**LEGAL DEPARTMENT**

Date: 19 April 2020

To:

**EY Israel**

Dear Sir/Madam,

**Subject: Legal Opinion in the Matter of the Factoring Agreement between Keter Plastic and Bank Leumi from 25 February 2019**

1. I was asked to give my opinion in the question of whether the assignments of rights under the factoring agreement (“**Agreement**”) signed on 25 February 2019 between Keter Plastic Ltd. (“**Keter**”) and Bank Leumi Leyisrael Ltd. are to be viewed as true sale transactions.
2. The Supreme Court discussed the definition of a true sale agreement of debts in the framework of the Agrexco ruling, Civil Appeal 7281/15 (hereinafter: “**Ruling**”).
3. In the Ruling, it was stated that despite the fact that the parties –
4. called the agreement a “factoring agreement”,
5. declared and undertook in the agreement that the debts of the clients would transfer to the ownership of the appellant in a final and absolute manner,
6. it was stated in the agreement between them that the securities which were given were not intended to guarantee the repayment of the debts of the clients, the Supreme Court stated that the intention of the parties was to create an encumbrance on the debts of the clients as a security for the repayment of the loan given by the appellant to the respondent, and the assignment of the rights under that agreement was not to be considered as a true sale.
7. A true sale transaction according to the Ruling is a transaction in the framework of which one party purchases the right of the other party to the agreement to receive a consideration from the clients. This is a transaction in which there are two central elements – the contractual element – an exchange of creditors, and the proprietary element – the transfer of ownership of the right. As a result of the changing of the creditors and the transfer of ownership, the assignee may demand compliance with the right from the debtor autonomously, independent of the assignor. It was further stated in the Ruling that a financing transaction which does not grant the purchasing party ownership of the clients’ money is not to be considered a true sale transaction.
8. The Supreme Court indicates a number of aspects which are to be examined in order to determine whether this is a true sale transaction. The Ruling does not state that only an agreement in which all the aspects listed below exist is to be deemed a true sale agreement. The question of whether this is a full assignment (transfer of ownership) or an assignment by way of encumbrance “**does not have to be examined by viewing each detail separately and its examination under a magnifying glass, but rather with a general view of the nature of the contractual connection**” (Civil Appeal 599/89 United Mizrahi Bank Ltd. vs. Hagi Pe’er, Accountant, *Piskei Din* 44(4) 870, 874 (1991)).

Below are the aspects which, according to the Ruling, must be examined in order to determine the nature of the Agreement.

In addition, I will examine below the manner in which these aspects are implemented in the Agreement –

1. **What is the nature of the transaction drawn up between the parties – is this in fact a full assignment transaction, by way of the sale, in which the ownership of the clients’ debts was transferred?**

The Agreement is called an “**agreement on general principles for invoice discounting transactions by way of a final and true sale**”. The preface to the Agreement indicates several times that the subject is “**a final, complete, absolute and non-recourse assignment**”, an “**absolute assignment transaction**”. Clause 2 of the Agreement, the title of which is “**True Sale**” states that –

“**For the avoidance of doubt, the Parties confirm their intention that the assignment of the rights regarding the debts purchased under this Agreement will constitute a true sale transaction regarding purchased debts as stated and not a loan or pledging arrangement of any kind whatsoever, and the bank, as assignee/purchaser will have full title, benefit and interest in those purchased debts, and therefore, and without derogating from the other provisions of this Agreement, the Parties agree as follows –**

1. **The bank may execute any transaction with a purchased debt which is the subject of the discounting transaction, including the assignment/sale of these rights to third parties.**
2. **The clients may not annul the transaction with regard to the purchased debts and/or redeem them and/or repurchase them from the bank.**
3. **The bank will bear the risk of nonpayment of the purchased debts by the debtors other than in the case of a breach of representations on the part of the clients regarding the purchased debts.**
4. **The clients will have no right whatsoever in connection with the purchased debts, including the right to receive money for them.**

Clause 3.6 of the Agreement states that “…the assignment of the clients will become valid regarding the purchased debts, and the latter **will be assigned to the bank in a final and absolute assignment, by way of the non-recourse sale**…”.

In Clause 4.7, Keter declares that “**neither the debts for sale nor any portion thereof have been encumbered, assigned or are subject to another right of any third party whatsoever**”, and this with the aim of legitimizing the full assignment of the right and the transfer of ownership thereof.

In Clause 4.14, Keter declares that pursuant to the loan agreements it and its parent company have with financing bodies in favor of which there is a floating charge – “**…the floating charge will not apply to the purchased debts. Moreover, the clients** (Keter – my addition N.P.) **will not create an additional charge on all their assets or on all their debtors in favor of any other third party whatsoever**”. This Clause is also intended to legitimize the full assignment of the right and the transfer of ownership thereof.

1. **Does** **the purchaser of the debts assume the risk of a decrease in the value of the asset or right (for example, non-repayment of the debt due to the insolvency of the clients)?**

In the Ruling, the assignee paid the assignor the amount of 85% of the debt as an advance and left the difference as a kind of “security” in the event that the debt is not collected in full. So in effect the assignee body “insured” itself against the full loss of the amount of the debt, and in this case the court stated that the leaving of the difference as a kind of security shows the non-transfer of the risk in full to the assignee body. In the Agreement under consideration, there are no payments of an advance and no differential being used as a security – Clause 3.8 of the Agreement states that “**upon the giving of the confirmation, the bank will credit the Keter account with the consideration for the transaction less taxes and levies, if any**”. Pursuant to the provisions of Clause 2.3 of the Agreement, it is explicitly stated that “**it is the bank which bears the risk of non-payment of the purchased accounts by the debtors, other than in the case of a breach of representations on the part of the clients with regard to the purchased debts**”.

1. **Have supervision and control mechanisms been fixed over the assigned right?** In the Ruling, a number of supervision and control mechanisms were determined, such as the transfer of customer receipts directly to the financing body, a limitation on mixing them with other assets of the assignor as well as ongoing monitoring by the assignee over the right, as testifying to a true sale transaction.

Under the circumstances of the case being dealt with in the Ruling, the court gave significant weight to the fact that the debtors did not know about the assignment of the right or the fact that the payment was made to the account of the assignor without need for a clear separation between money received under the assignment of the right and other money of the assignor. The Supreme Court stated that “**this is the strongest indication that this was not an absolute assignment transaction**” and mentioned that the assignee did not maintain any control or supervision ability over the collection of the money and over the location of its deposit or over its separation from other money of the assignor company.

The Agreement under consideration states two ways possessed by the client to execute discount transactions – (i) **a public discount transaction** in the framework of which Keter arranges that on the date of filing of the application for the discount, the bank possesses signed and approved instructions by the clients of Keter in which they confirm their consent to the assignment of the right, subject to and pursuant to an agreement between Keter and the client (Clause 3.4 of the Agreement), and (ii) **a silent discount transaction** – a transaction about which the client of Keter has been informed pursuant to Clause 5 of the Agreement but there is no obligation that it has given its consent to the assignment of the right (see also the last part of Clause 3.4 as well as Clause 7 in the matter of the date on which the bank may give notice to a debtor about the assignment); however, Keter undertakes to instruct the client to transfer the money to the dedicated account opened for the assignment of the debt.

Therefore in the framework of the Agreement under consideration, in both of the transaction types mentioned above, the client of Keter is notified about the assignment, and in a public transaction it even confirms in writing its advance consent. In contrast to the case dealt with in the Ruling, Keter set up a dedicated bank account (Clause 5 of the Agreement) into which only the amounts whose source is the assignment of the right under the Agreement are being paid.

The client of Keter undertakes to pay only into the above-mentioned account. Despite the fact that the owner of the account is Keter, the beneficiary in the account is the bank only, and the amounts accumulating in the account will be held by Keter in trust for the bank (Clause 6 of the Agreement). This dedicated account permits orderly control by the bank of the money being paid by the clients to the bank.

Additional Clauses in which the control and supervision of the bank find expression are –

* Clause 3.9 states that Keter will provide the bank with a power of attorney to sign any document connected with the realization of the assignment of the right in its name.
* Clause 4 includes declarations and undertakings of Keter regarding its relationship with the client.
* Clause 6 includes a variety of areas of supervision and control by the bank over the money owed to it such as – receipt of information, assistance from Keter, avoidance of actions which are liable to harm the rights of the bank, a prohibition of the encumbering of or an additional assignment of the debts by Keter, not to give a waiver to the client on the amounts owed by it to the bank, not to receive securities, etc.
* Clause 8 states that the bank, at its discretion, will conduct any procedure for the collection of the purchased debts.
* Clause 9 includes an undertaking by Keter to give various reports on incidents which affect the ability of the bank to receive money from the clients, in order to permit the bank to supervise and control the money owed by the clients of Keter.
1. **Denial of the right of the assignee body (the bank) to return to the assignor (Keter) if the debt is not repaid by the debtor** – in other words, the creation of an independent relationship between the bank and the clients of Keter.

Clauses 2.1-2.4 state explicitly that the bank may not return to Keter if the debt is not repaid by the debtor. The only exception to this rule of non-return to Keter is in the event that Keter has breached its representations with regard to the clients’ debts. In my opinion, this right of return of the bank to Keter, in and of itself, does not preclude the definition of a true sale. The right to annul a transaction following an error or deception recognized by law pursuant to the provisions of Clauses 14 and 15 of the Law of Contracts (General Section), 5733-1973 and the desire of the bank to implement these provisions in the framework of the assignment of the debt under the Agreement do not change the nature of the original Agreement signed as a sale agreement.

1. **The transfer of the insurance right on the clients’ debts to the financing body** – in the framework of the relationship between the parties to the Agreement, the bank was registered as the sole beneficiary of the debts of the clients of Keter in the framework of the credit insurance policy of Keter, but Keter is the one which bears the payment of the premiums.

The Ruling states that “**The assignment of the right to insurance receipts under the ICIC policy to Coface is liable, *prima facie*, to constitute an indication of the transfer of ownership of the debts to Coface. However, the fact that Coface constitutes only the “beneficiary” of the policy and is not the insured entity which pays the premium can indicate that this is a encumbrance-type transaction. In addition, the defining of Coface as the beneficiary of the policy shows that it wished to insure itself against the loss of the debts, so that in effect it took no risk in the event of nonpayment**”.

Does the fact that Keter bears the premium, in and of itself, preclude the recognition of the Agreement as a true sale agreement? In my opinion, the answer to this is negative. In the framework of the relationship between the parties, there are transaction costs for each party, and the very fact that Keter accepted the payment of the premium as a part of the costs of the transaction does not, in and of itself, preclude the classification of the Agreement as a true sale transaction, since the right to receive the benefit of the insurance belongs only to the bank.

1. **If the right of the assignee is reduced to the amount of the debt owed to it by the assignee [???], this means that the assignee has not received the full right over the asset, but rather only the right to be reimbursed from it** – Clause 2.1 of the Agreement, which states that the bank may execute any transaction with the purchased debt which is the subject of the discount transaction, including the assignment/sale of the right to third parties, supports the contention that the bank has received full ownership of the assigned asset. Clause 2.4 as well, which states that Keter will have no residual right whatsoever in connection with the purchased debts, showing the scope of the assigned right, supports this. The limitation imposed on Keter to encumber the assigned right, as well as other limitations imposed on Keter under Clause 6 of the Agreement, show that the bank has received the full right over the purchased debt.
2. **The existence of a security, such as a bond, received by the assignee from the assignor shows the transaction to be an encumbrance transaction and not a true sale transaction.**

In the Agreement there is no security whatsoever given by Keter to the bank to ensure compliance with its undertakings.

1. **Registration of the assignment of a right –** the assignment of a right constitutes an indication that this is a security and not a sale (Civil Appeal 8299/10 Bank Mizrahi Tefahot Ltd. vs. Beit Hashita Metal Industries (BHC) Ltd. (15 March 2015)). The agreement is silent regarding the right of the bank to register the assignment of the right, and in fact, to the best of our knowledge, the bank did not register the assignment of the right.

To summarize,

I believe that from all the provisions of the Agreement and from the various aspects stated in the Ruling, the debts assigned pursuant to the Agreement are to be viewed as a true sale transaction.

An additional important point raised in the Ruling is that the parties are to conduct themselves according to what is stated in the Agreement.

Therefore, as long as the parties to the Agreement conduct themselves according to it, in my opinion it may be stated that the transactions being conducted in its framework are true sale transactions.

Respectfully,

(-) Nir Palistrant

Legal Consultant