Other rights, as there may be.

The total purchase price sums up all the payments in money, money equivalents and in an exchange of rights (hereinafter: "**the payments**"), such as:

a. Cash consideration;

[19] Shares held by the public are usually minority shares. In cases that the Israeli company is a publicly traded company, or a material component of a traded group, the market prices can be relied upon with certain adjustments, such as adding the control premium and deducing the value of the Israeli company's business operation,

[20] The calculation of the total purchase price may be different from the consideration reported according to accounting principles.

[21] This refers to rights that were allotted before the share purchase transaction.

b. Amounts held back in escrow for all the rights' holders;
c. Amounts held back for part of the rights' holders;
d. Payments contingent upon future performance or compliance with milestones (earnout);[22]
e. The monetary value of non-cash consideration, including shares, RSUs, options;
f. Additional liabilities that were assumed by the buyer, for example transaction costs of the buyers or the sellers that were deducted from the purchase price.

*The position of the tax authority is that all the aforesaid payments are part of the overall consideration in a share purchase transaction that is a comparable transaction.*

**6.3.3** Arguments regarding excess premium in share purchase transactions

The overall consideration of a transaction represents the economic value of functions, assets and risks, less the economic value of liabilities, that the acquired group or company had at the date of the share purchase transaction.

*The position of the tax authority is that the overall consideration in the share purchase transaction has to be considered for the purpose of the comparison and estimating FAR value. No amount should be deducted from the purchase price because of an alleged synergy, control premium or any other deduction (arguments such as premium for "liquidation", premium for "winner's curse", and so forth).*

See example 3 in Appendix A.

**6.3.4** Adjustments required in a share purchase transaction for examining value of FAR

It is emphasized that comparable value for the purpose of estimating the market price of functions, assets and risks is the **enterprise value** of the Israeli company, which is derived from the share purchase transaction.

In order to obtain the enterprise value of the Israeli company out of the share purchase transaction, the following adjustments have to be made:

a. **Addition of excess liabilities** at the date of closing the share purchase transaction, such as:
   - Financial liabilities;
   - Liabilities to the Chief Scientist (at discounted value);
   - Accumulated rights of the employees for severance pay;
   - A bonus promised to the employees in the case of a share purchase transaction – see details in the next paragraph.

b. **Deduction of excess assets** at the date of closing the share purchase transaction, such as:
   - Cash and cash equivalents;
   - Investments unrelated to the business operation;
   - Tax asset;

[22] An initial assessment will be made with respect to payments that are contingent upon performance, and the final result will be determined according to the actual payments.

### 6.3.5 Additional matters

**6.3.5.1 Bonus that was promised to the employees in the case of a share purchase transaction**

Sometimes, in expectation of reaching a share purchase transaction, management of the company promises its employees a bonus for realizing the share purchase transaction. Such a bonus is sometimes presented as a part of "integration costs".

When the bonus is paid to the employees, also those who are no longer going be employed – the bonus should be considered an excess liability, and be added to the calculation when estimating FAR value in a business restructuring.

However, if the bonus's payment is contingent upon the employee's employment continuing, and will in the future be subject to tax as ordinary income of the employees on the one hand, and be recognized as a payroll expense on the other hand, the bonus to the employees should not be considered an excess liability in respect of which the calculation should be adjusted, rather a payroll expense according to an agreed scheme between the company and continuing employees.

In the Gteko ruling, the court did not accept the position of the tax authority, that the bonus to the employees and the contingent payment to the company's CEO and founders should be added to the company's value. The court considered the bonus and contingent payment to be a payment on the personal level, and the proof of this being that the bonuses are paid directly to the employees, and therefore do not contribute to the company's value.

*The position of the tax authority is that each case should be individually examined according to the aforesaid tests.*

**6.3.5.2 Reliance on a purchase price allocation (hereinafter: "PPA")**

Negotiations between a buyer and seller, before the transaction to purchase shares or the business operation, are usually held with respect to the overall enterprise value and not the prices of separate assets.

PPAs that are prepared by the buyers after completing the transactions do not estimate the arm's length prices of the intangibles and their purpose is to provide fair value measurements (per its accounting definition[23]) of acquired "intangible assets" according to the accounting principles applicable to the buyer.

*The position of the tax authority is that even though a PPA often contains important information regarding the examined business, the assumptions and*

[23] See IFRS 13

*calculations in a PPA are not relevant to determining market price and conditions. This position is supported by the Guidelines.*[24]

**6.3.6** The forecast of the business operation – basis for performing valuations

The FAR valuation is derived from the forecast of the business operation. When a share/business operation purchase transaction precedes a business restructuring, the tax authority requests to see the "acquisition model" that details the forecasted income, expenses, profits, and cash flows of the business operation, and details the excess assets and liabilities of the companies being acquired.

In some cases, the taxpayers submit a PPA, which includes many details of the acquisition model. In those cases, adjustments need to be made in order to reconstruct the original acquisition model.

There are cases in which information regarding the acquisition model is not provided at all, not even in a PPA. In those cases, the acquisition model needs to be reconstructed based on comparable assumptions and parameters.

**6.3.7** Adjustments for timing difference between a comparable transaction and the date of the business restructuring

If a business restructuring is performed after the purchase of the shares or business operation, the comparable transaction can be taken into consideration while making any necessary adjustments.

Additional adjustments that will be taken into consideration:

a. Changes in the economic environment of the Israeli company (relevant markets and economic conditions);
b. Developments in the Israeli company, in the period between completing the share/business operation purchase transaction, and the date of the business restructuring (hereinafter: "**the interim period**"), such as meeting development targets, meetings sales and profit targets, changes that were not expected at the time of the comparable transaction;
c. Changes in economic parameters such as: changes in money prices, sector forecasts, and so on.

**6.4 Cases that do not have a comparable transaction**

**6.4.1** Examining reasonableness of the value using the comparison method

When a business restructuring is performed without a comparable transaction (such as, a purchase of shares or business operation), an indicative valuation of the business operation will first be prepared using the **comparison method** in order to arrive at a reasonable valuation range – on the basis of the data of similar companies.

[24] Chapter VI, Paragraph 6.155

According to this approach, the value is estimated on the basis of enterprise value multiples[25] that are derived from the market prices of comparable companies (area of activity, size, stage in life cycle, and so forth) in acquisition or merger transactions. If there are no acquisition transactions of similar companies, the stock exchange value[26] of comparable public companies can be used, but it should be remembered that the stock exchange price usually represents the price of minority shares, and is lower than the aggregate economic value of the companies.
The valuation made at this point provides a reasonable valuation range, and does not constitute a specific valuation.

**6.4.2** Applying the income approach
Insofar as the taxpayer did not present a detailed business forecast of future income, expenses and cash flows for the period after the purchase date, such a business forecast has to be prepared using the accepted tools of the discounted cash flow (DCF) valuation model.

The DCF model is the most accepted model for performing valuations of transactions between parties that do not have special relation and is the most preferred and accepted method for performing valuations of a business operation.

A valuation using the DCF model results in an estimate of the specific value of the Israeli company's business operation, before performing the business restructuring, and its reasonableness is high insofar as its results are in the reasonable valuation range, according to the valuation using the comparison method (see previous section).

**6.4.3** Allocating value (valuation) to the Israeli company, before the business restructuring
As a preliminary stage to valuation of the FAR transferred from the Israeli company, a valuation must be performed of the functions, assets and risks it had before the business restructuring.

In cases that the Israeli company being examined is part of a group of companies, and the group as a whole is a basis for comparison, it may be necessary to examine the value of all or part of the group companies, in order to obtain and separate the value of the Israeli company.

### 6.5 Calculation of value of non-transferred FAR

According to a functional analysis, after the FAR expected to remain in the Israeli company are identified, or alternatively the FAR that from the beginning were not a part of the operation of the Israeli company, a valuation will be performed of the non-transferred FAR.

### 6.6 Market (arm's length) price of FAR transferred or ceased or eliminated following a business restructuring

This value is obtained as the difference between the value of all the Israeli company's FAR before the business restructuring, and the value of the FAR remaining after the business restructuring.

[25] Operating multiples, such as: EV/EBITDA, EV/EBIT, EV/Revenues.
[26] Average market value in the 30 trade days before the date of the valuation.

## 6.7 Determining the discount rate in the FAR valuation

**6.7.1** The discount rate of the business operation

If the business restructuring was carried out near the share (or business operation) purchase transaction with a party with which there are no special relations, the discount rate in the transaction is the internal rate of return (IRR) which reflects the assessment of parties that do not have special relations of all the risks that characterize the business operation that is the focus of the aforesaid transaction.

The specific IRR is the starting point for determining the discount rate for valuation of the functions, assets and risks that comprise the business operation.

In the absence of a comparable transaction, the cost of capital will be calculated using the WACC model, in which the parameters are derived from comparable data of similar companies, and the specific risks characterizing the operation or FAR being valued will be reflected.

**6.7.2** Discount rate for valuing functions

The business functions are generally not standard at all. This is particularly true for functions such as, research and development, marketing and sales or strategic management functions. These functions are usually unique for each specific operation and contain specific know-how and capabilities and therefore really depend on the success of the business operation to which the specific service is provided. Thus, the risk level of the functions depends very much on the risk level of the business operation they serve.

Cases that after the business restructuring the enterprise becomes the performer of functions, such as research and development services or marketing and sales services, in exchange for covering expenses plus a defined profit[27] – On the one hand the risk level becomes limited since the performer of the function is not exposed to business losses from market failure, claims of customers and so forth; but on the other hand the business risk increases because of exposure to a single customer – and the risk of losing the right to provide service. The exposure to a single customer considerably increases the discount rate and balances the aforesaid limitation of the business risks.

Therefore, the discount rate for valuing the functions will probably be the same or just a little lower than the discount rate of the business operation to which the service is provided.

**6.7.3** Adjustments for valuation of the operation in various countries

When valuing an operation carried out by related companies in foreign countries – the nature of the operation, intercompany arrangements, risk and the specific tax rates in that country will be taken into consideration.

[27] Like for example in method (3) of the definition of "profitability rate" in the Regulations.

## 7. Tax implications

### 7.1 Secondary adjustment

a. In cases that additional income was included in a business restructuring assessment, insofar as the transactions are in a multinational group, a secondary adjustment has to be made in accordance with Section 85A: the additional income will be considered an additional transaction that will be classified as a dividend or loan, according to the circumstances of the matter.[28]
b. Insofar as all or part of the consideration in the business restructuring transaction was recorded on the company's books as a debit or credit entry in the related parties' account, such amounts will be considered a loan between related parties, and the interest on it will be determined according to the rules of Section 85A, if it is an international transaction per its definition in the Regulations, or according to Section 3(j), according to the circumstances of the matter, or be considered a dividend.

### 7.2 Transfer of indirectly owned FAR

When a business restructuring is performed in subsidiaries, including companies outside of Israel, the business restructuring will be considered as if an arm's length price was received for the transferred FAR, and this consideration was transferred to the company in the form of a dividend. Therefore the value of the FAR will be subject to tax in Israel as the receipt of a dividend. The amount of the dividend will be included in a secondary adjustment.

The direct taxation of the FAR, insofar as imposed by the tax authorities in the subsidiary's country of residence, will be taken into account in the calculation of the dividend.

### 7.3 Implications of the business restructuring on benefits pursuant to the Law for the Encouragement of Capital Investments – 1959 (hereinafter in this item: "the Law") and benefits pursuant to the temporary order for encouragement of the hi-tech industry in the 2011-2012 Economic Policy Law (hereinafter: "the Angels Law") and the Law for the Encouragement of Industry (Taxes) – 1969 (hereinafter: "the Industry Encouragement Law").

(In this document the definitions of "**Beneficiary Enterprise**", "**Beneficiary Income**", "**Preferred Enterprise**" and "**Preferred Income**" – within their meaning in Section 51 of the Law prior to Amendment 68 of the Law and after it, as applicable, and "**Technological Enterprise**", "**Technological Income**" and "**Preferred Technological Income**" as defined in Section 51X of the Law as it is after Amendment 73. "**Start-Up Company**", "**Target Company**" and "**Qualified Company**" within their meaning in the Angels Law and "**Industrial Company**" within its meaning in the Industry Encouragement Law).

A business restructuring in companies engaged in technological development may have an effect on how the Law's provisions are applied to the company. The restructuring may have an effect on, inter alia, classification of the company's income as beneficiary income, preferred income or technological income. Moreover, the restructuring may affect how the base turnovers of expansions of a beneficiary enterprise and/or approved enterprise are calculated and in certain cases even result in revocation of the company's benefits. The definition of the company's enterprise before and after the business restructuring has to be examined and

[28] For more on this matter see Income Tax Circular 3/2008.

accordingly the provisions of the law according to, inter alia, its nature of activity, the benefits awarded and the conditions for receiving the benefits.

In addition to the aforesaid, the implications of the business restructuring should be examined also with respect to the Angels Law and the company meeting the definition of a start-up company, target company or qualified company insofar as qualified investments were made in the companies pursuant to the Angels Law.

Benefits granted pursuant to the Industry Encouragement Law can also be stopped insofar as the company no longer engages in manufacturing activity according to the definition of an "industrial enterprise" in the Industry Encouragement Law, which did not expand the definition to providing research and development services for foreign residents like the definition assigned to an "industrial enterprise" in Section 51 of the Law that also defined the term "manufacturing activity". It should be examined whether the company consolidates reports for tax purposes pursuant to Chapter F of the Industry Encouragement Law, amortizes existing know-how pursuant to Section 2 of the Industry Encouragement Law and so forth.

Presented hereunder are examples of business restructuring in technological companies that enjoyed benefits according to one or more of the law's benefit tracks, and the possible implications of the restructuring in connection with the law:

a. **Transfer of the operation of the company's plant, including all its tangible and intangible assets:**
   Such a sale constitutes an event on the capital level within its meaning in Part E of the Income Tax Ordinance. In such sales, the company may produce capital gains which, generally, are not entitled to tax benefits according to the Law.[29] On this matter, also the effects of all the restrictions imposed in the Angels Law on a start-up company or target company should be examined in view of the sale of the intangibles and breach of the conditions provided in the Angels Law while examining cancellation of the deduction granted to an investor in respect of its investment from the point of view of both the investor and the company.

b. **Transfer of intangibles owned by the company and transition from activity of providing a right to use know-how or software in consideration for income from royalties, to activity of providing research and development services in consideration for reimbursement of expenses plus a certain profit margin:**
   Before the business restructuring a company having an industrial enterprise[30] can enjoy tax benefits from a beneficiary enterprise, preferred enterprise or technological enterprise, as relevant, with respect to its income from providing a right to use "know-how"[31] that was developed in the enterprise.

   After the business restructuring, the company operates as a provider of research and development services to another. This activity may also be entitled to benefits awarded to a beneficiary enterprise or preferred enterprise, providing that the activity involves

[29] Section 41(B)(2) of the seventh chapter of the Law ("Income Tax Benefits") – excludes from the definition of "tax" the tax that is imposed on a capital gain. See also civil appeal 3724/12 Topap Industries vs. Assessing Officer for Large Enterprises.
[30] The definition of an industrial enterprise in Section 51 of the Law includes in "manufacturing activity", inter alia, activity of producing software and development products.
[31] "Know-how" – as defined in Section 51 of the Law.

providing industrial research and development services to a foreign resident and the company received the approval of the director of the industrial research and development authority in the Ministry of Economy. Insofar as it is an industrial enterprise, its compliance with the criteria provided in the definition of a "preferred technological enterprise" should be examined in view of the business restructuring and the change from development activity and IP ownership to activity of providing services with limited risk.

A company that applies the provisions of the Industry Encouragement Law as it was before amendment 68 can raise issues such as: standardization of the base turnover in view of the restructuring,[32] examination of whether it is the establishment of a new enterprise or the expansion of an existing enterprise and so forth.

A company that applies on itself the provisions of the Industry Encouragement Law may possibly no longer meet the definition of an industrial company since it no longer engages in manufacturing activity. The effects of not meeting the definition of an industrial company need to be examined.

The restructuring may also have an effect on companies that benefit from the Angels Law insofar as the business restructuring occurred in the benefit period provided in the law during which the company is subject to restrictions concerning the nature of its operation, the extent of its research and development expenses and so forth. These effects may apply to the **company itself or to its investors.**
The encouragement laws department of the professional division should be consulted with on these matters.

c. **Transition to activity of providing research and development services with limited risk while leaving intangibles in the company, all or part**
A situation in which a company begins to provide industrial research and development services for a foreign resident, but does not present a capital gain transaction on the transfer of intangibles. The company will continue to receive income from provision of a right to use know-how or software and income from royalties in respect of the intangibles it claims it still owns.

The company may also continue to claim benefits on income from royalties or from providing a right to use know-how or software and on providing industrial research and development services to a foreign resident.[33] Insofar as it is determined that the company has no more manufacturing activity as part of the "know-how" development, it is possible that the right to use will be classified as passive income not from the enterprise's activity, but this matter should be examined and the encouragement laws department be consulted with.

In view of the tendency to present the business restructuring such that there was no sale and no capital gain was created, the transaction should be carefully examined in view of the

[32] Before the business restructuring, the company held all the assets and risks that created the right to income and cash flows. After the business restructuring, the assets and risks are transferred to another and therefore the income remaining in the company from providing development services is usually considerably lower than the income before the restructuring.
[33] Subject to receiving the Chief Scientist's approval.

principles described above in section 5.2 ("Sale versus provision of temporary right to use") as well as the real economic meaning of the transaction.

In this context, it should be examined whether the company's activities after the business restructuring meet the conditions provided in the Law for continuing to receive the tax benefits it provides.

The encouragement law department of the professional division should be consulted with on these matters.

The company becoming a provider of research and development services, while leaving intangibles in the company, all or part, brings the company to a situation in which it no longer engages in promoting its business, does not invest in research and development and its expenses do not constitute research and development expenses rather expenses to provide services. This change, insofar as it is done within the benefit period provided in the Angel's Law, will result in the company no longer meeting the definition of a "start-up company" and accordingly to revocation of the deduction that was granted. Insofar as these are qualified investments in a "target company" the deduction should be taken away from the investors themselves while bringing the matter to the attention of the relevant assessing officers. In the case of a "start-up company" the payment of tax and the rules provided in Section 20(G) of the Angels Law should be examined with respect to the company itself.

## 8. Required documents and the degree of the taxpayers' response

The source of some of the required documents is the Israeli taxpayer and the source of other documents is other group companies. All the required documents, insofar as relevant to the specific case are required for examining the facts and determining the market conditions so as to improve the quality of the analysis and valuation. Failure to provide the documents, all or part, will not prevent treatment in an assessment. Annex B includes a list of required documents that is sent to the taxpayer in every case of examining a business restructuring issue.

**Sincerely,**

**The Israel Income Tax Authority**

## Appendix A

### Example 1[34]

Company A owns a government licence for a mining activity and a government licence for the exploitation of a railway. The mining licence has a standalone market value of 20. The railway licence has a standalone market value of 10. Company A has no other net assets.

Birincil, an entity which is independent of Company A, acquires 100% of the equity interests in Company A for 100. Birincil's purchase price allocation performed for accounting purposes with respect to the acquisition attributes 20 of the purchase price to the mining licence; 10 to the railway licence; and 70 to goodwill based on the synergies created between the mining and railway licences.

Immediately following the acquisition, Birincil causes Company A to transfer its mining and railway licences to Company S, a subsidiary of Birincil.

In conducting a transfer pricing analysis of the arm's length price to be paid by Company S for the transaction with Company A, it is important to identify with specificity the intangibles transferred. As was the case with Birincil's arm's length acquisition of Company A, the goodwill associated with the licences transferred to Company S would need to be considered, as it should generally be assumed that value does not disappear, nor is it destroyed as part of an internal business restructuring.

As such, the arm's length price for the transaction between Companies A and S should take account of the mining licence, the railway licence, and the value ascribed to goodwill for accounting purposes. The 100 paid by Birincil for the shares of Company A represents an arm's length price for those shares and provides useful information regarding the combined value of the intangibles.

### Example 2[35]

Birincil acquires 100% of the equity interests in an independent enterprise, Company T for 100. Company T is a company that engages in research and development and has partially developed several promising technologies but has only minimal sales. The purchase price is justified primarily by the value of the promising, but only partly developed, technologies and by the potential of Company T personnel to develop further new technologies in the future. Birincil's purchase price allocation performed for accounting purposes with respect to the acquisition attributes 20 of the purchase price to tangible property and identified intangibles, including patents, and 80 to goodwill.

Immediately following the acquisition, Birincil causes Company T to transfer all of its rights in developed and partially developed technologies, including patents, trade secrets and technical know-how to Company S, a subsidiary of Birincil. Company S simultaneously enters into a contract research agreement with Company T, pursuant to which the Company T workforce will continue to work exclusively on the development of the transferred technologies and on the development of new technologies on behalf of Company S. The agreement provides that Company T will be compensated for its research services by payments equal to its cost plus a mark-up, and that all rights to intangibles

[34] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 2017, example 22.
[35] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 2017, example 23.

developed or enhanced under the research agreement will belong to Company S. As a result, Company S will fund all future research and will assume the financial risk that some or all of the future research will not lead to the development of commercially viable products. Company S has a large research staff, including management personnel responsible for technologies of the type acquired from Company T. Following the transactions in question, the Company S research and management personnel assume full management responsibility for the direction and control of the work of the Company T research staff. Company S approves new projects, develops and plans budgets and in other respects controls the ongoing research work carried on at Company T. All company T research personnel will continue to be employees of Company T and will be devoted exclusively to providing services under the research agreement with Company S.

In conducting a transfer pricing analysis of the arm's length price to be paid by Company S for intangibles transferred by Company T, and of the price to be paid for ongoing R&D services to be provided by Company T, it is important to identify the specific intangibles transferred to Company S and those retained by Company T. The definitions and valuations of intangibles contained in the purchase price allocation are not determinative for transfer pricing purposes. The 100 paid by Birincil for the shares of Company T represents an arm's length price for shares of the company and provides useful information regarding the value of the business of Company T. The full value of that business should be reflected either in the value of the tangible and intangible assets transferred to Company S or in the value of the tangible and intangible assets and workforce retained by Company T. Depending on the facts, a substantial portion of the value described in the purchase price allocation as goodwill of Company T may have been transferred to Company S together with the other Company T intangibles. Depending on the facts, some portion of the value described in the purchase price allocation as goodwill may also have been retained by Company T. Under arm's length transfer pricing principles, Company T should be entitled to compensation for such value, either as part of the price paid by Company S for the transferred rights to technology intangibles, or through the compensation Company T is paid in years following the transaction for the R&D services of its workforce. It should generally be assumed that value does not disappear, nor is it destroyed, as part of an internal business restructuring. If the transfer of intangibles to Company S had been separated in time from the acquisition, a separate inquiry would be required regarding any intervening appreciation or depreciation in the value of the transferred intangibles.

**Example 3**[36]

Osnovni is the parent company of an MNE Group engaged in the development and sale of software products. Osnovni acquires 100% of the equity interests in Company S, a publicly traded company organised in the same country as Osnovni, for a price equal to 160. At the time of the acquisition, Company S shares had an aggregate trading value of 100. Competitive bidders for the Company S business offered amounts ranging from 120 to 130 for Company S.

Company S had only a nominal amount of fixed assets at the time of the acquisition. Its value consisted primarily of rights in developed and partially developed intangibles related to software products and its skilled workforce. The purchase price allocation performed for accounting purposes by Osnovni allocated 10 to tangible assets, 60 to intangibles, and 90 to goodwill. Osnovni justified the 160 purchase price in presentations to its Board of Directors by reference to the complementary nature of the existing products of the Osnovni group and the products and potential products of Company S.

[36] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 2017, example 26.

Company T is a wholly owned subsidiary of Osnovni. Osnovni has traditionally licensed exclusive rights in all of its intangibles related to the European and Asian markets to Company T. For purposes of this example it is assumed that all arrangements related to the historic licences of European and Asian rights to Company T prior to the acquisition of Company S are arm's length.

Immediately following the acquisition of Company S, Osnovni liquidates Company S, and thereafter grants an exclusive and perpetual licence to Company T for intangible rights related to the Company S products in European and Asian markets.

In determining an arm's length price for the Company S intangibles licensed to Company T under the foregoing arrangements, the premium over the original trading value of the Company S shares included in the acquisition price should be considered. To the extent that premium reflects the complementary nature of Osnovni group products with the acquired products in the European and Asian markets licensed to Company T, Company T should pay an amount for the transferred Company S intangibles and rights in intangibles that reflects an appropriate share of the purchase price premium. To the extent the purchase price premium is attributable exclusively to product complementarities outside of Company T's markets, the purchase price premium should not be taken into account in determining the arm's length price paid by Company T for Company S intangibles related to Company T's geographic market. The value attributed to intangibles in the purchase price allocation performed for accounting purposes is not determinative for transfer pricing purposes.

## Appendix B

## Information Document Request - Business Restructuring

This information document request is required for determining the proper tax assessment under the provisions per Section 85a of the Income Tax Ordinance, in connection to a presumed business restructuring.

For each of the required items below, state which entity possesses the original document, and select the most appropriate statement ("Statement"):

a) The document has never been prepared;

b) The document has been prepared though the company or purchaser doesn't intend to disclose it;

c) The document has been prepared and it was or will be provided to the assessment officer.

All requested documents must be provided in electronic format. Calculations, if any, must be provided in an active excel worksheet.

Additional information may be required upon further examination.

Required Data:

**Information on share or business acquisition between unrelated parties:**

| Source | Required documents or information | Statement |
|---|---|---|
| **Sellers** | **1.** Valuation study | |
| **Sellers** | **2.** Presentation to buyer | |
| **Buyer** | **3.** Due diligence report | |
| **Buyer** | **4.** Valuation study | |
| **Buyer** | **5.** Detailed business model prepared for the acquisition (i.e. purchase model) | |
| **Buyer** | **6.** Board minutes, Final Go or No Go presentation or documentations | |
| **Buyer** | **7.** Protocol of the approval of the acquisition | |
| **Buyer** | **8.** PPA | |
| **buyer** | **9.** Balance sheet as of the closing date | |
| **Buyer** | **10.** Merger or acquisition agreement including all exhibits | |
| **Buyer and Sellers** | **11.** The total purchase consideration, including cash, swap of rights, deferred or contingent consideration, et cetera | |
| **Buyer and Sellers** | **12.** Liabilities assumed, such as employee bonuses, swap of unvested ESOs, et cetera | |

**Information about the group or company or observed business:**

| Source | Required documents or information | Statement |
|---|---|---|
| **Financial Statements** | **13.** Consolidated - three years preceding the business restructuring date. | |
| **Financial Statements** | **14.** Solo reports - of all companies of the acquired group, three years preceding the business restructuring date | |
| **Prospectuses** | **15.** Prospectuses (including drafts) of the acquired company | |
| **Transfer Pricing Studies** | **16.** All TP Studies prepared for related companies of the group before and after the business restructuring date | |
| **Inter-Company Agreements** | **17.** Inter-company agreements preceding the business restructuring date | |
| **Inter-Company Agreements** | **18.** Inter-company agreements following the business restructuring date | |