

The National Labor Court

NIA 44405-10-15
LabA 28480-02-16

Handed down on March 26, 2018

**Before: President Yigal Plitman, Deputy President Varda Wirth-Livne, Judge Lea
Gliksman, Judge Ilan Itah, Judge Roy Poliak**

**Public Representative (Employees) Ms. Michal Biron Ben-Gera, Public Representative
(Employers) Ms. Yodfat Harel Buchris**

In the matter of NIA 44405-10-15:

Omri Keyes

The Appellant:

-

1. The National Insurance Institute

The Respondents

2. Galei Hatzuk Ltd.

**On behalf of the Appellant – Adv. Ynon Tamari, by appointment of the Legal Aid
Bureau**

On behalf of Respondent 1 – Adv. Carmit Naor and Adv. Orna Rosen Amir

On behalf of Respondent 2 – Adv. Asher Shor

And in the matter of LabA 28480-02-16:

D.A. Importing & Restaurant Managing Ltd.

The Appellant:

-

Yechiel Budah

The Respondent

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On behalf of the Appellant – Adv. Yaniv Ofek and Adv. Chaya Kaplan Toby

On behalf of Respondent 1 – Adv. Uri Eliav and Adv. Michal Schwed

**1. The Histadrut - The General Organization of
Workers in Israel – The Federation of Young
Students and Workers**

Attending the proceedings

2. The Association of Restaurants in Israel

3. The Attorney General

**On behalf of the Histadrut – Adv. Orna Lin, Adv. Osnat Longman, Adv. Yael
Stamati**

On behalf of the Association of Restaurants in Israel – Adv. Rany Schwartz

On behalf of the Attorney General – Adv. Yana Simkin

Judgment

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President Yigal Plitman

"And once again the road opens wide" – Introduction

1. The two proceedings before us raise the question of the status of tips paid to waiters. This issue, which involves a discussion of a number of legal branches and complex questions with broad implications, has arisen in various contexts in the case law of this Court and has even arrived at the Supreme Court sitting as High Court of Justice, including as part of a further hearing. We shall already note, in a nutshell, that NIA 44405-10-15 **Keyes - The National Insurance Institute** (hereinafter: the **Keyes Case**) discussed the National Insurance Institute’s (hereinafter: the **Institute**) decision to exclude from the unemployment fees paid to the appellant the sums of the tips he obtained from the customers of the restaurant at which he worked. LabA 28480-02-16 **D.A Importing & Restaurant Managing Ltd. - Buda** (hereinafter: the **Buda Case**) examines the question of whether the tip sums paid to the respondent in cash by the restaurant’s customers, should be included as part of his wages, and this in the context of the Minimum Wages Law, 5747- 1987 (hereinafter – the **Minimum Wages Law**).
2. Notwithstanding the different legal context of each of the proceedings at hand, we decided to hand down a consolidated judgment on both, given the broad normative basis common to both in respect of the status of the tip. In order for the description of each of the proceedings, including the judgment handed down therein and the parties' arguments there, to be clear, we shall first turn to the layout of the normative platform relevant to the common issue, namely the question of the status of the tip.

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Before we delve into the issue before us, we shall emphasize that our discussion concerns the status of tips insofar as it concerns National Insurance laws and labor laws alone, and it is not intended to set case law rulings on issues that are not within the material jurisdiction of the Court.

"Let me enter this gate" - the normative framework

"They carry plates set on a platter" - the meaning of a tip

3. In Israeli law, the word "tip" is mentioned explicitly under two legislation only: Section 12(a)(4) of the Airports Authority Rules (Maintaining Order at Airports), 5744-1984 (Regulation File 4624) prescribes that **"a person shall refrain from doing anything at the airport which may endanger the life, security, health, property or convenience of a person, or disrupt a person or prevent him from exercising his rights, as well as - ... Shall refrain from paying, granting, asking, demanding or accepting a tip for performing porter services or other services "** (emphasis added - YP; from now on all emphases are added, unless noted otherwise). An identical provision, though referring to a "terminal" rather than an "airport", is found in section 20(a) (4) of the Airports Authority Rules (Maintaining Order at the Land Crossing Terminals), 5745-1985 (Regulation File 4888). Indeed the word "tip" appears in the aforementioned rules explicitly, however they do not include - nor does any other legislation in Israeli law - any definition of this term.
4. In their article "Tips" (**Mishpatim** 38 107 (5768); hereinafter – **Tips**), scholars Yoram Margalioth and Sharon Rabin-Mergalioth review the development of the institution of tips historically and psychologically, as follows:

"Tipping in a similar format as we know it currently commenced in the 16th century in England, at public businesses and in private homes at the same time. During this period, copper cups began to be placed at cafés and taverns engraved with the words "To Insure Promptitude", abbreviated to T.I.P. Customers who visited the cafes dropped the tip in the cup in advance, as the sees... In order to receive preferential service... In private homes, a social norm developed that the guests of landlords tipped at the end of the visit, for services rendered other than within the ordinary duties of the servants... As the years passed by, tipping became a binding norm also in situations where no special service was provided to the guest" (p. 114).

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In the late 18th century, the authors continue, all servants who came into direct contact with guests who came to stay or dine expected to be given a tip, and in this situation the tip no longer constituted an incentive for providing better service, but was rather “**perceived by guests as payment for hospitality**” (**Tips**, p. 114). In the early 20th century, it was still customary to pay a tip at private homes in England. The institution of tipping spread throughout Europe during the 17th and 18th centuries, and only reached the United States during the late 19th century, however “**over the years the practice in Europe weakened and strengthened in the United States**” (**Tips**, p. 115).

5. The tip institution is acknowledged also by the Israeli reality as a common phenomenon in more than 30 professions, including gas stations workers, taxi drivers, hair designers as well as waiters (**Tips**, p. 107 and the references there). Although this is a very common phenomenon, and despite repeated calls to the legislator to act for regulating it, both by the various instances that heard the issue as well as on the part of a committee headed by Prof. Avraham Freidman, which was appointed in April 1995 by the then Minister of Labor and Social Affairs, Ms. Ora Namir of blessed memory, “for examining the issue of waiters’ employment terms at cafes and restaurants as well as the status of the tip as wages” (hereinafter – the **Friedman Committee**) - to date, the status of a tip has not been regulated as of yet under legislation, neither primary nor secondary (other than the rules noted in section 2 above). Under these circumstances, the status of the tip in Israeli law was regulated only partially, by means of case law rulings, as we shall present their main points below, in ascending chronological order.

“And his ideas as spurs, and his statements as cavaliers” - case law

“We will still play games, we will still turn the world upside down, freedom, freedom, there is nothing like you” - the tip in the context of the Annual Vacation Law - the al-Kurdi case

6. The earliest judgment that we wish to mention in the context before was handed down in the **al-Kurdi** case (LabC (National) 2-3/31 **al-Shoyesh - al-Kurdi**, IsrLC c 3 (1971)). That case discussed the matter of a cook who filed a claim for payment of various rights due to his work for 20 years at a restaurant, including rights by virtue of the Annual Vacation Law, 5711-1951 (hereinafter: the **Annual Vacation Law**). The cook received IL 14 daily from his employer. In addition, every day he received IL2 from the “tip box” paid by customers of the restaurant to waiters. The District Court accepted the the cook’s claim in part. Among other things, it awarded him a certain amount as redemption of vacation days, on the basis of a daily salary of IL16. As part of his appeal, the

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employer claimed, *inter alia*, that it was inappropriate to include the service fees in the cook's regular wages for calculating the redemption of vacation days. The National Labor Court accepted this argument, ruling as follows:

"The service fees that were allocated to the respondent by the waiters do not constitute part of the wages for the purposes of vacation pay. In section 10 of the Annual Vacation Law, which defines vacation pay, 'wages' means "any consideration, in money or money equivalent, that is paid to the employee by the employer... for the ordinary working hours." The service fees, which the waiters shared with the respondent, were not paid by the employer, but rather by the waiters, out of the money they collected from the customers, and this does not add or reduce from the fact that they followed the employer's instruction. Furthermore, the payment of IL 2 per day was not paid as consideration for the respondent's 'ordinary working hours', but rather as a grant due to the fact that as of a certain date, the respondent's work was limited to the kitchen only, and he could not receive service fees from the customers as well. Therefore, the ordinary wages for the calculation of vacation pay is IL 14 per day, rather than IL 16 as the Regional Court ruled.

7. This ruling of the National Court was confirmed by the Supreme Court sitting as High Court of Justice, by Justice Berenson, as follows:

"It is clear to me that this last payment [referring to the tip fee – Y.P.] is not within the realm of 'wages' as its meaning under the Annual Vacation Law, and the National Labor Court has rightly ruled not to include it in calculating the vacation fees. 'Wages', according to the definition in section 10 of the Annual Vacation Law, means - the consideration paid by the employer for ordinary working hours. The petitioner's share in the service fees, although he earned it in connection with his work and the respondent's efforts towards the waiters as the petitioner moved from waitressing to working as a cook, was not obtained from the employer and had not replaced wages. Such payment, which comes from a foreign source, does not constitute wages, unless an agreement is made in respect of this issue between the employee and the employer that it would be considered as part of the wages or would replace such "

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(HCJ 403/71 **Al-Kurdi v. The National Labor Court**, IsrSC
26(2) 66 (1972); hereinafter – the **Al-Kurdi Case**).

Tip in the context of the duty to register – the voluntariness test and the means of payment test – the Safari Holdings, Amitai and Lieberman cases

8. A most central judgment in which elements stand, essentially, even today, was handed down nearly 30 years ago in the **Safari Holdings** case (CA 476/87 **Safari Holdings Ltd. v. Tel Aviv Assessment Officer 1**, IsrSC 44(4) 780 (1990); hereinafter – the **Safari Holdings Case**). In that case the Assessment Officer conducted an audit at the restaurant managed by the appellant there (hereinafter - the **Audit Event**). One of the audit members dined there, paid a certain sum for the meal and a certain sum as a tip. The amount for the meal was recorded in the restaurant's cash register while the tip sum was not registered in it. Due to this failure to register, the Assessment Officer decided to disqualify the appellant's books, pursuant to the power vested in him under Section 145b(a)(1) of the Income Tax Ordinance [New Version] (hereinafter – the **Income Tax Ordinance** or the **Ordinance**).
9. The Supreme Court first noted that in accordance with the definition of the term "receipt" under the Income Tax Orders (Bookkeeping), 5733-1973 (hereinafter – the **Bookkeeping Orders**), only in respect of which applies the duty of registration, this duty applies to the sums obtained by the assessee in his course of business. He later ruled that "**it is acceptable to distinguish between service fees that constitute part of the price the diner is required to pay, as then the total amount constitutes the restaurant owner's income, and service fees granted out of the goodwill of the diner, not on demand, which is then customary to view as the waiter's income**" (p. 783 of the judgment; emphasis in origin – Y.P.). Meaning, where the tip is paid to the waiter voluntarily directly by the customer, this is not the restaurant's income but rather the waiter's only, and the restaurant is not obligated to register it. On the other hand, should the customer be required to pay a service fee, **or** should he pay the sum of the meal and the tip in one means of payment, this is the restaurant's receipt and it is required to register it. And as worded in the judgment:

"The tip amounts, which are paid by one means of payment together with the meal, are obtained by the restaurant owner, and he then gives the waiter his share. Where it is possible to separate between the means of payment and the sum of the

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tip... the restaurant owner does not obtain the tip for the waiter, but rather each of them directly obtains a separate receipt. On the other hand, where the means of payment is one, and two payments are included in it, then the restaurant owner obtains both of them and the waiter credits him with the amount of the tip. This is regarding the element of obtaining the payment. As for the requirement that the amount be received in the course of business, this of course is met, as then it is payment that repeats itself and constitutes, in fact, part of the restaurant's operating method”.

10. Hence, the two tests set out in the **Safari Holdings** case, in the context of tax laws, as a manner to rule whether or not there is a duty to register the tip in the restaurant's cash register, are the "voluntariness test" and the "means of payment test". Implementation of these tests on the audit event, as ruled in the judgment, indicates that following it no duty of the restaurant's registration arises, since the tip in that case was paid directly to the waiter, voluntarily, separately from the payment for the meal and without reaching the appellant's cash register. To complete the picture, it should be noted that at the end of the day, the Supreme Court approved disqualification of the books, since it was found that the appellant failed to register in its cash register other receipts, which (contrary to the receipts at the center of the audit event) it was required to pay.
11. In a judgment from 1993, which concerned a similar case, the Supreme Court “ratified” both the “voluntariness test” as well as the “means of payment test” (CA 497/89 **Amitai v. Tel Aviv Assessment Officer 1**, IsrSC 47(5) 384 (1993); hereinafter - the **Amitai Case**), although implementation thereof under the circumstance of that matter led to the opposite result from that reached in the **Safari Holdings** case. This is since in the **Amitai** case it was ruled that the checks found in the restaurant's cash register and did not match the cashier's paper roll, included both the payment for the meal as well as the tip fee and therefor “constituted one means of payment”. Hence, the appellant was required to “register them as they are, and it was not permitted to register them only in the “net” sum included in them, excluding the tip money.
12. The **Safari Holdings** case law ruling was “ratified” also a decade later, in the judgment on the **Lieberman** case (CA 9229/99 **Tel Aviv Assessment Officer 1 v. Lieberman**, IsrSC 59(1) 509 (2004); hereinafter – the **Lieberman Case**), mainly in respect of the “voluntariness test”, as it is the “main touchstone” set out in case law “for ruling whether the service fees are a receipt obtained by

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the business owner" (p. 515 of the judgment). Under the circumstances of that case, the check given to the customers (who conducted an audit on behalf of the Assessment Officer) included NIS 90 for the meal and NIS 9 (10%) as service fees. **"The total sum for payment - NIS 99 - was noted at the bottom of the check and circled"**. The customers paid NIS 99 in cash and only NIS 90 of which were registered in the restaurant's cash register. The tip in the sum of NIS 9 was placed in the "bucket" (the tip box) and was not registered at all. Therefore, the Assessment Officer decided to disqualify the restaurant's books. The Supreme Court ruled that the books were rightly disqualified. Prior to turning to its ruling, it emphasized that the question of the duty of registration does not concern the mere tax liability in respect of obtaining the tip or the rate of the taxable income, and it is required to register the tip sums in any event, if not as a receipt in the restaurant's books, then in the "service log" which a restaurant owner (or any business that employs waiters) is required to manage, pursuant to Section 3(8) of Addendum 11 to the Bookkeeping Orders (hereinafter: **Service Log**). It should be noted that it is required to daily register the names of the waiters employed on that day, their addresses and ID numbers, as well as their daily revenue or the number of working hours. A restaurant owner is exempt from registration as aforementioned **"If the restaurant owner has informed his customers, through advertisements, invoices, price lists, etc., that the service fees are included in the prices"** (section 3(8)(b) of the aforesaid Addendum). It should be further noted that the duty regarding the service log, was added to these Orders through an amendment from 1989, so that on the relevant dates it was not on the agenda in the **Safari Holdings** and **Amitai** cases.

Under the circumstances of the **Lieberman** case, as the Supreme Court ruled, the tip was not paid voluntarily, but rather following a payment demand presented to the customers, and therefore, pursuant to the principles outlined in the **Safari Holdings** and **Amitai** cases, should be deemed as the restaurant's receipt, which requires registration. It was ruled that **"the customer's subjective understanding of the question of whether he is required to pay a service fee is decisive in examining the nature of the service fee as being of free will"** (p. 516 of the judgment), and that had the customers paid as a tip an additional amount to that specified in the check, it could be deemed as a voluntary payment that does not require registration.

13. Alongside re-validation of the **Safari Holdings** case law ruling, it may be read both in the **Amitai** case as well as in the **Lieberman** case, although as obiter dictum, certain reflections regarding the means of payment test. Thus, Justice M. Heshin of blessed memory illustrates in the **Amitai** case the difficulties this test raises:

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“At the same time we should know, that the difficulties have not all been settled. Suppose, for example, that the price of the meal is NIS 90 and the customer wishes to give the waiter NIS 10 as a tip. Now we shall further suppose that the customer writes a “check payable to cash” (or in name of the business owner) in the sum of NIS 100; he seeks to obtain - and obtains - for it NIS 100 in cash (meaning: The customer 'cashes in' a check in the sum of 100 NIS); and from these he allocates to the business owner NIS 90, and to the waiter - directly - 10 NIS. This activity may be performed this way or in some other “abbreviated' way”. It may be argued in such a set of facts that the check in the sum of NIS 100 is not a “receipt” obtained by the business owner, and in this example we presented, the business owner would not be required to register as a “receipt” but only NIS 90. And what is the difference between this case and other cases we discussed? Indeed, it appears that the questions have not all been settled” (p. 392 of the judgment).

Also see Justice E. Rivlin’s statements in the **Lieberman** case:

"The judgment on Safari Holdings cannot be understood... as setting a rigid configurative test concerning the means of payment and the manner in which the service fees were obtained. Attempting to apply such a test to any given factual set raises many difficulties... Thus, we do not believe that in the case before us, the fact that the service fees were kept in a 'bucket', separate from the cash register in which the rest of the money received from the customers were kept is not sufficient for changing the nature of service fees as a receipt obtained by the restaurant owner. Don't judge a “bucket” by its cover”. (Section 517 of the judgment).

President A. Barak joined Justice Rivlin’s position, while Justice (as her title at that time) E. Hayut emphasized that the **Safari Holdings** case set, for classifying tipping fees as a receipt, both the voluntariness test as well as the means of payment test. However, she noted that she shares "**the opinion that distinguishing according to these criteria raises difficulty and establishes uncertainty**" however left the question for further review since it was not required for ruling there.

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14. Let us first note that the **Safari Holdings** case law ruling was reexamined also as part of **HCJFH Cohen**, which shall be specified below, and by majority opinion it was decided to leave it intact.

“In respect of the books only you are the sinner and judge” - tip in the context of the Minimum Wage Law – the test of registration in books - the Malka case

15. While in the judgments handed down in the **Safari Holdings**, **Amitai** and **Lieberman** cases, the question of tipping was examined in the context of tax laws and the question of registering the tip as a "receipt" in the restaurant's cash register, in the **Malka** case (LabA (National) 300113/98 **D.G.M.B. Eilat Restaurants Ltd. – Malka**, IsrLC m769 (2005); hereinafter – the **Malka Case**) discussed and ruled upon by this Court, examined the status of the tip in the context of the employer's duty to pay minimum wage, pursuant to the Minimum Wage Law. In that case Ms. Inbal Malka filed a claim against her employers at the restaurant where she worked as a waitress. The only consideration she obtained for her work was the tip money paid to her directly by the customers. Her employers undertook that in the event where she would not reach the daily minimum wage in this manner, they would complement her wages accordingly from their cash register at the end of the month. In her claim, Ms. Malka petitioned for payment of minimum wages during the period of her employment at the restaurant, arguing that the tip money should not be included in calculating the wages she was paid. Ms. Malka relied on section 2(a) of the Minimum Wage Law, which states that “**an employee who is over 18 years of age... who is employed full-time, as customary at his workplace, is entitled to obtain from his employer wages not less than minimum wage...**”, and added that the tip money was obtained from the restaurant's customers rather than from the employer, and thus they cannot be deemed as wages for the purpose of the Minimum Wage Law. The employer, on its part referred to the definition under section 1 of the Wage Protection Law, 5718-1958 (hereinafter - the **Wage Protection Law**), according to which “**wages” - including payments for holidays, work productivity and overtime as well as other payments obtained by the employee for his work and during his work**”, and argued that according to this definition the tip should be deemed as “wages”. The Regional Court accepted Ms. Malka's position and ordered the restaurant to pay her minimum wage for the entire period of her work at the restaurant, in addition to the sums of the tip she received.

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16. The employer appealed against the Regional Court's judgment. the Attorney General attended the appeal proceedings (hereinafter - the **Attorney General**), as also the H'histadrut- General Organization of Workers presented its arguments. It should be noted that during the hearing, the Court recommended that representatives of the Histadrut and representatives of the employers in the domain **"try to resolve the issue of the status of the tip through collective negotiations, which would be accompanied by the coordinating bureau of the economic organizations and the Attorney General"**, alas, for some reason it was not possible" and the Court was required to rule.
17. This Court, as stated by President (ret.) S. Adler reviewed in a comprehensive judgment, the sections of the Law relevant to the issue of minimum wage, examined the purpose of the legislation and the rulings of the Regional Courts on the question of the status of tips for the purpose of the Minimum Wage Law, and mentioned judgments that were handed down regarding the tip issue in several countries worldwide. After all this, he ruled that a tip paid directly to the waiter without passing through the restaurant's cash register does not constitute wages, while a tip paid through the employer's books constitutes wages. And so it was ruled:

"A tip that is given directly to the waiter without passing through the employer's cash register cannot be considered 'wages'. This is a payment given by a customer and not by an employer; this is a method according to which it is not possible to supervise the payment of minimum wage and releases the employer from its liability to pay minimum wage; it is a method that invites exploitation of the waiters and sometimes the employers' lack of good faith; it is a method that invites non-payment of national security fees and impairs collection of taxes; it is a method that misleads customers who believe, that the money they left for the waiter is designated to be a tip rather than assistance to the restaurant in paying his wages.

On the other hand, where the tip goes through the employer's cash register, it would be deemed as wages for the purpose - ~~Hyperlink Removed~~. We should add that the same is true also where the tip goes through the cash register through a 'tip box', so long as the sums are registered in the employer's books. The waiter knows what amount was obtained as a tip and whether he is entitled to supplement the amount up to

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minimum wage. In this manner the employer acts in full transparency regarding payment of wages, registration of the tips and registration of the business revenues. According to this method, both parties know and are confident that the waiter's salary would not fall short of the minimum wage and they are also entitled to agree between them that should the sum of the tips exceed the minimum wage, the excess amount would remain with the waiter". (Pp. 794– 795 of the judgment).

In accordance with these principled rulings, known as the “registration in books test”, it was ruled that the tip money Ms. Malka obtained does not constitute wages for the purpose of the Minimum Wage Law since they were paid to her directly, without passing through the restaurant's cash register and without the employer having control over their receipt. Therefore, it was ruled, that the Regional Court rightly charged the employer with paying Ms. Malka wages for the entire period of her employment.

18. The Court based its rulings, in essence, on these two: A. The customer's intent: A customer who pays a tip to the restaurant's cash register understands that it would later be paid to the waiter as wages by the restaurant, while a customer who pays a tip directly to the waiter assumes that it would be in addition to the wages paid by the restaurant. B. Interpretation of the Minimum Wage Law: Sections 2(a) and 3(a) of this Law refer to the wages paid by the employer, and therefore should not include amounts paid by a person other than the employer. In addition, the Court referred to the judgments in the **al-Kurdi** case, which concerns, as aforementioned, the status of the tip in the context of the Annual Vacation Law, which also refers to wages as payment by the employer.
19. In addition to President Adler's rulings, as part of the judgment in the **Malka** case, by majority opinion, the following comments made by Judge S. Tzur were accepted:

"An employer is liable for paying wages and he may not shake off this duty of his by relying on payment of a tip paid to the employee by another person...

However, in my opinion, it cannot be ruled out that payment of a tip would be taken into account for payment of wages if a number necessary cumulative conditions are met:

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- (a) A personal agreement exists between the parties, or a collective agreement applies to them, which states, explicitly, that in calculating the wages also tip sums paid to the employee may be included.
- (b) The employment agreement or the collective agreement includes a detailed and orderly arrangement in respect of the manner of treating income from tips, such as - transparency and documentation of payments, the existence of a cash register and accounting of income, the manner of distributing the sums obtained, the dates of distribution, etc.
- (c) The wages from both sources (the ordinary wages and the tip payments) would not fall beneath the minimum wage set out under law.
- (d) The employee's social rights are based on the income from both sources and are fully secured.
- (e) Ensuring the full tax payments due to the employee's wages.

In my view, only a detailed arrangement that meets these requirements – in terms of a transparent arrangement 'on the table' – could lead to acknowledgment (full or partial) of tip payments as wages” (*ibid*, p. 798).

Prior to concluding this chapter, we shall remind that the “registration in books test” was first proposed by the Friedman Committee, worded as follows:

[It is recommended] not to regard a tip paid directly to the employee and is not included in the business's revenues or receipts as wages, and this should be ensured by legislation. On the other hand, a tip paid directly to the employee and is included in the business's revenues or its receipts, would be be deemed as wages"
(Page 7 of the Committee's report).

“They reviewed books of multiple volumes, and now no book nor values” - tip in the context of payment of National Insurance fees– the Renaissance case

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20. Approximately two months after the judgment on the **Malka** case was handed down, the National Court reiterated its main rulings as part of the judgment on the **Renaissance** case (NIA (National) 1349/01 **Renaissance Hotel - The National Insurance Institute** (14.8.2005); hereinafter – the **Renaissance Case**), as it again adopts the “registration in books test”. In that case, at the center of the discussion stood a tip paid to hotel employees by hotel guests, after it was registered in the hotel books and tax was deducted in origin. The hotel failed to pay insurance fees for the tip sums in the reports it submitted to the National Insurance Institute (hereinafter - the **Institute**) In light of this, the Institute required the hotel to pay national security fees for the amounts received as a tip.
21. The Regional Court, and subsequently this Court, sided with the Institute's position, based on the ruling on the **Malka** case. It was first ruled that pursuant to the National Insurance Law [Consolidated Version], 5755-1995 (hereinafter: the **National Insurance Law**), the basis for calculating the insurance fees is the employee’s monthly income, which is defined under section 344(a) of this Law, as his income “**from the sources specified in section 2(2) of the Income Tax Ordinance**”. This section 2(2), which would again be discussed as part of the hearings on the **Ester Cohen** cases, prescribes that income tax would be paid, *inter alia*, on “**earnings or profits from work; any benefit or allowance granted to the employee by his employer;... And all - whether given in money or money equivalent, whether given to the employee directly or indirectly, or given to another in his favor**”. The National Court applied the “registration in books test” to the circumstances of the case, which was set out in the **Malka** case, and added that under the circumstances of the matter, as the tip was registered in the hotel’s books and the hotel is the one who paid the employees, according to a fixed arrangement that was agreed upon by the parties, it is to be deemed as work income and it is required to pay insurance fees in respect of it. The Court noted that “**indeed the conditions under which a tip would be acknowledged as wages for the purpose of the Minimum Wage Law were specified in the Malka judgment, however the statements made there are true for our case as well**”.
- It was further ruled that the aforesaid conclusion is consistent with the purpose of the National Insurance Law and its principles, according to which it is important to determine the real income of the policyholder, since it constitutes a basis not only for collecting insurance fees, but rather also for payment of allowance that are relative to or instead of income (hereinafter – **Allowances In Lieu of Income**). In this regard the following quote was cited from the judgment in the **Bashiri** case:

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“Payment and distribution are inextricably linked to each other, as they together required for achieving the social purpose of the Law. In the absence of payment of insurance fees according to the real income, there can be no proper distribution of allowances according to the criteria of the Law and its purpose would be thwarted” (NIA (National) 316/03 **Bashiri – The National Insurance Institute**, IsrLC 40 (2005) 145 (2004)).

The Court concluded and ruled that under the circumstances of the case, failure to pay the insurance fees for the tip would thwart the purpose of the National Insurance Law, and hence should be considered, if passed through the hotel's cash register, as wages, for the purpose of payment of insurance fees.

“Since the sea loves the brave” - tip in the context of payment of dependents' allowance - the Ester Cohen cases

22. The status of the tip arose again, this time under particularly unfortunate circumstances. Mr. Uzi Cohen, Ms. Ester Cohen's late husband (hereinafter respectively – the **Deceased** and **Ms. Cohen**), lost his life drowning in the sea, while trying to save youngsters in distress. His action was acknowledged as a voluntary act to save the lives of others, as its meaning under section 287(5) of Chapter 13 of the National Insurance Law, entitled Ms. Cohen, per her choice (pursuant to section 320(c)(2) of this Law) to a dependents' allowance (hereinafter also - the **Allowance**); and led to a chain of complex and prolonged legal litigations commencing 2002 at the Regional Labor Court in Tel Aviv-Yafo and ended in 2013 at the Supreme Court sitting as High Court of Justice, within the framework of a further hearing. About what and why? Prior to his death the deceased worked as a waiter at a restaurant and according to the pay slips issued to him, he earned minimum wage. During the three months before his death, his wages amounted to NIS 8,046, and on the basis of this amount, Ms. Cohen's dependents' allowance was calculated. Ms. Cohen requested that the Institute would calculate her allowance based on the deceased's real wages, including the tip money he received, which according to Ms. Cohen stood at the sum of NIS 10,000 monthly.

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23. The Regional Court ruled that it was proven that the deceased's real wages stood at the sum of NIS 10,000 monthly, and ruled that the Institute is required

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to calculate Ms. Cohen's dependents' allowance based on these wages (Judge V. Samet and public representative Mr. D. Randall; NIC 1076/02 **Cohen - The National Insurance Institute**). This ruling was explained by the fact that the "sin" of the deceased should not serve against the dependents of the deceased, as the latter failed to report his income from tip money and had not paid insurance fees in respect of them. An additional consideration the Regional Court noted is that an allowance paid by virtue of chapter 13 of the National Insurance Law, titled "allowances for volunteers", is a "**non-collectible allowance**", meaning an allowance paid by the State Treasury through the Institute, unrelated to payment of insurance fees. As a result, the Institute's claim to charge the restaurant as a third party, with all of the allowances' differences was rejected, this, given the ruling according to which the tip money had not passed through it, and since the duty to pay tax and insurance fees in respect of it was the deceased's duty.

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24. The Institute filed an appeal against the judgment (NIA (National) 1571/04 **The National Insurance Institute – Cohen** (8.11.2005); hereinafter - **NIA Cohen**). It was argued that pursuant to the National Insurance Law, the income at the base for calculating the dependents' allowance, is the income that served as the basis for calculating the insurance fees, which under the circumstances of the case stood at minimum wage as the employer reported of. Alternatively, the institute proposed a construction of "**double status**", according to which for the purpose of the minimum wage the employer paid the deceased, the latter would be deemed as "employee", while for the purpose of the tip money he would be deemed as "self-employed". Pursuant to section 77 of the National Insurance Law, in order to obtain an allowance as "self-employed", it is required to register as such, and in the absence of such registration, as was the case with the deceased, he is not entitled to an allowance, nor is it appropriate to exercise under these circumstances section 366 of the National Insurance Law, concerning reduction or denial of an allowance due to payment in arrears of insurance fees.
25. This Court, stated by President (ret.) S. Adler, accepted the Institute's appeal and ruled that under the circumstances of the case the tip money should not be included as part of the income that serves as the basis for calculating the dependents' allowance, since the tip money was paid to the deceased directly and had not passed through the restaurant's books. Therefore, they are not deemed as "wages" and cannot constitute the basis for an allowance. The Court

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examined the relevant provisions of the Law: Section 289 of the National Insurance Law, which applies to a volunteer injured or those dependent on him the provisions of Chapter 5 of the Law, which concerns work injury insurance; Section 290 of the Law, which prescribes that the allowance is required to be calculated "**according to the income that serves as the basis for calculating the allowance pursuant to Chapter 5...**"; and Section 288 of the Law, which defines "wages" for the purpose of Chapter 13 as "**wages for work due to which insurance fees are required**". In light of these, the Court completed, the allowance's basis was calculated according to that stated in the deceased's pay slips, pursuant to the relevant Chapter of the Law, which concerns allowances for dependents of people injured at work..

The Court referred to the ruling in the **Malka** case and the **Renaissance** case and ruled that "**there is no escape from ruling that the tip money is not deemed as "wages" and they cannot constitute a basis for calculating the dependents' allowance for the respondent or payment thereof**", since they were not registered in the restaurant's books. It was further ruled that "**even the fact that this is a non-collectible allowance does not lead to a different result.**" This is since in National Insurance issues, "**payment and distribution are inextricably linked to each other**" and since the legislator's intention arising from Chapter 13 of the National Insurance Law was to equalize the status of a volunteer to the status of a person injured at work, no more, and since the tip of a person injured at work is not deemed as wages, the same is not to be determined in the case of a volunteer. The Court addressed the difficulty in proving the rate of income from unreported tip money, adding that this difficulty may lead to inaccuracies and that "**the institution should not be required to examine the amount of income that was not reported.**" The Court rejected the argument that this result is a punishment imposed on the dependents of the deceased even though they had not sinned, and noted that they benefited from the tip money given to the deceased without paying insurance fees and income tax for them. This concerns, the Court emphasized "**an improper practice of non-payment of the waiter's real wages by his employer**" and that the "improper situation in this industry" would be amended by ruling that only a tip registered in the employer's books would be deemed as wages.

Given the outcome, the Court had not discussed the construction of double status the Institute proposed, however noted that *prima facie* the tip obtained by the waiter directly from the customer constitutes work income and the waiter is required to report it, and should he do so, the amount would be acknowledged for calculating the allowance.

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26. The central opinion in NIA **Cohen** was handed down, as aforesaid, by President (ret.) S. Adler. Following his statements, I presented my position, as these are its main points:

- The Institute's argument of the double status of the deceased is artificial, **"as all his wages were paid to him for the same waitressing work"**. Therefore, **"the deceased had the sole status of a employee, and the agreed-upon sole consideration for that work should not be split by changing his status in respect of part of it."**
- The allowances for people injured at work and those dependent on him are intended to compensate for loss of wages. **"Therefore, in essence, the wage that serves as the basis for calculating entitlements pursuant to labor law is the ordinary wage for calculating the disability and dependents' allowances."**
- **"When it is agreed with a waiter that the entire tip would be the consideration for his work; in my opinion, the entire tip should be deemed to be his wages. It is not the question of payment or non-payment of tax for it that should determine its essence. Payment of tax should be derived from the essence of the income, not *vice versa*. Therefore, the test of defining the tip as wages should not be the test of registration in the cash register"**.

Notwithstanding these comments of mine, to which public representative, Mr. A. Raff, agreed, I joined, for the sake of stability of the case law ruling, the position of then President Adler and the other members of the panel, which relied on the ruling in the **Malka** case, including the "registration in books test". Hence the judgment signed off with these words:

"Agreed by all of the panel members... The basis for calculating the dependents' allowance... Shall not include the sums the deceased obtained as tips, since a tip that is not reflected in the restaurant's books does not fall within the scope of 'wages'."

Tips – Margalioth

27. At this stage, although the continuum of the ruling relating to Ms. Cohen will be interrupted, and even though this is not a judgment, we wish to present the

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main points of Margalioth's article, **Tips**, in order to maintain a chronological continuum and due to its importance for the statements below. The article **Tips** was published in 2008, meaning, approximately three years after the judgment in NIA Cohen was handed down, and while the petition filed in that case was pending at the High Court of Justice, however a judgment had not been handed down on it. According to the authors, in summary, the tip should be regarded as a receipt of the business, and this anywhere a tip is given and in respect of all relevant aspects, and even where it was given directly to the waiter and was not registered in the business's books. According to them, payment of the tip should be deemed as if the customer had given it to the business, which in turn was given to the waiter. Underlying this approach stands the view of the tip as payment originating from a practice so far rooted, as it is perceived by the customer to be a binding practice, and hence payment of the tip should not be viewed as a voluntary act. The article further explains at length the difficulties arising from the ruling, including failure to pay income tax in respect of the tip money, and it was argued that it is possible to arrive at the said result without requiring a change in legislation.

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28. After we have presented the main points of the article **Tips**, we shall return to Ms. Cohen's case. She did not give up following the ruling of the National Labor Court in her case, and filed a petition with the Supreme Court sitting as High Court of Justice (HCJ 2105/06 **Cohen – The National Insurance Institute** (26.7.2010); hereinafter- **HCJ Cohen**). The hearing on the petition was also attended by the Attorney General. It should be stated in brief that in a judgment handed down by President (ret.) A. Grunis, the Supreme Court accepted the petition and ruled that in calculating Ms. Cohen's dependents' allowance it is required to consider the deceased's total income, including the tip money. The Court reached this result following a comprehensive and in-depth analysis of the relevant provisions of the Law, scholarly articles, etc., and ultimately ruled that the tip money given to the deceased should be deemed as work income within the scope of section 2(2) of the Income Tax Ordinance, although it is not from his employer, and hence for the purposes of the National Insurance Law, he should be classified as an employee (rather than self-employed) and include his income from tips in calculating the dependents' allowance, even though national insurance fees were not paid in respect of it - this applies solely in respect of the allowances that are not volunteers' allowances.

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29. And now we shall expand a bit. The Court reviewed the relevant provisions of the National Insurance Law, which at the end of a long day led to sections 97 and 98 of this Law, and these led to the following question, as decisive in the petition:

"How should the money the deceased obtained as tips be classified, for the purposes of section 2 of the Income Tax Ordinance. If the source of this income is from the sources listed in section 2(2) of the Income Tax Ordinance, ... It is required to include it in the base of the calculation of the dependents allowance. If, on the other hand, the source of the income is not listed among the sources listed in section 2(2) of the Ordinance, then it should not be taken into account for the purpose of calculating the allowance".

Hence, at the center of the judgment on **H CJ Cohen** stood the question of whether income from a tip constitutes "**earning or profit**" from an **occupation**", pursuant to section 2(1) of the Income Tax Ordinance, or perhaps it constitutes "**earning or profit from work... Whether given in money or money equivalent, whether given to the employee directly or indirectly, or given to another in his favor**", pursuant to section 2(2) of the Ordinance. In order to rule on this question, the question that was first examined is who does the income from a tip belong to, for the purpose of the duty to pay taxes, noting, *inter alia*, as follows:

"If the tip is considered to be the income of the business, there is no interpretive dilemma regarding its classification. On the part of the business, the tip is to be treated as the main payment it obtains for the product or service. On the part of the employee, the tip he obtains through the employer, is work income pursuant to section 2(2) of the Income Tax Ordinance. The employer would be required to treat the amount of the tip forwarded to the employee in the same manner he would treat any other component of the wages. Meaning, the duty of withholding tax at origin, payment of National Insurance fees and the like would apply to it. **Another option is to view the income from tips as direct income of the employee from the customers, without a 'stopover' at the business.** On the part of the business, it is clear that the duty to withhold tax at origin or payment of

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National Insurance fees for the tip would not apply to it, as this is not income it grants the employee (see the judgment of the National Labor Court in NIA 1349/01 Renaissance Hotel v. The National Insurance Institute [published in Nevo] (14.8.05)). Regarding the employee, who obtains the tip directly from the customers, the question that would arise is how should this income be classified for the purposes of section 2 of the Income Tax Ordinance”.

It was noted that the aforementioned question arose in the **Safari Holdings** case and was ruled upon according to the "voluntariness test", however this was in the context of the duty of registration only, rather than in the material aspect of the income tax charge, and therefore –

“We are not required to rule on the question of what is the exact test that should be adopted in this context. It is sufficient that we rule that there are cases in which the tip is deemed as direct income the employee obtains from the tip giver...”

What are those cases? These are not cases in which the demand for payment of the tip was explicitly included in the bill and the tip was received at the cash register and was recorded in the books, but rather cases in which the tip was paid **"by the customer in a completely voluntary manner, directly to the waiter, in addition to the basic wages the waiter obtains from the employer, without the tip being reflected in any way in the business's books (excluding registration in the "service log") and without the amounts' passing through the employer or managed by it"** (hereinafter – **Direct Tip**). It was noted that indeed there are those who advocate considering a direct tip as the waiter's income from the employer – for example, Margalioth in **Tips**, however it was ruled that this position cannot be adopted, certainly not fully, without a change in legislation. Therefore, it was ruled that a direct tip is deemed for the purpose of charging taxes as the waiter's income.

30. At the end of the day it was ruled that for the purposes of section 2 of the Income Tax Ordinance, income from a direct tip is the waiter's income other than from the employer. It was noted that indeed, according to case law, **“earning or profit from work”** are required to stem from employer-employee relations, however the wording of section 2(2) of the Ordinance indicates that the **“earning or profit” are not necessarily required to be obtained from the employer, and it is inappropriate to rule categorically that income from work that is not from the employer is not possible.**” At the same time,

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the Institute's and the Attorney General's (hereinafter jointly: the State) position was rejected, according to which it is required to classify income from a direct tip as income from an "occupation" pursuant to section 2(1) of the Ordinance, explaining that **"considering the waiter's work as a "self-employed" person's work... Does not suit reality"**.

31. The Court had not ignored the difficulties inherent in its said interpretation, the main one being enforcement of payment of income tax for tip money, however believed that these difficulties are lesser than the difficulties arising due to classification of a direct tip as income from an occupation pursuant to section 2(1) of the Ordinance, and reasoned that in any event, from a comprehensive perspective, there is no escape from this classification. Another difficulty mentioned, apart from enforcement and collection difficulties, concerns the question of whether the employee is required to pay himself, for direct tip income, national insurance fees, and whether failure to comply with this duty leads to a reduction or denial of the allowance pursuant to section 366 of the National Insurance Law (which concerns, as aforementioned, a reduction or denial of an allowance due to arrears in payment of insurance fees). This question was left for further review, as in any event, since the aforementioned does not apply to volunteer's allowances, however noted that **"in the more general context, there is no denying that acknowledging income from work other than from the employer could lead to a result that is contrary to the sense of justice. This is especially true should the conclusion be that regarding this type of income, the basic principle under section 366 of the National Insurance Law is of no applicability... The problem would be revealed in its full severity if in the event of a work injury the right to an allowance for work income that is not from the employer would be established, without applying the balancing mechanism set out in section 366 of the National Insurance Law"**. In these statements, the Court referred to one of the basic principles of the National Insurance Law, according to which an allowance would be calculated solely based on the income for which insurance fees were paid.

An additional aspect noted as raising a difficulty, in a situation where direct tip is deemed as the employee's direct income other than from the employer, concerns the Institute's possibility to turn to the employer pursuant to section 369 of the National Insurance Law. However, under the circumstances of the case, this too was left for further review.

32. Further down, President Grunis addressed the question of the burden of proof, stating that **"where it concerns income that is not documented, then also in cases where it is required to be taken into account, the burden of proving**

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its existence and its extent is imposed on the employee, and this is not a simple burden." He concluded his remarks with a call to the legislator for comprehensive regulation of the status of the tip, in the following words:

"Although the answer to the question of classification does not have to be uniform in respect of each of the domains, as we have seen, there may be reciprocal relations between them. It is appropriate that the legislator would address the issue as a whole, while taking into account all the legal and social aspects involved in the phenomenon of tipping."
(Section 45 of President Grunis's judgment).

33. We should mention that the late Justice E. Levy joined President Grunis's ruling, while noting that it is limited to the dependents' allowance only, and emphasizing that the issue of the tip's status **"cries out for a comprehensive arrangement"** by the legislator. He further noted that **"there is great logic, I believe, in the solution proposed"** in the article **Tips**, at the center of which stands the view of the tip as part of the business's receipts, however **"we are not discussing it today. It is proper that the Knesset consider this issue."**

"It is the dream of wonders that set a rule" – HCJFH Ester Cohen

34. On the ruling in **HCJ Cohen**, the State filed an application for conducting a further hearing, arguing that the case law ruling set out in it, according to which a tip constitutes a work income other from his employer and the Institute should consider it in calculating the dependents' allowance, even if it indicates that insurance fees had not been paid for it - is a harsh ruling (HCJFH 5967/10 **The National Insurance Institute v. Cohen** (14.4.2013); hereinafter - **HCJFH Cohen**) The State's application was accepted. As part of the further hearing that was conducted before a panel of seven justices and during which the Association of Restaurants' position was submitted, the scope of the hearing was changed, given the change in the State's position. The State no longer believed, as it did as part of the the hearing in **HCJ Cohen**, that tip money should be regarded as income from "occupation" pursuant to section 2(1) of the Ordinance, but rather agreed that a tip constitutes income from work pursuant to section 2(2) of the Ordinance. Its arguments focused on the practical implications arising from the ruling on **HCJ Cohen** – the question of **"the manner of registering the receipts from the tip money and its impact on the employer's duties towards the National Insurance Institute in the**

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event of non-payment of the insurance fees during the period of employment” (HCJFH Cohen, section 9 of President Grunis’s opinion).

The State's position was that a direct tip (certainly a tip following the restaurant’s demand) should be considered as part of an overall arrangement, the business’s income rather than that of the waiter; that it is required to be registered as a receipt in the business’s cash register; that where it is paid to the waiter it is required to be registered as an expense like any other component of wages he is paid by the business; and that the employer is required to deduct in respect of it all that is required pursuant to the National Insurance Law and tax laws. The State argues that in accordance with this position, upon the occurrence of an entitling event there would nothing to prevent including the tip money at the base of calculating the allowance, and should the employer fail to deduct the insurance fees in respect of them, the waiter would be entitled to calculation of his allowance according to his actual income, including the tip money, and the Institute would be entitled to turn to the employer with a claim for indemnification under section 369 of the National Insurance Law. The State noted that the interpretation it proposes is consistent with all of the relevant laws and resolves the difficulties established in the case law ruling set in **HCJ Cohen**. The State further believed that this interpretation could be made without a change in legislation, although a change in previous case law rulings relating to the status of the tip is required, such as the “voluntariness test” and the “means of payment test”.

Ms. Cohen and the Association of Restaurants supported the ruling set forth **HCJ Cohen**.

35. Therefore, the question, before the Supreme Court in its expanded panel was this:

“Is it required, for the purposes of the implementing the case law ruling set in the judgment on the petition, subject matter of the petition, to set an overall arrangement regarding the status of tip money by way of judicial interpretation, while overturning previous case law rulings set by this Court; or whether such comprehensive arrangement could and should be set only by the legislator”. (Section 15 of President Grunis’s opinion).

The main case law ruling under examination is the Safari Holdings ruling, concerning the “voluntariness test” set in it, and the justices had different positions. President Grunis, without taking a position **"on the degree of voluntariness involved in the actual payment of the tip"**, believed that a

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comprehensive arrangement on the issue of the tip should not be set by way of judicial legislation, and that the regulation should be left to the legislator, especially in a situation where as part of the further hearing overturning previous case law rulings was requested rather than the case law ruling set out as part of the judgment subject matter of the further hearing. And so he ruled:

"Indeed, in view of the complexity and variety of the questions on the agenda, the legislative branch has preference over this Court in the ability to reach a comprehensive and balanced arrangement, as part of which the overall principled and practical consideration relevant the issue of regulating the status of tip money would be taken into account. Relevant to this issue are the statements made by Prof. A. Barak, who discussed the types of considerations that in institutional terms, it is desirable (or undesirable) that the Court would address in its judicial ruling:

"The justice should be cautious in exercising complicated considerations of economic or social policy, which are often controversial, require expertise and information, and which may require assumptions and hypotheses, which in turn require additional assumption. The safest way would usually be to leave the issue to the legislator, which would be able to obtain full information from experts and establish a legal policy that is consistent with the issue to its full extent" (see A. Barak Judicial Discretion 255 (1987)).

... Regulating the status of tip money is hence listed, in my view, among the types of arrangements that raise questions of economic and social policy. Due to the complexity and possible implications of the arrangements, it is appropriate to leave them to be decided upon by the legislator". (Sections 19-20 of his opinion).

President Grunis specified some of the aspects involved in the matter, including the question of the manner of collecting income tax and value added tax from the tip money, the impact accepting the State's position, according to which the tip constitutes a receipt of the business, on the restaurant industry as a whole **"and even beyond"** (section 20 of the opinion, as well as other ramifications,

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“placed on the level of the relations between the restaurant owner and the waiters regarding the waiters’ rights pursuant to the various protective laws and regarding the waiters’ rights pursuant to the National Insurance Law, upon the occurrence of such or other insurance event” (*ibid*). Therefore, President Grunis concludes his position on a multi-focus problem, which involves many factors, as it is possible that it is not at all possible to resolve by a judicial ruling that establishes a legal rule or balancing formula, and it requires a legislative solution, based on a **“sufficient factual foundation, which is not presented to us as well as various principled rulings concerning economic and social order of priorities.”**

36. Justices (ret.) E. Arbel and S. Joubran and Justice (as his title at that time) H. Meltzer joined the outcome President Grunis arrived at, although for other reasons. According to them, and contrary to the President's position, in principle, the issue may be judicially ruled upon, however due to the rooting of the **Safari Holdings** ruling in case law, it is required to leave the overall regulation to the legislator.
37. *Vis-à-vis* the majority opinion stood the position of Deputy President (as her title at that time) M. Naor, Justice (as his title at that time) E. Rubinstein and Justice (as her title at that time) E. Hayut. They believed, in essence, that the State's position should be accepted and consider tip money as the business's income. These were mainly stated by Justice Naor, according to which, although the issue in whole is appropriate to be regulated under legislation, and although the path to the aforementioned conclusion requires deviation from a previous case law ruling, **“it should be ruled that income from tips in the restaurant industry is the restaurant's receiptt, rather than that of the waiters, and “insofar as the waiters obtain some receipt for the tip income, then this constitutes a work income provided by the employer”** (section 12 of the opinion). Justice Naor based her position on two layers: "Internal" and "external". As part of the "internal" layer, she presented the characteristics of the tipping institution in restaurants in Israel - **“the degree of its voluntariness, its purpose, the mechanism for distributing the tip between the restaurant and the waiter and the effect of the tip on the restaurant's business calculations”**, and ruled that these indicate that the tip should be classified as the restaurant's receipt (section 16 of the opinion). The second layer, it being the "external" layer, concerns the impact of classifying the tip as aforementioned, **“on tax law, national insurance and work relations”**, and it too supports this classification (*ibid*). Justice Naor emphasized that her remarks relate solely to a **“tip the customer adds as he sees fit after paying the compulsory bill”** and not to the tip that constitutes an integral part of the bill

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served to the diner, as then it is clear that it constitutes the restaurant's income and requires registration.

These are the main points regarding the “internal layer”:

- "The voluntariness test": This test was established in the **Safari Holdings** case, based on the fact that the parties there were not in dispute on the assumption that a direct tip constitutes the waiter's income, as well as that the Court believed that the custom then was to view tip income as the waiters' income. In later rulings – the **Amitai** and **Lieberman** cases - this assumption was no longer reviewed, and in fact, slowly it became a binding case law ruling. Justice Naor, on the other hand, believed that **"in the restaurant industry, those tips that were previously called 'voluntary' are not voluntary in essence"** (section 21 of the opinion), **but are rather an accepted and common practice** and **"rooted, constituting part of the norms according to which customers, restaurant owners and waiters work."** Justice Naor noted that it is precisely the Association of Restaurants' position, according to which changing the legal approach to the tip would bring about a very significant economic and social change, **"apparently attests to the fact that considering the tip as a voluntary matter does not reflect the reality as it is"** (*ibid*, section 22). It was further noted that the key point of voluntariness is expressed by setting the rate of the tip (unlike its mere payment), however, this too to a certain extent only, in the sense of **"weak voluntariness" and nothing more** (*ibid*, section 233). The sense of social obligation of tipping and the social sanction towards those violating this obligation in the article **Tips** were also mentioned. Justice Naor, unlike President Grunis, believed that the “voluntariness test” set out in previous case law rulings may be changed since **"the mouth that prohibited is the mouth that permitted, and it is possible, with the necessary caution, to deviate, by an extended panel, from a previous ruling"** and **"the case before us justifies changing the case law ruling"** (*ibid*, section 22).
- The purpose of the tip: Contrary to the statements of Justice Rivlin in the **Lieberman** case, according to which the tip is given in respect of service **"which deserves special consideration"**, the parties' arguments clearly indicate that this is not the current situation. Not once the tip is derived from **"the chain of service at the restaurant... The waiter does not work at the restaurant as a self-employed person who happened to be at the place, and if he provided the customer with exceptional service - the professionalism of the service he provided is integrated in the restaurant's professionalism. The service he provides the restaurant's customers with is his work at the restaurant, and any payment by the**

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customer for the “service” is payment for the “waiter’s work” (*ibid*, section 24).

- The tip distribution mechanism: The payment of the tip is determined by an internal mechanism between the waiter and the restaurant, and is not known to the customer. There are different mechanisms, all of which have in common that **“the owner of the restaurant has a considerable, if not exclusive, influence”** on setting them. Since the customer is not aware of the mechanism existing at the restaurant, it is unreasonable to say that he always assumes that the tip would get to the waiter, in addition to the wages he is paid by the employer. **“The assumption that the tip constitutes sort of a transaction between the customer and the waiter, separate from the customer's transaction with the restaurant, does not reflect the true situation”** (*ibid*, section 26).
- The tip as part of the restaurant's business calculations: The Association of Restaurants’ position itself indicates that collecting the tips constitutes an integral part of the restaurant's business calculations. In addition, it is unlikely that **“a business entity would ignore a fixed and cyclical income of approximately 10-15% of its income”** (*ibid*, section 27).

As part of the "external layer" the difficulties that arise as a result of classifying the tip as the waiter's income were detailed on various levels: Tax law, national insurance law and work relations. And these are the key points of the issue:

- Tax law: If income from a tip is not that of the restaurant, it is the waiter’s income as a “self-employed” person - a possibility that was rejected in the judgment subject matter of the further hearing, or the waiter’s income other than from his employer. Justice Naor believed that both these options **“raise considerable difficulties”**. It was noted that contrary to that stated in **H CJ Cohen**, it appears that should waiters be required to report their income from a tip, and under these circumstances, the classification of the tip as the waiter’s work income remain intact, many waiters may be exposed to **“criminal proceedings due to violation of the duty of reporting”**. Justice Naor noted, without setting a precedent, that acknowledging work income other than from the employer raises considerable difficulty also on the theoretical level, and in practical terms **“no tax is paid for tips at restaurants at all. This is a 'black hole' in enforcement of tax law, established, *inter alia*, by the difficulties in classifying income from tips, which is inappropriate.”** *Prima facie*, the restaurant owners, waiters and customers benefit from this situation, however **“the main loser is the tax**

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system, and in fact... The public at large". This concerns at least one billion shekels annually, which are not taxed, and **"one cannot accept this"**. It was further noted that even if changing the classification as she proposes in her opinion would lead to a reduction in the waiters' and restaurants' income, or to raising the costs of their services, it is required by the mere tax liability. **"The price of a service should embody the tax liabilities imposed on it. I accept the Attorney General's position, that collecting tax within a domain in which tax has not been collected in the past, by nature leads to reduction of the net wages paid to the employee, and somewhat impair the restaurant's income. This is an impairment for a worthy and called for purpose - paying true tax on income from tips"**. The reliance on the Safari Holdings ruling mentioned in president Grunis' position, **"insofar as it concerns the restaurant owners and waiters, is nothing but an ongoing and extensive benefit by tax evasion"** and there is no reason for distinguishing between waiters and other employees. The solution for these difficulties, on the level of tax law, is classification of the income from a tip as the restaurant's receipt, classification that would establish **"certainty and clarity in tax law"** (*ibid*, section 33), and therefore it should be preferred (*ibid*, section 37).

- National insurance law: Should a tip be classified as the restaurant's income, and accordingly as the waiter's income from his employer, the restaurant would be required to pay for it (also) national insurance fees. Leaving the classification set in **H CJ Cohen** intact may lead to many hearings on the question of the accurate rate of wages, to imposing a complex burden on the policyholders to prove this rate, and imposing a heavy burden on the Institution in examining policyholders' claims. However, the main point is this - according to the ruling on **H CJ Cohen**, **"the Institute is required to pay policyholders' allowances also for income in respect of which no insurance fees were paid"**, in this situation, had the requirement to pay insurance fees been that of the employer, the waiter's right would not be impaired and the Institute would be entitled to turn to the employer with a claim for indemnification, pursuant to section 369 of the National Insurance Law. However, should the duty of paying insurance fees be imposed on the waiter, for the most part, **"there is a real possibility that his [allowance] would be denied due to failure to pay the insurance fees"**. Justice Naor noted that indeed President Grunis left these matters for further review, however his rulings **"necessarily lead to a problematic future situation, in which the Institute would be required to pay allowances to policyholders for income in respect of which insurance fees were not paid"**.

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- Work relations: Indeed, it is not necessary that the classification of the tip for tax law purposes would be identical to the classification for the purpose of labor law. However, **“a uniform definition may contribute to legal clarity.”** It was noted that many cases that led to legal litigations stemmed from the ambiguity regarding the status of the tip and from the question of **“how it should be weighted when examining the employer’s compliance with his duties towards the waiter”**, and that these problems do not arise if it is ruled that income from a tip is the restaurant’s income, which pays wages to the waiter. This classification **“also secures the waiters’ social rights”**, both in the field of national security as well as in the aspect of rights to allowances.
38. Justice Naor noted that the interpretation she proposes would harmoniously resolve the difficulties raised by classifying the tip following the **Safari Holdings** case. And in her words: **“It ensures that the different cubes line up side by side and receive, cube by cube, its proper place”** (*ibid*, section 45). In light of the aforementioned, she ruled that **“within the restaurant industry the tip should be classified as the business’s receipt, and this while deviating from previous case law rulings”**, and this ruling leads to the following results:

“The restaurant is required to register the income from tips in its books, and is required to pay tax on it as required by law. The employer pays the waiter his wages according to the agreement between them, and these wages could naturally include remuneration for the tips collected in the restaurant's cash register. Any payment payable to the waiter from his employer in this regard is work work income from the employer, as defined under section 2(2) of the Ordinance.

As for the duty to pay national insurance fees, this duty applies to the restaurant and the waiter, as to any employer and employee within the economy. If, for some reason, they do not pay the insurance fees as required, there would be consequences as described above. This is unless the law “severed” the ties between the duty to pay insurance fees and the entitlement to the allowance – as determined ... in the case of volunteers” (*ibid*, section 46).

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39. Justice Naor emphasized that she does not share the approach according to which changing the institution of tips requires a change in legislation, noting that **"the Court is the competent interpreter of the law... In my view, the legislator's silence does not exempt the Court from the duty of interpreting the law, even if it is an issue with broad implications"** (*ibid*, section 50). Referring to Justices (ret.) E. Arbel's and Joubran's and Justice (as his title at that time) H. Meltzer's positions, she noted that they do not provide a solution for the main difficulties established by the Safari Holdings ruling, and them being charging the Institute with payment of allowances while considering incomes for which no insurance fees were paid, and legitimizing tax evasion in broad scopes. She further noted that even where the tip is given voluntary, it should not be deemed as a private transaction between the waiter and the restaurant, since it is **"at the center of the business activity of the restaurant industry"**, and hence should be considered as the restaurant's receipt.
40. To conclude this chapter, we should note that after the judgment on **HCJ Cohen** was handed down, and before the judgment on **HCJFH Cohen** was signed, Y. Margalioth's article was published "In Praise of Substantive Interpretation: HCJ Cohen as a Missed Opportunity For a Comprehensive Legal Arrangement " (**Iyunei Mishpat** 35 231-242 (2012)), which mainly criticizes the judgment subject matter of the further hearing as legitimizing tax evasion and alongside it an explanation of why a change in the institution of tips in legal terms does not require a change in legislation.

The appeals before us

41. After we have presented at length the main points of the normative framework, and its foundations are now clear and visible, it is possible to turn over and present on it the history of the proceedings for which we have convened. For good measure, it should already be noted in a nutshell - and it shall be detailed below - that calculation of unemployment allowances, which is the issue discussed in the Keyes case before us, is made also, similar to the dependents' allowance, based on the "monthly income" of the policyholder, as set out in section 344(a) of the National Insurance Law, which refers to Section 2(2) of the Income Tax Ordinance. Thus, the foundations presented in **HCJ Cohen** and **HCJFH Cohen** and the principles set forth in them are also applicable to the Keyes case and also affect it.

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"It comes in here and goes out there" – NIA 44405-10-15 – the Keyes case

Factual background and the parties' arguments at the Regional Court

42. "Gali Tzuk Ltd.", Respondent 2 in the Keyes case, operated the "Mona Beach" restaurant in Tel Aviv (in this chapter – the **Restaurant**) at the relevant times. Mr. Omri Keyes, the appellant (hereinafter – **Mr. Keyes**), worked at the restaurant as a waiter from 25.11.10 until 22.6.11, when he was dismissed.
43. As set forth in the judgment subject matter of the appeal, at the end of each shift Mr. Keyes gave the restaurant, out of the tip amounts he received from the customers, a total of NIS 3 per hour for his social rights. In addition, he gave the bar workers at the restaurant 1% of the total bill, if it exceeded NIS 1,500. According to the restaurant's procedures, if Mr. Keyes had not achieved an hourly wage of NIS 20, he was given a supplement to this rate from the restaurant. The rest of the tip money given to Mr. Keyes from the restaurant customers remained with him.
44. When Mr. Keyes was dismissed, he filed with the National Insurance Institute, the respondent (hereinafter – the **Institute**) a claim for payment of unemployment allowances. The unemployment allowances were calculated by the Institute ignoring the sums of the tips paid to Mr. Keyes.
45. Against this background, Mr. Keyes filed a claim against the Institute, in which he requested that it include at the base of calculating the unemployment allowances he is entitled to, the money he was paid as tips. Mr. Keyes claimed that the pay slips he received do not accurately reflect his working days and working hours, nor do they accurately reflect his full wages, which in practice were 2.5 times higher than the average wage in the economy, and this is as they did not include the tip amounts he received. Mr. Keyes relied in essence on the judgment of the Supreme Court in **H CJ Cohen (his claim was filed before the judgment in HCJFH was handed down)**, according to which it is required to include within the framework of the income, for calculating the dependents' allowance, the income from tips the deceased obtained, even if they had not been registered in the restaurant's books and even if they had not been reflected in the deceased's pay slip.
46. The Institute, in its statement of defense, denied Mr. Keyes claims. Subsequently, it filed an application for delivering a third party notice to the restaurant (hereinafter - the **Application**), arguing that if Mr. Keyes's wages

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were, as he claims, 2.5 times the average wages in the economy rather than the wages listed in the pay slips, the restaurant should have paid insurance fees in respect of them, and should Mr. Keyes win his claim, the restaurant would be required to indemnify the Institute. It was further argued that it is not possible to hold the hearing without the restaurant, in light of the nature of the arguments in the claim. The Institute attached a third party notice against the restaurant to the aforementioned application, in which it listed its arguments against it as stated above (hereinafter – the **Third Party Notice**).

47. In the Regional Court's ruling dated 3.10.13, in the absence of an objection on Mr. Keyes's part, the application for delivering a third party notice was accepted.
48. Subsequently, the restaurant filed a statement of defense, in which it denied the arguments that were presented in the third party notice. The restaurant argued, *inter alia*, that it dismissed Mr. Keyes immediately after he was caught embezzling its funds, and that it was explicitly agreed on the manner of distributing the tip money, pursuant to the law, as follows: The tip money was collected in a joint pay box of all the waiters and was distributed among them at the end of each shift, according to the procedures; the tips all waiters obtained passed through the restaurant's cash register and was registered in the waiters' log, up to minimum wage; in the event where the tips during that shift did not reach minimum wage and the ancillary rights, the restaurant supplemented the wages up to minimum wage and the ancillary rights; the tip paid to Mr. Keyes was explicitly noted on his pay slips, according to his hours of work at the restaurant monthly; in the event where during a certain shift a balance of tips remained beyond minimum wage and the ancillary rights, it was distributed among the waiters at the end of each shift, upon obtaining the payment on account of the wages and the ancillary rights as well as the tip balance (if any), the plaintiff signed in the waiters' log that he obtained the advances and balance.

The restaurant further argued that the balance of the tip money beyond the minimum wage and the ancillary rights, does not constitute wages as defined under law; and insurance fees should not be paid for it; that Mr. Keyes's salary as reflected in the pay slips, was duly paid to him, including pursuant to case law including the **Malka** ruling. Therefore, the restaurant concluded, it had paid the Institute the national insurance fees as required by law and in accordance with Mr. Keyes' wages, and therefore it is not obligated to pay insurance fees beyond what it paid for Mr. Keyes and hence it should not be obligated to pay any unemployment fees. Regarding the arguments included in the statement claim - the restaurant denied, *inter alia*, Mr. Keyes's claims

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according to which it refrained from providing him with certain documents and that the pay slips do not correctly reflect the wages and scope of the work.

The judgment of the Regional Court

49. The Regional Court (Judge Dagit Weisman and public representative Mr. Yitzhak Glick; NIC 35115-03-12; judgment dated 7.9.15) rejected Mr. Keyes' claim, and this since it was not convinced **"of the amounts that the plaintiff received as a tip, let alone that the amounts specified in the statement of claim were not proven..., in the plaintiff's affidavit... or in his summary arguments..."** In its conclusion, the Regional Court relied on **the plaintiff's testimony, which was not convincing, consistent or credible** and on the fact that that Mr. Keyes **"stated different amounts"** in the pleadings he filed. It was ruled that **"it is not sufficient to prove the general claim according to which the plaintiff received tips in amounts exceeding those specified in the pay slips, but rather the plaintiff bears the burden to prove what were the aforementioned amounts. This factual matter, which is essential for accepting the claim, has not been proven."** As for the main evidence presented by Mr. Keyes in support of his claim that he received wages exceeding that recorded in the pay slips – a photograph of a log including different records he wrote (hereinafter respectively – the **Log** and the **Records**), it was ruled that this evidence is not reliable, as the records are not uniform, they were partial, at least some of them were not recorded in real time but rather in retrospect, after several months of work, and Mr. Keyes did not know how to explain them in his questioning. The recordings Mr. Keyes recorded his superiors (hereinafter – the **Recordings**) were presented in part only, with no reasonable explanation, and this issue served against him **"both in terms of the testimony's reliability as well as in terms of the weight that should be given to the transcripts, as it is clear the plaintiff selected them, in order to serve his claims and the fact that not all conversations were presented, would serve against him"**.
50. After detailing and analyzing the totality of the evidence, the Regional Court concluded that they raise **"significant question marks as to the credibility of Mr. Keyes' testimony"**, and under the aforementioned circumstances **"he did not prove his claim at all"**, since **"in fact there is no factual basis for a claim for unemployment differentials according to wages in the amounts of NIS 6,820"**. Given all the above, it ruled that there is no basis for Mr. Keyes's arguments according to which the Institute erred in calculating the unemployment fees paid to him. As a result, the discussion on the question of

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the restaurant's liability, as an employer, in its relations *vis-à-vis* the Institution, became unnecessary.

Mr. Keyes' arguments in the appeal

51. Mr. Keyes filed an appeal on the judgment. His arguments are directed primarily at factual findings, however not only at them. According to Mr. Keyes, the Regional Court failed to give proper weight to the objective evidence it was presented with in respect of the rate of his wages, and had failed to address the credibility of the restaurant manager's testimony and additional evidence clearly indicating that his wages exceeded minimum wage and the pay slips he was given did not reflect his true wages. According to him, under the circumstances of the matter it was appropriate to shift over to the restaurant the burden to prove the accurate rate of wages. It was further argued that the Lower Court did not attribute proper weight to the fact that according to the ruling in **HCJ Cohen**, tip money constitutes wages for all intents and purposes, and that the Court should have focused on the rate of Mr. Keyes's wages over the last three months of his employment only, rather than throughout the term of his employment at the restaurant.

The Institute's arguments in the appeal

52. The Institute relies on the Regional Court's judgment, and believes there is no reason to intervene in it. According to it, the Court's ruling according to which Mr. Keyes failed to prove obtaining additional sums as a tip, is correct and so is its results - rejecting his claim. The Institute further argues that Mr. Keyes requests the intervention of this Court in the Lower Court's factual findings, and this is contrary to the case law ruling, according to which only in exceptional and rare cases the Appellate Court would intervene in factual findings set by the Trial Court, what more so in credibility findings. It was further argued that the Regional Court analyzed the evidence extensively, **"while it harshly criticizes the appellant's version and testimony"**, and rejects the records in the log and the recordings, and there is no reason to intervene in these rulings, which are well enshrined in the evidence. The Institute believes that Mr. Keyes's argument, according to which it would have been appropriate to shift the burden of proof over to the restaurant, should be rejected. According to it, pursuant to the ruling on **HCJ Cohen**, this burden is imposed on Mr. Keyes, and under the circumstances of the case at hand, the Regional Court ruled, rightly, that this burden was not met - not in respect of

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merely obtaining the tips nor in respect of their rate. An additional argument the Institute claims is that “**the appellant's main argument regarding the existence of objective evidence of his income from tips**” should be rejected, since this evidence does not reflect his true income and is inconsistent with the fact that throughout all the months of his work, except for the last month, the restaurant supplemented his wages to minimum wage. The totality of the circumstances shows that the pay slips rather indicate the exact rate of his wages, more than any other evidence. In addition, Mr. Keyes’s argument, according to which the Lower Court should have examined his claims concerning his true wages in respect of the last three months of his work only, should be rejected, since the correctness and credibility of the pattern of work and wages throughout the period were duly examined, and separating the periods is artificial.

The Institute adds that should Mr. Keyes’s appeal be accepted and the Institute would be required to increase the wage basis for calculating the unemployment allowances, it insists on the the third party notice it filed against the restaurant, pursuant to the provision of section 369 under the National Insurance Law, with all that entails.

The restaurant’s arguments in the appeal

53. The restaurant believes that the judgment subject matter of the appeal is right, “**including all its findings and rulings**”, and repeats the arguments it raised at the Regional Court. According to it, Mr. Keyes seeks to object in his appeal to factual findings that were ruled based on the Lower Court’s direct impression and an analysis of the evidence in a most reasoned manner, however pursuant to the case law ruling, intervention in this type of findings by the Appellate Court would be done only in rare cases. It was further argued that in **HCJFH Cohen**, the Supreme Court left the **Malka** ruling intact, according to which considering tip money is dependent on the manner of its registration in the employer’s books. The restaurant further argues that Mr. Keyes’s argument according to which the Regional Court should have examined his claims only in respect of the last three months of his employment, should be rejected. Finally it was argued that should the appeal be accepted, the third party notice should be rejected, as the restaurant acted lawfully and impeccably in Mr. Keyes’s matter.

The continued hearing of the appeal

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54. On 11.5.2017, upon completion of the first hearing on the appeal in the Keyes case, it was ruled to consolidate it with the other case in the heading - the Buda case, where it was ruled on conducting a hearing by an expanded panel. This is in light of the issue common to both proceedings. It was also ruled to accept the Attorney General's position in both cases.

"I have an old salary... not big... not big" – LabA 28480-02-16 – the Buda case

Factual background and the parties' arguments at the Regional Court

55. The Appellant, D.A. Importing & Restaurant Managing Ltd. (In this chapter – the **Appellant**), is a restaurant management company, which manages, *inter alia*, the "Alfredo" restaurant in Petah Tikva (in this chapter - the **Restaurant**). The respondent, Mr. Yehiel Buda (hereinafter – **Mr. Buda**), worked at the restaurant as a waiter since 25.4.2010. His last day at the restaurant, in practice, was 28.1.2012.
56. In October 2012, Mr. Buda filed a claim against the appellant with the Tel Aviv-Yaffo Regional Court, for payment of various sums of money in respect of the period of his work at the restaurant and termination thereof. In the statement of claim it was argued, *inter alia*, that: Throughout the period of his employment at the restaurant Mr. Buda was not paid wages by the appellant, and his entire wages were based on money he obtained as tips from the diners; the tip money he obtained by credit cards were paid to him at the end of the month by a check, after deducting 10%; the pay slip he was given specified the sum of this check; commencing March 2011 he was asked, as the other restaurant's employees, to pay NIS 2 for each working hour later than 19:30, and this for the "honor" to work at the restaurant; commencing that date an "advances" section was added to Mr. Buda's pay slip, although the sums specified on the pay slip were never paid to him. Additional arguments in the statement of claim referred to additional claim components. Based on the arguments, Mr. Buda petitioned for payment of various rights in a total sum of NIS 133,000, of which approximately NIS 90,000 for wage differentials. He also petitioned for charging the appellant with compensation for withholding of wages and compensation due to violation of labor laws and lack of good faith.
57. In the statement of defense, the appellant denied Mr. Buda's arguments and claimed it had acted lawfully, that it complied with all its liabilities towards him, and that his conduct is contrary to the duty of good faith imposed on him

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and constitutes unjust enrichment. According to the appellant, it was agreed with Mr. Buda on the manner of payment of wages and social allowances. It was agreed that the wages would be in the form of the tip money he would receive from the restaurant's customers, this agreement does not contradict any of the protective laws and Mr. Buda was aware of it. Mr. Buda's wages were considerably higher than minimum wage and were paid to him through a pay slip. The slip included payment for the base hours as well as an "advance" reflecting the tip money received in cash. Since Mr. Buda obtained the tips in cash, prior to issuance of the slip, this payment was deducted from the wages and called an "advance". According to the appellant, this is consistent with section 1 of the Wage Protection Law, 5718-1958 (hereinafter – the **Wage Protection Law**), which enables payment of wages in the form of "other payments". It was further agreed that should Mr. Buda's wages from tips be less than minimum wage (in respect of daily wages including tips divided by the number of hours he worked), at which case the appellant would pay the balance up to minimum wage - a situation that never occurred. As to Mr. Buda's argument according to which he was never paid the "advance" component specified on the pay slip, it was argued that this is unreasonable since its outcome is that throughout his employment Mr. Buda worked for the wages of approximately NIS 500 per month, without speaking up. The only explanation for this, according to the appellant, is that Mr. Buda had taken a much higher amount of tips than he reported. The appellant raised additional claims in respect of the other components of the claim.

The judgment of the Regional Court

58. The Regional Court (Senior Judge Michal Levit and public representatives Ms. Hanna Kapelnikov and Mr. Ury Matityahu; JWD 11611-10-12; judgment dated 3.1.2016) accepted the claim for the most part, and ordered the appellant to pay Mr. Buda a total sum of approximately NIS 117,000, of which NIS 70,000 as wage differentials, as it ruled that the tips Mr. Buda was given in cash by the restaurant's customers are not to be counted as part of the wages. Below we shall detail the main points of the judgment, placing an emphasis on the parts that are relevant to our case, in respect of which the appeal was filed (wages differentials, including overtime, sick pay and attorney fees):
- a) Redemption of sick pay: Although Mr. Buda's actual last working day at the restaurant was 28.1.2012, to this should be added 30 days, which are the sick days Mr. Buda was entitled to from among the overall incapacity

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period set out for him. Therefore, the period of his work should be counted until 27.2.2012. Mr. Buda is entitled to sick days at the rate of NIS 6,426, according to his calculation, in the absence of a counter calculation.

- b) Wages: There is no dispute that the wages at the restaurant were paid, almost entirely, through cash tips paid directly by the diners. Mr. Buda was not paid wages directly by the appellant, according to his working hours. It was agreed between the parties on payment of a minimum sum of NIS 24 per hour (rather than NIS 20.7 per hour as was the minimum hourly wage during the relevant period), and in the pay slip an amount was deducted, specified as an “advance”, which is, according to the appellant's witness's testimony, **“money he obtained from the customers according to a calculation of NIS 24 per hour according to the hours he reported. He already received it from the customers, so there is no need to pay again.”** The appellant did not present any evidence regarding the scope of the tip amounts that were paid to Mr. Buda in cash and the date of their payment, and therefore the advance deducted was purely speculative. Hence, **“the sums specified on the pay slips should be considered as net amounts”** and only these, without the advance, should be considered as wages that were paid in practice for Mr. Buda's work.
- c) Overtime: The working hours were not specified as required on the pay slips, until March 2011, and even commencing this date the registration does not necessarily match the actual working hours. At the same time, Mr. Buda adopted in his summary arguments the scope of the working hours as specified in the appellant's affidavit, as the basis for calculating the pay and ancillary differentials, and in the absence of other positive data, this basis should be adopted. Against the background of all the circumstances, including the failure to provide Mr. Buda with notification regarding the terms of work, as required under the Notice to Employees and Employment Candidates Law (Terms of Employment and Screening and Hiring Procedures) 5762 -2002, **“As there is more than meets the eye”** and as it was not Mr. Buda **“who set the norms of conduct and norms of payment at the restaurant”** - the doubt should be exercised against the appellant, as the one who bears the duty under law **“to manage accurate registration of the working hours and the paid wages, including their various components, and including payment for overtime”**.

There is no dispute that Mr. Buda worked overtime from time to time. As aforementioned, the appellant failed to present attendance reports or any other records registered in real time regarding his working hours,

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and failed to manage registration of working hours as required, including overtime work. There is no reason for this lack of registration and there was nothing to prevent doing so. Even if Mr. Buda is the one who requested to work overtime, this does not exempt the appellant from its duties under law, once it had approved this. The appellant claimed of an oral agreement for payment of wages that include remuneration for overtime work, convalescence fees, vacation fees and pension fees, however failed to prove that consent was given to this. Even if such consent had been proven, it should not be given validity given the power gaps between the parties. Additionally, in light of the provisions of sections 5 and 26b(c) of the Wage Protection Law, it is required to apply the presumption that Mr. Buda was paid overall wages to be deemed as ordinary wages only, meaning not including payment for overtime. Mr. Buda's calculation was not contradicted by the appellant and it meets the limits of the quota set forth in section 26b(b) of the Wage Protection Law, and thus it should be accepted. The appellant was required to pay Mr. Buda wage differentials including overtime, at the rate of NIS 69,227.

- d) Compensation for violation of the Minimum Wage Law and the Wage Protection Law: According to the work hours presented by the appellant and compilation of the net amounts as specified on the pay slips, the hourly sum Mr. Buda was paid stands at NIS 4.56 per hour. The appellant argued that the balance had been paid through through tips, however since the tip amounts had not passed through the restaurant's cash register and no registration was managed in respect of these, pursuant to case law they are not deemed payment of wages for the purpose of minimum wage. Therefore, as the appellant's argument regarding the manner in which it paid the wages, and in the absence of a counter calculation, Mr. Buda's calculation should be accepted concerning the failure to pay minimum wage.
- e) In addition, the appellant was required to pay Mr. Buda convalescence fees (NIS 3,313), redemption of vacation days (NIS 3,315), travel fees (NIS 3,111), compensation for failure to make pension provisions (NIS 2,629) and compensation for bad faith and violation of labor laws (NIS 5,000). The claim for payment of holiday fees was rejected, and compensation for withholding of wages was set on linkage differentials and interest only as provided under law.

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- f) In light of all the above, the appellant was charged with Mr. Buda's expenses and attorney fees in the sum of NIS 10,000.

The appellant's arguments in the appeal

59. The appellant filed an appeal on the judgment – "**on the components of wages, overtime, sick pay and attorney fees as ancillary to these components only**". In its notice of appeal it expanded on the issue of tips in principle, according to case law, the legislator's position and the "**accounting angle of view**" as well as its position regarding the circumstances of the concrete case. In a nutshell, the appellant believes that under the circumstances of the matter, according to which, *inter alia*, Mr. Buda "**benefited from "black" money, unreported, failed to register a receipt and failed to pay tax as required**", the tip money he was paid by the customers should be deemed to be wages for all intents and purposes. According to it, the judgment subject matter of the appeal contradicts case law concerning the issue, and leads to a result that is "**warped, unreasonable, and detached from factual and legal reality, in its financial result**".
60. And now on to the appellant's arguments in depth. The appellant believes that tips should be deemed as wages for all intents and purposes, pursuant to Section 2(2) of the Income Tax Ordinance [New Version] (hereinafter – the **Income Tax Ordinance**), regardless of the question of registration, and this provided that two conditions are met: A. The employee knew that tips are paid to him as wages and he agreed to this; b. His wages exceed minimum wage. According to it, in the case at hand both these conditions are met, and hence the tip funds Mr. Buda was paid are to be considered to be wages. It was further argued that even if "**supervision of the amount of tips in the waiter's reporting**" is required, in the case at hand this supervision was conducted "**in the form of the respondent's reports to the restaurant on attendance hours**", and his argument that he did not know how much he earns and the terms of his work is playing naïve, bordering on unjust enrichment. The District Court's disregard of the tip money and its ruling, which is derived from the fact that Mr. Buda earned a total of approximately NIS 4.5 per hour only, constitute turning a blind eye to reality.

According to the appellant, the ruling "**acknowledges payment of tips as "wages", even if paid directly by the diner to the waiter**". In this regard, the judgments on the **Malka** case and the **Cohen** case, as well as several judgments handed down by the Tel Aviv-Yafo Regional Court were mentioned, which indicate, according to the appellant, cracks concerning the

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conditions ruled upon in the **Malka** case concerning classification of tips as work income, and in which it was ruled that should it be clearly proven that the waiter obtained minimum wage from tip money paid to him directly by the customers, it should be ruled that these tips constitute income from work even if they were not registered in the employer's cash register. Therefore, its charge to pay minimum wage differentials and overtime should be canceled. The appellant argues that should its appeal be rejected, the meaning would be - a. Paying double wages to Mr. Buda and unjust enrichment by him; b. Unjust enrichment at the expense of the restaurant and its customers; c. Opening of the gates of the Court to all waiters, for filing claims for payment of wages, which means "**an economic disaster for the restaurant owners in Israel**"

61. The Appellant notes that the issue of tipping is "**sinuous and problematic**" and has very significant broad implications. According to it, a "market practice" was established in the restaurant industry, which became an accepted norm, according to which tips are considered to be wages, and this is also evident from a discussion held on the issue at the Knesset. A change in this "market practice" should be done only "**through comprehensive and inter-ministerial work of all the players in the industry... by the legislator, through an appropriate law, and under regulations by virtue thereof...**"
62. As for the question of to whom it is required to apply the duty of registration of tips, the appellant believes that this applies to the waiter, as he is the one obtaining the tips, and he is also the one required to tax in respect of them. Regarding VAT, the appellant believes that in principle it should be imposed only on a tip that had passed through the restaurant's cash register, and adds that pursuant to the Regional Court's judgment, in the event where the tip does not pass through the restaurant's cash register and is not deemed to be wages, the waiter is required to pay VAT in respect of it.
63. Another claim the appellant argues is that the employment agreement between it and Mr. Buda was clear to both parties and that its cancellation by the Lower Court was performed unilaterally and imposed on it only the duty of payment, without requiring Mr. Buda returning the money he obtained and without restoring the situation to its previous one. According to the appellant, the National Court is required to cure this and order Mr. Buda to return to its cash register the tip money he was paid directly - "**since tips are not wages – they belong to the appellant and hence the respondent is required to return them**". It was further argued that the respondent's silence at the Regional Court, when asked about the sums of the tips he received in cash "**hides the truth, lack of good faith, unjust enrichment, and exploitation of the legal loophole**

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of the anomaly within this domain”, and this Court should not accept Mr. Buda’s position according to which he had not earned minimum wage during the time of his employment by the appellant. Mr. Buda never referred to the appellant claiming that his wages had not reached minimum wage, and hence he earned fine wages, and legislator in enacting the Minimum Wage Law certainly had not had these cases in mind.

64. According to the appellant, the outcome of the judgment is inconsistent with the principle of increased good faith in labor relations and is not possible on the practical level, **"since this a huge sum... imposed on a restaurant that cannot carry this burden, even if it were justified... This, yet prior to considering the broad implications of this ruling"**, and this is a decree the restaurant owners cannot meet. The appellant further argues that the Regional Court **"adhered in its ruling to the Minimum Wage Law as a cogent law"** however ignored the blatant breach of the duty of good faith by Mr. Buda. According to it, under the circumstances of the case, as Mr. Buda earned **"double and tripled earnings"**, even had the cogent law been violated, it should take a step back from Mr. Buda’s unjust enrichment and due to his lack of good faith, as case law instructs, for example in the **Buchris** case (LabA (National) 145-3/55 **The State of Israel - Ministry of Housing - Buchris**, IsrLC 36 1, 9 (1997)).
65. The appellant further raises arguments concerning termination of the employment relations with Mr. Buda and the sick leave fees. In this regard, it was argued that the Court ruled that Mr. Buda had been dismissed, although the respondent himself testified that he had resigned, and therefore it was appropriate to dismiss the claim for sick leave. It was further argued in this regard that Mr. Buda attempted to argue in the claim he filed with the National Insurance Institute that he was injured at work, although he was injured playing basketball in his spare time, and in so his action in lack of good faith is revealed.

Mr. Budah’s arguments in the appeal

66. Mr. Buda believes that there is no justification for intervening in the Regional Court’s judgment. He argues that the ruling, according to which under the circumstances of the case the tips he was paid should not be considered to be wages, is consistent with case law in this regard. Mr. Buda’s position is that a tip given to a waiter in cash by the customer directly is a voluntary payment, where the customer does not intend it to replace the wages his employer is required to pay, but is rather given by the customer as the **"customer’s**

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personal gratitude for the personal service he was provided with by the waiter”.

67. According to Mr. Buda, the appellant raises objections on factual matters, in respect of which it is case law that the Appellate Court would not intervene in other than in exceptional cases; objections on legal matters that were already discussed and ruled upon; and arguments regarding its financial situation and the broad implications for the restaurant owners’ community – arguments that are irrelevant. Mr. Buda therefore requests that no weight be given to the arguments regarding factual findings that were ruled upon, since no new argument or evidence was presented to indicate an error in the judgment of the Lower Court. Also the arguments concerning the appellant’s financial situation should not be addressed, since it is irrelevant and unproven. Mr. Buda refers in detail to each of the appellant's claims, and argues, *inter alia*, that **“the one who sinned in tax evasion and black money”** is the appellant itself, who initiated the employment agreement with the respondent and in so **“saved for itself payment of VAT in respect of these tips, as well as payment of social allowances to the respondent.”** He further notes that if, as the appellant claims, tips are part of payment of wages, this is an indirect receipt, which requires reporting, payment of VAT and registration in the business’s books. Mr. Buda further argues that under the circumstances of the case, even had he obtained the tip money on the pay slip, he would not have paid tax in respect of it due to his being a discharged soldier at the relevant time, with a family as this is his sole income. Therefore, he did not benefit from the agreement with the appellant, but rather lost his social rights. Mr. Buda wishes to draw a distinction between the question of tax liability arising from payment of tips and the question of whether the appellant complied with its legal duty to pay him wages, by relying on the customers and without having any details on the matter. Mr. Buda further refers to the various judgments that were handed down concerning the status of tips and denies the appellant's claim according to which any changes occurred in them. Finally, Mr. Buda denies the appellant's claims regarding overtime and sick leave fees, argues that it acted in bad faith both in the manner of his employment as well as in the proceedings at the Court, and that the result of the judgment subject matter of the appeal is **“proper and appropriate conduct under law”**, and pursuant to the legislator's wish.

Application for stay of execution of the judgment and continuation of the appeal proceedings

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68. Alongside filing the appeal, the appellant filed an application for stay of execution of the judgment. In a ruling dated 12.4.16 (Judge M. Toyna) the application was accepted in part, so that one half of the sum ruled as wages compensation - NIS 35,000, was withheld, subject to deposit of a bank guarantee on this amount. After approximately a year and a half, as the appellant failed to deposit the bank guarantee as required (according to it due to a bona fide error), and since subsequently law enforcement and collection proceedings were initiated against it, the appellant requested to “ratify” the ruling dated 12.4.16. This application was rejected in a ruling dated 15.11.17 (Judge R. Poliak).
69. In a ruling dated 18.4.17 I ordered on conducting the hearing on the proceedings by an expanded panel of judges, pursuant to section 20(a) of the Labor Court Law, 5729-1969. On 11.5.17 it was ruled on consolidating the proceedings on the Keyes case with these proceedings, given the issue common to both proceedings, as it was also ruled on accepting the Attorney General's position on the issues arising in each of these proceedings. In an additional ruling, also the positions of the Association of Restaurants and the Association of Waiters were requested (hereinafter together – the **Associations**). Both the Attorney General as well as the Associations submitted their positions, as detailed below.

The Attorney General's position

70. The Attorney General's position, in essence, is that it is appropriate to regulate the issue of the status of tips under legislation, and until a comprehensive regulation under legislation or by the Supreme Court is arranged, it is required to leave – on the level of labor law – the **Malka** ruling intact. On the other hand, within the domain of national insurance law and tax law, since the issue had not yet been regulated under legislation, he intends “**to present his position once again before the Supreme Court in the appropriate proceedings**”, since the case law ruling set in **HCJFH Cohen** raises various difficulties, including charging the Institute with paying its policyholders “**disability allowances and allowances substituting wages, for incomes no insurance fees were paid**”. According to the Attorney General's position, as presented also as part of **HCJFH Cohen** and as also now he refers to it, should the income from tips constitute wages pursuant to section 2(2) of the Income Tax Ordinance, tips should be considered as the business owner's receipt that is paid by the customers for the service provided to them by the waiters as the business's employees, rather than as the income of the waiter himself. This

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classification, according to him, would provide a solution for all the legal aspects that arise in the matter. The Attorney General notes that the majority opinion in HCJFH “**chose not to adopt or reject**” his position, in light of the circumstances that require the legislator to regulate the matter, and that pursuant to this ruling, the professionals were instructed to promote legislation that would regulate the issue of tips. They began promoting the issue, however **"the political echelon decided not to advance the legislative amendments."**

71. Regarding the **Malka** ruling, the Attorney General notes that after it was handed down and pursuant to it, “**the enforcement authorities apply the registration in books test for enforcing the provisions under the Minimum Wage Law**” and additional cogent laws, and he believes it should be left intact. According to him, the registration in books test enables simple and clear supervision of payment of minimum wages, and the data provided by the Ministry of Labor, Social Affairs and Social Services, indicate that these means were proven effective within the enforcement domains. The Attorney General expresses concern that should the registration in books test be modified, it would not be possible to implement the provisions under the Increased Enforcement of Labor Laws Law, 5772-2011, particularly in respect of criminal sanctions by virtue of the protective laws. It is further explained that leaving the **Malka** ruling intact (while the Attorney General believes that it is required to change the rulings regarding the status of tips in the context of national insurance law and tax law) is consistent with the position of this Court, as well as with the position of the Supreme Court, according to which the answer to the question of classification of tips does not necessarily be uniform in all areas in which it arises.

The Association of Restaurants’ position

72. The Association of Restaurants is a registered association operating since 2001 as a non-profit organization, and includes more than 700 members in the restaurant business. According to its regulations, it is not an employers’ organization.
73. The Association of Restaurants believes that “**a tip received by the waiters in the restaurant industry constitutes the waiters’ income paid by one who is not their employer and constitutes an integral part of their wages.**” According to it, the judgments handed on the matter to date, balanced between most of the competing interests, and regulation through case law could violate the balance achieved through previous judgments. According to it, it is required to regulate the status of tips in an overall manner, according to the current

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situation, however, this not through judicial legislation but rather under primary legislation and in collaboration with all government ministries, since the legislative branch has priority over the Court in regulating the issue in a balanced manner, given its complexity.

74. The Association believes that tips should continue to be considered as a voluntary payment paid "**as the customer's desires**" and "**constitutes the waiters wages**" which is not under the restaurant's control. According to it, it is required to entrench the current practice, without impairing the waiters' income on the one hand, and the restaurants' on the other hand. According to this practice, pursuant to case law:: The employer is required to ensure that the full social rights are paid and set aside at least for the sum of minimum wage; in the event where the tips do not amount to minimum wage - the employer is required to supplement it; the tips are registered in the restaurant's books – in the waiters' log, however does not constitute taxable income. Accordingly, the social rights are paid out of the tip money. And in more detail - in the agreement between the waiter and the restaurant it is prescribed that the tips belong to the waiter and the restaurant is required to ensure wages at the rate of minimum wage; in addition to the minimum wages, the restaurant "**takes care**" of payment of travel and convalescence fees as part of the overall wages as well as vacation pay, separated from the total wages; for payment of wages the tips are taken into account, and if necessary, supplementation is given up to minimum wage. Should the tips exceeds minimum wage, the balance remains with the waiter; tips are forwarded to a "tip box" and distributed every two or three days by the person in charge from among the waiters or the employer; until distribution thereof the tips are kept separately from the restaurant's cash register for the waiters and are not under its control; the restaurant manages a service log in which various details are recorded, under law; the tips are registered in the service log however are not registered in the restaurant's cash register.

According to the position of the Association of Restaurants, this practice ensures that the waiter would be paid at least a minimum wage and his social rights would be guaranteed at this rate, as well as payment of tax at this rate. The Association of Restaurants' position is that modifying the current practice may lead to serious damages, including "**a financial disaster for the restaurant industry**", due to harming the waiters and a "**dramatic increase of prices in restaurant services**". **This is since should the tips be deemed as the business owner's receipt, in financial terms it would not be able to forward the full tips to the waiter, noting all that this implies, including the obligation to pay value added tax in respect of tip money.** In essence,

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"deviation from case ruling... And judicial regulation... Would very likely lead to harsh results for the restaurant industry. "

The Histadrut - The Federation of Young Students and Workers' position

75. At the outset, it should be noted that the Association of Restaurant's position was filed through the Histadrut- General Organization of Workers - The Federation of Young Students and Workers (hereinafter - the **Federation of Young Students and Workers** or the **Histadrut**), which according to its notice, is the competent organ of the Histadrut- General Organization of Workers to organize and represent **"the workers in the fast food industry and the restaurants, café' and pubs industry"**. Therefore, and in the absence of a separate waiters' union, it presented its position on the issues at hand. The Histadrut specifies that it is a representative organization in several work positions within the fast food and catering industry, and also signed collective agreements within the fast food industry.
76. The Histadrut's position, in a nutshell, is that **"tips distributed to waiters within the restaurant industry, in the reality that has been established in Israel in recent years, constitutes an integral part of wages for all intents and purposes"**. The Histadrut requests that this Court issue **"a clear rule that would regulate the situation in the market in which "any employer may do as it pleases", in a manner that would lead to enforcement of labor laws in the industry and would ensure the work conditions of waiters in Israel."**
77. In its position, the Histadrut - The Federation of Young Students and Workers specifies extensively that which is taking place in the restaurant industry. According to it, this industry has become a huge industry that constitutes approximately 10% of the total number of small businesses in Israel, affecting the manner of employment in it; in the past it was not customary to leave a tip in Israel, however commencing the 90's of the 20th century, the restaurant owners began paying waiters' wages through tips; the employees within the restaurant industry lack occupational security and social rights; the lack of professional requirements and the possibility to work in shifts draws them to the domain, mainly youth and students; their young age, lack of experience in the labor market and the tentativeness of their employment, make it difficult for them to be aware of their rights as employees and insist on them' during the years 2013-2017, 146,000 - 200,00 employees worked in the "food and hospitality services" industry, approximately half of them between the ages 20-29. From among all these employees, in 2016 approximately 90,000 employees

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were employed in “food services in restaurants, diners and serving beverages” approximately half of them part-time.

78. According to the Histadrut, tipping waiters is a **“very common and rooted social norm; amounting to casting doubt on the degree of the “voluntariness” of the tip institution”, and that “currently a “tip” is in practice payment to the waiter for his regular work at the restaurant, not necessarily related to the degree of the diner’s appreciation of the service he received, and as a fixed derivative of the cost of the customer's order”**. According to it, the situation of the labor relations in the restaurant industry, in which the employers are those who dictate the employment terms unilaterally and control the tip money, undermines the provisions of protective legislation. According to it, many employers exploit their control over tip money in order to **“shake off partially or fully”** their duties under law - for example, by issuance of fake pay slips that do not reflect the full amount of the wages, in paying social rights only in respect of part of the wages, in failure to record the accurate work hours and rate of the tip, etc. In addition, employers exploit their control over tip money in order to finance the wages of all restaurant employees, regardless of the workload or the actual work that was performed, also among employees who are not service providers, and in order to dictate exploitative and abusive work arrangements.
79. In its position, the Histadrut reviews the current legal situation regarding the status of tips, both in the context of the Minimum Wage Law and the **Malka** case law ruling, as well as in the context of national insurance law and the **Cohen** case law ruling. In respect of the **Malka** case and the status of tips as wages, it was argued that over the years there has been erosion in it, where cases were filed with the Regional Courts cases in which it was clear that the tests prescribed in the **Malka** case do not necessarily match the daily reality in the industry, and thus, for reasons of justice and good faith, tips were acknowledged as wages even where these had not passed through the restaurant's cash register. This was done, for example, in cases where the employer's control over the distribution of the tip had been proven, including through its registration, or where the purpose of the Minimum Wage Law was met. Meaning, the Histadrut - The Federation of Young Students and Workers summarizes, the point of origin that guided the National Court in the Malka case, according to which tips that do not pass through the employer’s books are not wages, **“no longer guides the rulings of the Labor Courts, at which this case law ruling had been reduced to a significantly less stringent test”**. Concerning payment of social rights, the Histadrut believes that the rulings of the Regional Courts indicate a clear trend, according to which **“payment of**

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social rights to an employee should be ruled upon according to the waiter's wages including the tips, regardless of the question of whether the tips constitute wages in that case. Furthermore, the Regional Courts do not accept the problematic norm that has taken roots in the restaurant industry, where funding waiters' social rights is conducted through the tips". According to the Histadrut, from a substantive standpoint, the rulings of the Regional Courts refers to tips as wages for all intents and purposes, and as a separate component for calculating the social rights payable to the employee. The given state of affairs, the Histadrut concludes, is that while there are District Courts' rulings as aforementioned, **"a guiding judgment has yet been handed down by the National Labor Court, which requires restaurants to set aside social benefits for tips paid to employees, and which in fact constitute the bulk of their work income and is controlled by the employer"** - and there is a need for such a ruling.

80. In conclusion, the Histadrut - The Federation of Young Students and Workers argues that the current situation in the restaurant industry is **"chaotic"** and that most employers exploit the power gaps that exist between them and all employees, including waiters and treat the tip money as their own, including failure to pay social benefits in respect of this money. In this situation and in light of the ruling of the Regional Courts, it is clear that the time has come to change the **Malka** case law ruling. If employers were to pay their employees fair wages, without relying on or controlling the tip money, the industry could be regulated in a manner that acknowledges, where appropriate, tips as a voluntary payment given to the waiter as a special gift, regardless of his wages. According to the Histadrut, **"it is imperative to change the case law ruling in a manner that would regulate the status of tips as wages"**, and until regulating the issue by legislation or collective regulation, **"it is required to regulate the issue of the status of tips as wages in a coherent and uniform manner in respect of all matters concerning wages and social benefits, including in the context of national insurance"**. The Histadrut's position is that **"any remuneration or financial gain that the employee obtains as part of his work on the employer's premises, including tips, regardless of the registration in the employer's books test... is wages for all intents and purposes"**, meaning, it is required to be specified on the pay slip, and it is required to pay for social benefits and national insurance fees in respect of it as provided by law. The Histadrut further believes that it is appropriate to rule in a positive manner **"that the duty to register, track, pay wages and ensuring the employee's rights is the duty of the employer as at any other workplace"**, as it is also appropriate to clarify that tips paid for service are intended solely for the waiter, and the employer is not to make any use thereof,

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other than for paying the waiter's wages. The Histadrut signs off its position with a call to refrain from excluding the public of waiters from all employees and regulate their terms of work so that labor laws would apply to them as to the other employees.

The hearing on the appeals

81. On 13.12.17 a hearing was held on the two proceedings at hand, each of them separately, attended by litigants and their counsels as well as the counsels for the various parties whose position was required. The hearing on the Buda case was held first, at the outset of which the Court raised the fundamental question – **“is it appropriate that tips be considered to be wages? Both for the purpose of minimum wage as well as beyond minimum wage.”**
82. Counsel for the appellant (D.A. Importing & Restaurant Managing Ltd.) noted that it is possible to regulate the issue under case law, and it is desirable to set a clear and simple ruling to the extent possible. According to him, tip money should not be considered to be wages to begin with. In response to the Court's question, he stated that the hourly remuneration for overtime should be calculated based on minimum wage only, excluding tips, and the balance of the tip money, after payment of minimum wage from them, should be forwarded to the waiter directly, without registering it in the employer's cash register and without paying in respect of it various rights, such as severance pay, and it constitutes **“social rights”**. Later he added that should the Court believe that it is required to pay from the tip money, in addition to minimum wage also social benefits, it is required to go back **“to the method where there would be no tip and the entire wages would be paid by the restaurant”**. The Court raised the possibility that out of the tip money, after minimum wage has been paid from them, the employer may keep sums it is required to pay due to employing the waiter, such as social benefits, and forward to the waiter only the balance. Counsel for the appellant stated in response that he is concerned of **“a complicated and incomprehensible formula”** that may impede. According to him, the waiter should be treated as a **“sales agent”** who is guaranteed minimum wage and social benefits paid with the tip money, and the balance of the tips, if any, belongs to him, as the client intends. Counsel for the appellant believes that the manner of payment of tips is important: If paid through a credit card – this is the restaurant's income for which value added tax is paid, and if paid in cash – this is the waiter's income. He later emphasized that in terms of enforcement, the source of the money from which the employer pays the waiter does not matter.

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83. Counsel for Mr. Buda noted that the most important issue is the tipper's intention and his intention is that the waiter would enjoy it rather than the restaurant owner. He further argued that the waiter's wages are embodied in the price of the dish, and where the employer uses the tip money for payment of wages, this is a distortion of the customer's wish, as in fact the tip is a gift given by the customer to the waiter. In response to the Court's question if the same is true where the employer is the one setting the manner of distributing the tip money, counsel for Mr. Buda stated that it is not customary at all places to do so and insisted that a principled ruling be set. In this regard, he argued as follows: **"It is required that all tips be registered in the restaurant's cash register... On a separate line in the form of tips"; "on the principled level the employer would not be able to benefit from these"; "it is inappropriate to impose on the waiters the duty to keep a log and register and report";** it is required to register tips as the waiter's income and he is the one **"who is required to file a report to the income tax authority"; and it certainly cannot be the employer's income, and there is no reason that it benefit from it";** the ruling on **HCJFH Cohen** was in the context of national insurance and there is no lesson to be learned from it for the purposes of the case at hand. Counsel for Mr. Buda further emphasized that **"any receipt obtained should be registered by the restaurant including tips and what it is payable to the employee as a tip would be paid to him as a bonus. And the employer does not bear social rights in respect of the bonus."**
84. Counsel for the Association of Restaurants opened with the argument that the customer does not pay the waiter a tip personally, but rather in exchange for **"the overall and depending on his satisfaction"**. He added that the solution found in **HCJFC Cohen**, according to which tips constitute wages paid other than by the employer, **"creates difficulties"** and **"inconsistencies"**, and therefore **"a special solution is necessarily"**, requiring the use of tools that do not necessarily exist under legislation. According to him, per the existing case law ruling, tips are wages that are not paid by the employer, and therefore the employer is obligated only to ensure that the waiter obtained minimum wage. The position of the Association of Restaurants, he added, is **"that the current situation... Is the lesser of two evils. The waiter's minimum wage is guaranteed... The rights up to minimum wage are guaranteed by the employer from the tips that are considered to be part of the employer's payment to the employee. From the tips, if higher than minimum wage, social benefits are paid."** He later added that **"it is impossible to ignore the fact that the platform for obtaining tips is the restaurant... We believe that once it is ruled that tips are wages, they may be paid as minimum wage. I**

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am not the one who pays it and there should be no demand against me.”

He further noted, in response to the Court’s question, that regarding the essence of tips, the manner in which they are paid, whether in cash or by a credit card is of no relevance, and it is the Association's position that **“from the tips including tips that were left on a credit card, all social rights may be paid, and should be treated as any other tip and hence the social rights are paid according to minimum wage, beyond which this is payment paid by one other than the employer. The meaning is minimum wage in agreement with the employee, and no less than minimum wage under law. If the employer made an agreement on minimum wage then also the social benefits would be in respect of the minimum wage.”**

Counsel for the Association of Restaurants noted the problematic current legal situation, in which at times, where tips are paid by a credit card, VAT is added to it, and the result is payment of VAT on wages, for which no VAT should be paid.

85. Counsel for the Histadrut - The Federation of Young Students and Workers reiterated the aforementioned in the position she filed on behalf of it. According to her, the term “wages” should not have one definition, however, **“a waiter should not be different from any other employee”** and payment of minimum wage and social benefits should not be allowed to be taken from the tip money. Counsel for the Histadrut further noted that notwithstanding repeated calls by the various judicial instances to the legislator, it **“failed to accept the challenge”** although the situation on the ground is **“not good”** and **“includes very severe harm to the employees” - approximately between 200,000 - 160,000**. According to her, failure to set regulation by the legislator is not accidental, but rather apparently stems from the complexity of the political system and interests on the agenda, and in this situation the Court's intervention is required **“rather than waiting for legislation”**. It was further argued that it is possible to consider regulation, if only sectoral, by negotiations between representative bodies, perhaps in a gradual manner, however this only pursuant to a clear ruling by the Court, according to which tips are wages, with all that implies. Regulation of the issue of tipping is necessary, *inter alia*, in order to ensure pension rights **“from the moment of entering the labor market”**. In response to the Court's question, counsel for the Histadrut stated that the employer cannot make use of the balance of the tip money (after minimum wages or the hourly wages agreed upon were paid from them) for payment of social benefits.
86. The Attorney General’s position as presented by his counsel, is that the issue of tips should be regulated under legislation, however given the current

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situation, as the legislator failed to act on the matter for almost 5 years since the judgment in **HCJFH Cohen** was handed down, it may be that there is no escape from regulating the matter by means of a judicial ruling. Counsel for the Attorney General reiterated the position she submitted as part of the proceedings at hand as well as within the framework of **HCJFH Cohen**, according to which a tip should be considered, per its essence, as the business's income, and this classification **"would regulate the issue in its entirety"**, including in the aspect of national insurance and tax laws. It was further noted that **"signals"** may be found in the rulings of the Regional Labor Courts, placing the **Malka** case law ruling in doubt, and should the registration in books test set in the **Malka** case be canceled or changed, and it be ruled that also tips that were not registered are wages, difficulties in enforcement would arise, since the Ministry of Labor acts pursuant to the tests set forth in the **Malka** case - examines the rate of wages according to that registered in the restaurant's cash register or waiters' log, and in the absence of registration **"we would not be able to determine the hourly wages, and whether all the rights pursuant to the protective laws had been paid"**. Counsel for the Attorney General expressed support of the Histadrut's position, according to which tip money should be specified on the pay slip **"with all that entails, a deduction of national insurance fees would be made and withholding tax at origin, this is the desirable arrangement"**.

87. Attorney Debbie Eliezer from the Ministry of Labor, Welfare and Social Services who also attended the hearing, noted that the enforcement authorities are currently acting pursuant to the **Malka** case law ruling, meaning, examines whether tips **"go into the employer's cash register, even should this be a tip box, and whether it is registered in the employer's books, even if not registered in a wages book."** She further noted that a separate question is the manner of specification on the pay slip, and that in this regard **"there are provisions under Amendment 24, where it is prescribed that registration of wages is required"**. In response to the Court's question, she stated that payment of social rights to the waiter should be made based on the full wages, including tip money. According to her, two criminal verdicts were handed down on the issue. In one it was ruled that tips constitutes wages even where they were not registered in the books, and the outcome was an acquittal, and in the other the punishment threshold was reduced to the minimum possible.
88. Towards the end of the hearing counsels for the appellant (D.A. Importing & Restaurant Managing Ltd.) and Mr. Buda argued in respect of the concrete aspect of the appeal. Upon conclusion of the hearing it was proposed that the parties to the Buda case reach an agreement regarding the concrete aspect of

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the proceedings, as opposed to its principled aspect. Since no such agreement was reached, this judgment is handed down in respect of both the aforementioned aspects.

89. Following the hearing on the Buda case, the hearing on the Keyes case was conducted. Upon opening the hearing on the Keyes case counsels for the parties notified that **“in respect of the principled question, we agree that the protocol of the appeal”** in the Buda case **“would serve us also in the appeal before us”**. Later they reiterated their positions regarding the special aspects of the Keyes case and refined them, *inter alia*, in addressing the Court's questions. For example, in response to the Court's question of whether the Institute believes that it is required to pay insurance fees in respect of tip money, contrary to the ruling in **HCJFH Cohen**, counsel for the Institute stated that its position is that **“it is required to pay insurance fees in respect of the full wages, it is not acceptable that there be a wages component for which insurance fees are not paid and it would be included in an allowance in lieu of wages”**. Counsel for the Institute further noted that case law was interpreted by the Institute as **“applying to all allowances replacing wages”** and that **“the Supreme Court established problems in the definition by stating that these are wages, however not from the employer... This is not the legal situation we would like to see... We would be pleased that the full wages be reflected in pay slips.”** She further argued that if, from the standpoint of labor law, it would be ruled that tip money is required to appear on the pay slip, **“it would be required that insurance fees would be paid for them”**.
90. Counsel for the restaurant (Galei Hatzuk) emphasized that a ruling on the question at the center of the appeal affects not only the restaurant industry, but rather **“has enormous transverse impacts in a variety of sectors. It begins with gas station attendants, clerks, chambermaids, there is no end to this.”** Counsel for the restaurant noted that he does not dispute that tips constitute wages, however added that there is a dispute as **“to whom they should attributed”**. According to him, if tips be attributed to the employer, this may be a decree the public would not be able to meet, and the **“immediate implications would be in respect of social terms and overtime.”** Counsel for the restaurant insisted that such a ruling is problematic as its outcome would be that the employer would have no control over the rate of the wages it is obliged to pay, and in his words: **“Tomorrow someone would decide to leave the employee a ridiculous and excessive tip, I am required to include it in my calculations...”**

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91. Counsel for Mr. Keyes noted that **“if the Supreme Court had not outlined a manner in the further hearing”** this does not mean that **“the situation should remain intact”**, and it is **“unacceptable that such high sums pass through without being reported”**. According to him, tips may be considered as **“money given to the restaurant”** and not necessarily to the waiter personally, **“and the employer is required to pay the waiter wages”**. Counsel for Mr. Keyes added that per the other approach, according to which a tip is given to a waiter personally, establishes chaos, **“and it is the employee who is required to prove his earnings beyond minimum wage, and this is a situation that I believe is impossible”**. According to him, should this position be accepted notwithstanding, it would be necessary to determine **“how should all this money, which is required to be registered be treated”**, and one of the options is **“to treat it as the cost of overall wages”**. An additional question is whether the employer should be required to pay the social benefits in addition. As for the concrete aspect, counsel for Mr. Keyes noted that the emphasis in the judgment was not on credibility findings, but rather on findings related to documentation.

Interim summary

92. So far we have reviewed the normative framework concerning the various aspects of the status of tips - labor law, national insurance law and tax law, and we presented the difficulties that arise as a result thereof, as presented in case law and literature. Then we extensively presented the history of the proceedings before us, against their factual background and on the direct parties' arguments and those of the parties that attended the proceedings. From here, we move on to the discussion and ruling chapter.

"On the brink of the heart stand many things" - discussion and ruling

93. As aforementioned, the question on the meaning of tips includes many different secondary question, as different entities provide different answers to, and as its implications are most significant, both in respect of the various legal branches it touches, as well as in terms of the number of parties related to the matter - the Tax Authorities and the National Insurance Institute, tens of thousands of employees (according to the Histadrut, approximately 170,000 employees) and the thousands of businesses in the restaurant industry, as well as in terms of the scope of tip money in this industry annually, which is estimated at NIS 1-2 billion per year (**Tips**, 108). The Supreme Court, both as part of **HCJ Cohen**

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and as part of **HCJFH Cohen**, was of course aware of this situation and the difficulties arising from considering tips as the waiter's income from one who is not his employer - mainly failure to pay taxes in respect of this income and charging the Institute with payment of allowances based on income for which no national insurance fees had been paid. Nevertheless, it believed, by majority opinion, that there is no escape from the result it arrived at, whether since it is impossible to reach another result without a change in legislation (President Grunis), or whether given the **Safari Holdings** case law ruling's taking root in case law (Justices E. Arbel, S. Joubran and H. Meltzer). Under these circumstances, alongside pointing out the difficulties and while leaving certain issues with no ruling, the Supreme Court added a clear call to the legislator to promptly act for overall regulation of the tip issue, including all aspects thereof, after obtaining the positions of all the relevant parties and in so joined the various instances that again and again referred to the legislator to act for regulating this issue for many years.

94. Notwithstanding these calls by the various judicial instances, notwithstanding the Friedman Committee's recommendations for regulating the issue (although we believe its recommendations on their merits should not be adopted), and notwithstanding the fact that over the years such and other bills have been filed, seeking to regulate the issue of the status of tips, in various contexts, being aware of the problematic current legal situation - so far these efforts had not matured to legislation. We believe that given legal situation, including all the difficulties involved in all of its aspects, as elaborated upon extensively in **HCJFH Cohen**; in light of the legislator's silence, even after almost five years had elapsed since the judgment on **HCJFH Cohen** was handed down, as part of which it was again called to act on the matter; and since we are not aware of any expectation of resolving the issue in the foreseeable future – not only is there no escape from making our statements on the issue of tips, but rather it is also our duty.
95. We should first note that we seek to adopt in this judgment of ours, mainly, President Naor's position in **HCJFH Cohen** (agreed by Justices Rubinstein and Hayut), and rule that tip money in the restaurant industry would be deemed as income belonging to the restaurant, **“and any income obtained by the waiter from such a tip is work income from his employer”** (section 48 of her opinion). The key points of this position are also presented in Margalioth's article, **Tips**. In short, reexamination of the “voluntariness test” and the outcome ultimately derived of it, as cited above, more fully and accurately reflect the reality concerning tip money in the restaurant industry, provide an appropriate solution for the difficulties established by case law and regulate the

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status of tips in a comprehensive, full, balanced and appropriate manner. We are aware that following this ruling, there may be some changes in the restaurant industry, and perhaps in other tangential areas, some of which may lead to some financial damage to one or other public. However, first, it should be assumed that after a certain period of time things would be balanced, and second and mainly - this is a natural and ordinary course of action following a new case law ruling, which regulates in a balanced manner and for a worthy cause a certain issue that has been managed improperly over many years.

96. We should further state at this stage, in a nutshell, that we believe that alongside renewed examination of the “voluntariness test” and alongside the “means of payment test” and acknowledging tips as the business’s income and as the waiter's work income from his employer, it is required to reexamine the case law ruling on the **Malka** case, at the center of which stands the “registration in books test”, and rule that every income from tips would be deemed as his wages, whether or not the tip passed through the restaurant's books. Indeed, it is true that classification of tips does not necessarily have to be uniform on each of the legal levels in which it acts, however one cannot ignore the impact of this classification of tips in a certain industry on its classification in another industry, certainly when there is substantial justification for this. We believe that changing the “voluntariness test” and determining tips to be income that belongs to the business and as the waiter’s work income from his employer, requires also a change in the **Malka** case law ruling and the “registration in books test” in the same manner, so that together a just, uniform and harmonious arrangement would be established.
97. Whether this judgment of ours constitutes a call for judicial legislation, or whether it is the Court’s meeting its duty as the interpreter of the existing law and legislation, including case law, and as their implementer under the circumstances of a given case, at times requiring refreshing a previous case law ruling and examination of its foundations anew - it is only clear that the move made as part of the judgment should be made with the necessary caution. However, such a move is possible – and sometimes even necessary, as under the circumstances of the case at hand – certainly by an expanded panel of judges.
98. Before we present the main points of our rulings, we wish to once again specify the problems and difficulties resulting from ruling that tip income constitutes the waiter’s income from one who is not his employer – both difficulties in the ruling itself as well as the difficulties derived from it. Some of these difficulties were presented as part of the judgment on **HCJFH Cohen** and some we shall

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point out here for the first time, mainly concerning the level of labor law, against the background of the judgment on the **Malka** case. And these being:

- a) Damage to the principle of social insurance: We accept Justice Naor's statements in **HCJFH Cohen**, according to which Justice Grunis's position **"necessarily leads to a future problematic situation, where the Institute would be charged with payment of allowances to policyholders for which no insurance fees had been paid"**. This state of affairs is frontally contrary to a basic principle in national insurance law, according to which allowances in lieu of wages are calculated based on income for which insurance fees were deducted. This principle embodies the symmetric link between income for which insurance fees are paid and the income based on which the allowance is calculated (see for example NIA (National) 20/99 **Sedik - The National Insurance Institute** (18.2.2002); NIA (National) 330/09 **Levy - The National Insurance Institute** (10.11.2010)). Violation of the aforementioned principle automatically leads to damage in collecting insurance fees, and therefore in their distribution according to the various insurance sectors. In this regard, I mentioned as part of NIA Cohen, that allowances to people injured at work and those dependent on them are intended to compensate for loss of wages, and therefore **"essentially, the wages that serve as a basis for calculating entitlements pursuant to labor law are the ordinary wages for calculating disability and dependents' allowances."**

In addition, as stated in Justice Naor's position, the current situation may lead to prolonged litigation between the Institute and the waiter-policyholder concerning the question of the accurate rate of tip money he was given directly by the customers, and as a result impose a complicated burden on policyholders, in proving this rate, and on the Institute in examining their claims.

- b) Underinsurance: According to the current legal situation, as arises from **HCJFH Cohen**, and since in respect of direct tip money no national insurance fees are paid, many waiters could, upon the occurrence of an event that in principle entitles them to an allowance, face a situation in which they would be completely denied of the allowance, or its rates would be reduced, due to failure to pay insurance fees in respect of their income from tips, pursuant to the provisions of section 366 of the National Insurance Law, should the duty of payment of insurance fees to the Institute be imposed on them.

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- c) Violation of social rights: On the level of labor law, according to the **Malka** case law ruling and the “registration in books test” set forth in it, tip money should not be considered to be wages, in the event where they had not passed through the restaurant's cash register. This situation leads to the fact that the social rights paid to the waiter are calculated on the basis of his “official” income from the restaurant rather than on the basis of his real income, which includes tip money, with all that entails.
- d) Adversely affecting employers: Further to that stated in the preceding paragraph, the existing legal situation encourages filing of claims by waiters against their employers for payment of minimum wage, based on the **Malka** case law ruling, although the income of many of them, in respect of their work at the restaurant, exceeds, at times even at considerable rates, minimum wage. Under these circumstances, many employers are exposed, even if theoretically, to claims in an enormous monetary scope, although in practice the purpose of the Minimum Wage Law is not impaired and although the said conduct of the waiters may amount to bad faith.
- e) Lack of uniformity: The rulings of the Regional Courts show discomfort with the aforementioned situation, and accordingly various approaches to these situations and as to the manner of implementation of the **Malka** case ruling may be found in them. This lack of uniformity is increasing, naturally, as long as proceedings of this kind continue to arrive at the Courts for examination, in dozens.
- f) Theoretical difficulty in classifying the tip as work income other than from the employer: Conceptually, it is not simple to acknowledge an employee's work income that is not from his employer. In this regard we should note that there were those who sought to consider tips as a gift given by a customer to the waiter, however, this position raises difficulties mainly since the tip is given as consideration (for the service), while pursuant to section 1(a) of the Gift Law, 5728-1968, “**a gift is granting an asset for no consideration**”.
- g) Theoretical difficulty in separating income from the same work into two types: It should be mentioned that **HCJ Cohen** and **HCJFH Cohen** concerned direct tips, as we referred to above (section 29 of the judgment), meaning, a tip given directly to the waiter in a “voluntary” manner and does not pass through the restaurant's cash register and is not registered in its books. According to the ruling there, the waiter's income, in practice, is

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now separated into two types: The wages he obtains from his employer, including tip money passing through the restaurant's cash register, and his income from direct tips - and all this for the same work. While this is not a double status as the Institute's alternative argument in **NIA Cohen**, as also in respect of direct tips it was ruled that this is work income and the waiter is an employee, alas, also in separating the income for the same work (unlike the same type of work), at the same place and at the same time and under the same circumstances, into two as aforementioned, there is a great deal of artificiality.

- h) Lack of a solution for types of tips that were not discussed: Another difficulty stems from the fact that the judgments on **HCJ Cohen** and **HCJFH Cohen** concern only direct tips and indirect tips. A direct tip, as aforementioned, is a tip that is given directly to the waiter without passing through the restaurant's cash register and without being registered in its books. In **HCJ Cohen**, President Grunis mentioned these two types of tips – direct tips and indirect tips, and added:

“Between the two mentioned end situations lies a range of forms of tipping, which according to their characteristics do not distinctly belong to one of the types of tips. For example, one may wonder what should be the rule where the business has some involvement in determining the manner of distributing the tip money among the employees. Does this fact turn this money into its income, in terms of the duty to pay income tax? Another case is where the bill includes a component of service fees, however only as a “recommendation” or “optional”. As aforementioned, for our purposes we are not required to draw the line between a tip that is considered to be the employer's income, in respect of the duty to pay income tax, and a tip that is considered to be the employee's income. This is since the tip amounts the deceased obtained throughout his work at the restaurant clearly belong to the second type we mentioned. Meaning, this is tip money constituting the deceased's income he obtained directly from the customers rather than from the restaurant. Hence, the question we are required to ask is how should, for the purposes of section 2 of the Income Tax Ordinance, a tip considered to be the employee's income he obtained directly from the customers, without passing through the employer, be classified.”

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Meaning, although there are many types of tips, the ruling on **HCJFH Cohen** addresses only the two end types: Direct tips, which are the waiter's income other than from his employer, and tips paid upon demand and enter the restaurant's cash register, which constitute, also according to the majority justices in **HCJFH Cohen**, the restaurant's income. In so, this ruling leaves a whole range of tip types unregulated, and with the possibility that a need would arise for examining whether they nevertheless fall within the scope of direct tips and hence the **HCJFH Cohen** case law ruling applies to them, or perhaps they do not constitute direct tips and this ruling does not apply to them, and then - what is to become of them? And in general, in what manner would the degree of the employer's involvement in setting the tip distribution mechanism or the degree of the customer's voluntariness in leaving a tip be ruled upon? Would it be appropriate to summon the customer who gave it and clarify with him his intentions in giving the tip and the degree of his free will, according to his understanding of the situation? And would it be appropriate to examine within this framework the extent of the customer's knowledge of the tips policy that prevails in the place he dined?

- i) Collection of true tax: In respect of the tip money in the restaurant industry, estimated at NIS 1 billion to NIS 2 billion a year, no income tax is paid. This is since usually this money does not pass through the restaurant's cash register and therefore, pursuant to the ruling on **HCJFH Cohen**, it is deemed as the waiter's income. In this situation, the restaurant does not withhold tax at origin in respect of it, however, apparently nor does the waiter himself. From judicial knowledge, it may be stated that very few waiters, if at all, are aware of the aforementioned situation and/or duties imposed on him for such, concerning tax law (both in terms of reporting as well as in terms of the payment), and in any event, it is doubtful they comply with these duties. It may be noted that in so they are exposed to criminal prosecution for violation of the duty of reporting. The severity of tax evasion is reflected in criminal law, according to which the king's road is to sentence tax offenders to an actual prison sentence and alongside it a monetary fine (see: LCrimA 3385/13 **Dimitshtein v. The State of Israel** (29.5.2013); LCrimA 7790/13 **Haim v. The State of Israel** (20.11.2013), section 7 of the ruling, and the references therein)). In this regard we shall present the statements of Justice Y. Danziger, in the Hajama case:

"This Court has long ago pointed out the great severity of economic criminality, which has become a bane of existence in our places, and its severe harm to the general public and

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the economy. My colleague Justice D. Barak-Erez well noted the importance of economic criminality... That:

“Despite its 'clean' character, it is no less 'dirty', and its damage in many cases even exceeds the damage of traditional property offenses...

...These statements are all the more so true in respect of tax offenses that have a foundation of fraud and their purpose is to evade tax payment in a manner that violates the principle of equality in bearing the tax burden, and the severity of which is intensified where they are committed systematically over a prolonged period and in view of the scope of the tax evaded...” (CrimA 4316/13 The State of Israel v. Hajama, section 17 of the judgment, (30.10.2014)).

"An interesting idea... I shall not deny" – classification of tips – re-examination

99. Details of these obstacles, the outcome of the given legal situation, and understanding that it is undesirable that this situation would continue, require the Court in conducting its judicial role as mediator **“on the gap between between law and the varying social reality”** (A. Barak, **Selected Essays Vol. IV - On the Court and its Justices**, pp. 42 and 131 (2017); hereinafter – **Barak**).

"The state of the situation"

100. The reality is that in practice the restaurant regulates the manner of addressing the tip in respect of each of its waiters within the framework of a systemic arrangement, it sets out regarding its conduct and operation. As part of this, tips are paid as wages to the waiter in exchange for his work. In practice, currently a tip is given by the restaurant guest for the entire chain of service, from the quality of food, for the manner of serving it, through the restaurant's atmosphere and character. The chain of service has many links, and this is not necessarily a single waiter serving a particular diner from A to Z. Usually, in addition to waiters, the chain of service also includes bartenders, kitchen workers and other service providers. Our word "waiter" therefore includes all the service providers at the restaurant, and all of these shall be referred to

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hereinafter as – **Service Chain Employees**. The actual tip rate almost always ranges between 10% to 15% of the price of the meal the diner pays. The common arrangement at restaurants is distribution of tip money among the service chain workers in one way or another.

101. The main capstone upon which the set of rulings in **HCJ Cohen** and **HCJFH Cohen** rely (by the majority justices), at the center of which stands the ruling according to which direct tips are the waiter's income other than from his employer, it being the “voluntariness test”: As Justice Naor in HCJFH Cohen, also we believe there is a real difficulty in leaving the “voluntariness test” intact, as it no longer reflects reality as it is (and perhaps never reflected it as so), and as this is a presumption that had not been examined sufficiently. We believe that the current institution of tipping - and in fact has been for many years – originated in a well-established custom, almost amounting to a valid legal norm, according to which, customers in the restaurant industry are required to pay a tip in the rate of 10% (at least) of the price of the order. To this we add that even if this practice does not result in initiating any legal proceedings against the violator, the social sanction involved in not paying a tip leads to leaving a tip at the determined rate of between 10%-15% depending on the quality of service, and this out of a sense of obligation and as the tip no longer constitutes a “**voluntary gesture**” (**Tips**, p. 116). Under these circumstances it is difficult to state that tipping is an act conducted voluntarily - certainly in respect of the mere payment and to some extent also in respect of its rate.

In our opinion, the position according to which payment of tips cannot be deemed as the customer's voluntary action, is also the custom among many of the restaurant owners themselves, who refrain from including service fees as part of the bill they serve their customers. This is based on the assumption that the service fees would be paid by the customers as tip money, as expressed in many cases that were presented to the Courts.

Considering payment of tips as an action arising from a well-established custom, which almost amounts to a binding legal norm, rather than an act originating from the customer's goodwill, joins the statement that there is no substantive point in justifying separation and distinction between the service provided to the customer as part of his visit at the restaurant, and the other components included in such a visit, including the food and drinks he is served, the chair on which he sits to eat, the atmosphere at the place, which is expressed by its design and the music playing it, etc. Just as the diner does not pay “cooking fees” to the cook or “atmosphere fees” to those responsible for the design and music separately, since there is no justification for pricing each of these components separately – and the customer is indeed served with a bill in

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a total price for the entire dining experience at the restaurant, including all components thereof - there is no justification for paying “service fees” to any of the service chain employees separately for the service he provides. The service chain employees are employed at the restaurant in order to serve the customers. This is exactly their job. This is what they were hired to do. For this they are paid. This is what they are expected to do. In this sense, the service they provide – and for which they are paid a tip – is not a service “**worthy of special consideration**” (as ruled by Justice Rivlin in the **Lieberman** case), but is rather a service that is their ordinary work (see in this regard also **Tips**, p. 110).

As a supplement to this, it should be noted that for the very same reasons, the income from tips, for the purposes of labor laws and national insurance laws, should be regarded as the business’s income rather than that of the service chain employees themselves, and hence their income from tip money constitutes their income from work, from their employer. This is even where the tip money remained, physically, in their hands or in their pockets without first being forwarded to the employer. And all as shall be detailed below.

102. The fall of the “voluntariness” capstone leads to the fall of the entire building, including its top floor which classifies tips as the service chain employees’ work income other than from the employer. In light of this, and noting the difficulty involved in classifying tips as the income of the service chain employees from “an occupation” (as specified in respect of the waiters in the judgments on **HCJ Cohen** and **HCJFH Cohen**, including in Justice Naor’s position), the called for conclusion - and so we rule - **that tips, for the purposes of labor laws and national insurance laws, are to be deemed as income belonging to the business and the income of the service chain employees is from the wages paid by the employer.** This is even if the tip money was paid to them directly by the customer; even if it was paid as the customer’s “will”; even if it were paid without an explicit demand in the bill he was served with; even if it remained in the pockets of the service chain employees without being forwarded, physically, to the employer’s cash register; even if it was paid by means of a payment separate from that through which the bill for the meal was paid; even if it was not registered in the restaurant’s books; and even if it was not registered in the service log.
103. As stated above, we believe there is no practical reason justifying separation and distinction between the service provided to the customer as part of his visit at the restaurant and the other components included in such a visit. Similarly, there is also no reason justifying a distinction between the service chain employees’ income from their work at the restaurant originating from tip

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money and their income from the exact same work, other than from tip money. In light of this, given our ruling according to which income from tips, for the purposes of labor laws and national insurance laws, constitutes the business's income and the work income of the service chain employees paid by the employer, and given the essence of tips as payment intended for the service providers at the restaurant - in the absence of another explicit provision, the default is that an employer may use the tip money only for payment of wages. It is not entitled to make use of the tip money for compulsory payments, pension provisions or for payment of social benefits.

104. Supplementing this, on the level of labor law, we believe there is room to reexamine also the **Malka** case law ruling. We should mention that in the same matter it was ruled that tips paid directly to the waiter without having passed through the restaurant's cash register, do not constitute wages for the purposes of minimum wage. This case law ruling raises discomfort, particularly in those cases where it was found that the waiter, or any of the service chain employees, earned from tip money sums exceeding minimum wage, at times even significantly, and notwithstanding he claimed from his employer minimum wage or supplanting it. This feeling of discomfort stems both from the conduct of the service chain employee, who is usually aware of and agrees to the conditions of his work and continues to work at a restaurant of his own choosing, in light of the amounts of money he earns as part of it, and only after termination of the labor relations he "remembers" that he had not earned minimum wage - this type of conduct is problematic, both as in these cases the purpose of the Minimum Wage Law had been obtained in practice - ensuring an employee earns minimum wages, which would enable him to live with dignity; as well as since insisting on the **Malka** case law ruling and obligating the employer to pay an employee minimum wage under such circumstances, led to the fact that a service chain employee earned double wages, amounting to unjust enrichment.
105. All of the difficulties listed above, as well as the sense of injustice arising from the aforementioned cases and those similar to them, which continue to arrive at the Regional Courts, and the new angle from which they view, in some of their rulings, of the **Malka** case law ruling— require renewed discretion on the issue. We believe that acknowledging tips, whether or not registered in the restaurant's books, constitutes, for the purposes of labor laws and national insurance laws, income that belongs to the business, intended, in the absence of another explicit provision, only for payment of the service chain employees' wages, and constitutes these employees' wages paid by the employer - would

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obtain in this regard two desirable results: Appropriately coping with the difficulties arising from the **Malka** case law ruling, and the second, harmony, uniformity and clarity – both in the field as well as in case law. Admittedly, it is not necessary that a particular legal ruling in a certain context would act in the same manner in all the contexts in which it arises, however since there is great logic in classifying tips as aforementioned, and this is also the classification we acknowledged for the purposes of national insurance laws, applying this classification also on the level of labor laws is called for, certainly as there is substantial justification for this.

Indeed, also in respect of labor laws, including the Minimum Wage Law at the center of the Buda case, there is no justification for distinguishing between a tip that passes through the restaurant's cash register and a tip that does not pass through it. Both here and here the tips are income belonging to the restaurant, the employer determines the working conditions and wage arrangements, including tips, and if a tip is given to any of the service chain employees, it constitutes work income from his employer, whether passed through the employer or not, whether registered in the books or not. Hence, tips are included under the definition of wages by virtue of the provision under section 2(a) of the Minimum Wage Law, according to which **“an employee over the age of 18... is entitled to obtain from his employer wages not less than minimum wage...”**

106. Given all the above, we rule that also for the purposes of labor laws, tip money is to be considered as the work income of the service chain employees from their employer, with all that entails, for example with regard to pension provisions, calculation of severance pay and early notice pay, pursuant to case law.

“It is required to get up and stand on guard...this they have said and done” - change of previous case law rulings

107. Our rulings above constitute a significant change of previous case law rulings and previous practices, including the “voluntariness test”, the “means of registration test” and the “registration in books test”. This is not a negligible matter. To the contrary. In another case we have recently cited the Supreme Court's statements in this regard, according to which changing a previous case law ruling **“occurred and will occur, and it is appropriate for a fair legal system that would examine itself at all times, whether due to an additional consideration or due to an error”** (NIA (National) 33351-11-12 **Dolani** –

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The National Insurance Institute, sections 65-68 of the judgment (26.9.2017)). It was further noted there that in a case where the Court believes that its previous ruling is erroneous, not only is it entitled to deviate from it, but it is also obligated to do so, morally and legally. Subsequently, the questions arising from the Supreme Court's ruling that should be examined, as the Court deviates from a precedent, were detailed, as follows:

- “a. To what extent is the judge convinced that the ruling set in the precedent is erroneous? Should the judge be confident in his position on the matter, the right and duty to insist on his position increases...**
- b. What is the practical outcome of the judgment, in which the judge considers joining his opinion to a position that is unacceptable to him, in respect of the litigants in that trial? To what extent does the judge believe that miscarriage of justice may be incurred as a result of 'following the rules'?**
- c. What is the public failure that may arise due to the uncertainty regarding the legal situation of the issue in question, and what is the severity of this possible failure compared to the failure in leaving the same rule, which the judge believes to be erroneous, valid?**
- d. Does the case law ruling in question, as the judge handling the issue believes, touch the “apple of the eye” of our legal system? Should the judge’s response to this question be yes, his view would be greater supported that not only is he entitled in such a case to deviate from a previous precedent, which he believes to be erroneous, but it is rather his duty to do so**
- e. Is this a case law ruling that took roots over a prolonged period and the public of jurists and potential litigants have acted according to it all that time, or perhaps modifying the issue in dispute and opinions were expressed for and against?**
- f. And as I mentioned above, eventually, to all these points would be added the question of whether the previous judgment was handed down by an ordinary panel of the Court, or perhaps it was handed down by an expanded panel, which was composed for conducting a “further**

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hearing” or due to the importance of the controversial ruling?”...

108. Noting all that has been stated so far, we believe that the case at hand meets all these criteria, and thus justifies deviation from previous case law rulings. It should be well emphasized that we have not lost sight that some of the rulings we wish to change were not ruled by this Court, but rather by the Supreme Court. At the same time, we believe, and after repeatedly warning ourself, that the aforementioned criteria may be exercised under the unique circumstances that were established, them being: Case law, including the Supreme Court's ruling, which includes an explicit call to the legislator for action (and possibly also an expectation that this would indeed be done promptly without delay), significant difficulties in the socioeconomic reality stemming from this ruling, which require an immediate solution and are within this Court's substantive jurisdiction and the ongoing silence of the legislator. Under these circumstances, we should not hesitate. President Barak's statements are relevant to this case:

“The history of law is the history of adapting the law to the changing needs of society. A normative system that does not allow growth, is deemed to calcify. We cannot guarantee stability, certainty, consistency and continuity without ensuring change. Law is stable only when it is in motion. The judge maintains the stability of the law only when he changes it, for the sake of resolving new problems that life has created.” (Barak, 131).

109. Elsewhere, and in another context – of the terms of employment of nursing caregivers living in the patients' homes and the Hours of Work and Rest Law, 5711-1951 application to them, this Court discussed the need for establishing regulation by the Court, where the legislator fails to do so, as stated:

"The right to weekly rest is included within the framework of the sub-constitutional right to fair working conditions, which the State is required to regulate as part of sub-constitutional law, meaning - in our case, as part of the protective legislation. In the event where the legislator fails to regulate this right as part of a legislative arrangement, the Court is required to regulate it by appropriately interpreting protective legislation, or by establishing “Common Law” and setting a case law ruling.

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... Over six year have gone by since handing down the judgment on HCJ Gloten, which forwarded to the legislator to regulate the working hours and rest days of the nursing caregivers who live in their patients' homes, and since as of yet no legal arrangement was made regarding the applicability of the Hours of Work and Rest Law as a rule to the terms of employment of the nursing caregivers; this situation requires the Court to rule on, at least, the normative arrangement concerning the weekly rest and remuneration of the nursing caregivers living in the patient's home. This is to ensure that their rights as a case law ruling and establishing Common Law' - meaning establishing a common law that is consistent with public policy and the principles of Israeli labor laws, and which does not exceed the requirements of the Limitations Clause. This is since, as stated, in Justice Hendel's opinion on HCJFH Gloten it was stated that, "nursing caregivers cannot remain with no rights until the legislator would take the time to make its statements" (LabA (National) 47576-10-12 Zaltman - Petrov, sections 54-55 of the judgment (7.7.2016)).

And these statements are relevant to our case as well, *mutatis mutandis*.

"This is how it is arranged and structured and adjusted" – the details of the new arrangement

110. In summary so far: In light of the significant and wide-ranging difficulties described above, which arise from the current legal situation, and since the legislator continues with its silence, although approximately five years have gone by since handing down the judgment on **HCJFH Cohen** - and there is still no light at the end of the tunnel, it is no more possible to stand on the sideline where it concerns issues that require immediate ruling, and there is no other choice but the Court's complying with the duty imposed on it by law and that it regulate the issue, at least its main aspects, through a ruling, in an expanded panel of this Court. Therefore, we ruled that tips should be deemed as income belonging to the business, and the income of the service chain employees from wages by the employer, without the possibility of separating the two, both on the national insurance law level, as well as on the labor law level. This assertion in turn gives rise to secondary assertions, these being:

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- a) In view of the fact that according to the representation towards the customers and the customary practice, the tip money is intended for payment of wages to the service chain employees – the default, in the absence of another explicit provision on the form of notification to the employee of the working conditions or otherwise by law, is that the employer may use the tip money solely for the purpose of payment of wages to the service chain employees, and this pursuant to the agreed arrangement at the restaurant, which should be explicit and preferably in writing; and it is not entitled to pay compulsory payments from the tip money (the employer's share in the national insurance fees and health tax), pension provisions (the employer's share) or other social rights. These payments are required to be made in respect of the full wages paid to the employee, that is, including the tip money. It should be noted, that the aforementioned is required to be reflected in the registration duties the employer is required to comply with under the Wage Protection Law.
- b) The employer, as the one setting the wage arrangements and all terms of employment at the restaurant, including in respect of tip money, may, subject to any law, arrive at an agreement with the service chain employees in his business, concerning a provision deviating from the aforementioned default (hereinafter – a **Deviating Provision**) For example, a deviating provision prescribing that the employer may use the tip money, exceeding minimum wage or wages at a higher rate agreed upon (hereinafter – **Contractual Wages**) for payment of the compulsory payments applying to the employer, such as its share in the national insurance fees and provisions for pension or payment of the social rights of the service chain employees.
- c) It should be emphasized that such a deviating provision is subject to any law, for example, the provisions under section 5 of the Wage Protection Law (regarding the prohibition of comprehensive wages), section 26b(c) of this Law (concerning a situation where certain components are not included in the pay slip) and section 28 of the Severance Pay Law, 5723-1963 (regarding wages that include severance pay). A deviating provision is also subject to the other protective laws and/or provisions under collective agreements and expansion orders, as well as the restrictions imposed by virtue of contract law and other relevant legislation, noting the circumstance of leaving the tip and the parties involved.

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- d) In any event, whether by default or by a deviating provision, the employee is not to be paid wages at a rate lower than the minimum wage under law or the contractual wages, the higher of the two.
 - e) All mandatory payments required to be deducted from wages are to be deducted from the employee's wages - national insurance fees (the employee's share) and pension provisions (the employee's share).
 - f) Upon the occurrence of an event entitling to payment of an allowance, the Institute is to calculate the allowance based on the waiter's true and full income, which includes the tip money.
 - g) In the event where the national insurance fees were not paid in respect of the tip money, there would be room to consider, given the new case law ruling, whether the Institute is entitled to turn to the employer with an indemnification claim, pursuant to section 369 of the National Insurance Law. In any event, there is no room for denying a benefit or reducing it due to non-payment of insurance fees in respect of tips by any of the service chain employees (pursuant to section 366 of this Law), since it is not he who is required to pay them, pursuant to section 342(b) of the Law.
111. Classification of tips, both for the purposes of national insurance law as well as of labor law, as the service chain employees' wages paid by the employer, as aforementioned, and setting the rules specified above, as deriving directly from the aforementioned classification, provide, as we believe, an appropriate solution for most of the difficulties we discussed and mainly ensure the following three: A. Determining the true wages of a service chain employee; b. Ensuring payment of the service chain employee's social rights based on his real wages; c. Ensuring payment of national insurance allowance in lieu of income based on the service chain employee's true wages.

The date of the arrangement's taking effect

112. The new arrangement requires all concerned parties' preparation. In this regard, it should be noted, as an example, that it is not only just to expose employers to an indemnification claim on the part of the Institute in respect of failure to pay insurance fees for employment prior to handing down this judgment, while in real time they acted pursuant to the given legal situation, according to which the employer is not required to pay national insurance fees in respect of tip money.

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113. Since this arrangement also applies to payment of national insurance fees, in respect of which an annual settling of accounts is conducted every tax year, and in order to enable the legislator time to regulate the issue in a another manner, should it see fit to do so, we order that the new arrangement shall take effect on 1.1.2019, except for the two proceedings at hand. Regarding these two proceedings, the new arrangement shall apply immediately, in accordance with the case law rulings related to the question of applicability and commencement of the change in the case law ruling, including the desire to provide an incentive to the litigant, in the proper cases, to act to change the customary case law ruling (compare in this regard to AAA 7335/10 **The Pensions Officer - The Ministry of Defense v. Lupo**, section 66 of Justice E. Rubinstein's judgment, and the references therein (29.12.2013)).

“The particular and the general are a couple” - from the general to the particular

114. In light of our rulings above, we may continue and implement our rulings on the proceedings before us, each case and its context - and its concrete circumstances.

From the general to the particular - the Keyes case

115. It should be noted that at the center of the Keyes case stood the question of whether in calculating Mr. Keye's unemployment allowance the Institute should have taken into account his income from tips. Prior to turning to examine the arguments of the appeal on their merits, we shall examine of the provisions of the Law concerning unemployment allowances. Section 158(1) of the National Insurance Law, which is relevant to our case, defines a “policyholder” as follows: **“An Israeli resident or temporary resident who has reached the age of 18 and has not yet reached the age set for him..., and he is an employee entitled to wages his employer is required to pay insurance fees for him”**. In other words, the employer's obligation to pay unemployment insurance fees is a condition for the employee's entitlement to an unemployment allowance. Therefore, in our case, it is necessary to rule on charging the restaurant owner with payment of unemployment insurance fees for the employee.

Section 167 of the Law, which concerns calculation of unemployment allowances prescribes under sub-section A that **“unemployment allowance shall be calculated as a percentage of the average daily wages...”** Section 170(a) of the Law, which is relevant to our case, determines the average daily

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wages, as follows: **"The average daily wages, for an unemployed person who is not a soldier, shall be calculated according to the income from which unemployment insurance fees are paid..."** Section 335(e) prescribes that **"a policyholder pursuant to paragraph (1) of the definition of a policyholder under section 158... Unemployment insurance fees shall be paid for him"**. Section 337(a) (1) states that **"the rates of monthly insurance fees under section 335 in respect of an employee are percentages as stated in Schedule 10, of his monthly income"**. Section 342(b) provides that **"the employer is liable for payment of insurance fees for his employee"**, and in subsection (c) states that **"where the insurance fees are paid for an employee pursuant to section 335(a), (d), (e), (g), (h) or (j), the employer shall deduct from the employee's wages a percentage of the income according to which the insurance fees are paid, as stated on Table J and section 337"**. Meaning, pursuant to this provision, an employer is required to deduct from an employee's wages pursuant to section 335(e), which is relevant to our case, a percentage of the income as prescribed under section 337 cited above, which prescribes that the rate of insurance fees are a percentage of the employee's monthly income. And what is the employee's monthly income? Section 344(a) of the National Insurance Law prescribes that **"an employee's monthly income shall be deemed to be his income for the month preceding the 1st of the month in which the date of payment is due, from the sources specified in section 2(2) of the Income Tax Ordinance..."**.

116. As aforementioned, in the Keyes case the Regional Court ruled that Mr. Keyes failed to prove the rate of his income from tip money. Mr. Keyes' appeal is directed mainly against factual findings the Regional Court ruled upon, based on a thorough and in-depth analysis of the various evidence presented to it and based on its direct impression of the witnesses and the evidence. It is well known that the appellate court would tend to refrain from intervening in the rulings of the trial court in cases of this type, and we have not found that the circumstances of the case at hand justify deviation from this rule. Regarding Mr. Keyes' argument according to which the Regional Court should have examined the rates of tips only in respect of the last three months of his employment, we shall briefly note that credibility findings are ruled based on the entire evidence submitted to the Court, and therefore it is possible that certain evidence, although they do not affect the issue in dispute directly, would affect the credibility of any of the parties. The same is true in our case. In any event, the Lower Court ruled that the amounts of tips Mr. Keyes claimed of had not been proven, and this also in respect of the last three months of his work at the restaurant, and we have not seen it fit to intervene in this factual finding as well.

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117. In light of the aforementioned, as we have found that there is no justification for our intervention in any of the findings the Regional Court ruled on, the appeal should be rejected, although in principle tips are wages for which the employer is required to pay insurance fees for the waiter, insurance fees that the employer is required to deduct from the waiter's wages in accordance with the law. Given this result, there is no need under the circumstances of the case to discuss the Institute's arguments regarding its right to turn to the employer as a third party with a claim for indemnification.

From the general to the particular - the Buda case

118. It should be mentioned that in this case the Regional Court ruled that since the tip money had not passed through the restaurant's cash register and no registration was managed for them, they should not be considered to be wages for the purposes of the Minimum Wage Law. In light of our ruling above, according to which a tip is a tip, and wages are wages, even where it had not passed through the restaurant's cash register, and even where no registration was managed for it - the appellant's (D.A Importing & Restaurant Managing Ltd.) argument is accepted in principle, according to which the tips that were paid to Mr. Buda in cash should be deemed to be wages (the tips that were paid to Mr. Buda by a credit card were specified on his pay slip anyway and paid to him as wages), and it is required to cancel its charge with payment of minimum wage differentials.
119. On the other hand, we reject the appellant's arguments relating to its charge for payment of Mr. Buda's sick pay. These arguments are mainly directed against factual findings the Regional Court ruled on regarding the circumstances of termination of the employment relations and the date of their termination. As stated above, in the Keyes' case, the Appellate Court would tend to refrain from intervening the Trial Court's discretion concerning findings of this type, as their being based on the direct and unmediated impression of the entirety of the evidence and the witnesses. We have not found that the circumstances of the matter justify deviation from this rule. In light of the aforementioned, Mr. Buda's case is to be returned to the Regional Court in order to revise the various calculations regarding overtime (including separation between the overtime component and the minimum wage differentials component), and this in accordance with our principled rulings in this judgment, according to which the tip money paid to Mr. Buda should be deemed to be wages, and thus revoke the charge of the appellant with payment of minimum wage differentials.

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Calculation of the overtime remuneration shall be performed pursuant to case law. The Regional Court shall not discuss the sick pay component, as we rejected the appellant's arguments on this matter above, and shall not discuss the other components in respect of which no appeal was filed. In accordance with its new rulings in respect of overtime (including separation between the overtime component and the minimum wage differentials component), the Regional Court shall also rule anew on the rate of expenses and attorney fees the appellant was charged with as part of the proceedings subject matter of this judgment.

“This is not the end. There is still more and more” - prior to conclusion

120. Three notes prior to concluding:

- a) We wish to emphasize that this judgment applies to payment of tips in the restaurant industry only, that is, in restaurants, cafes, bars and pubs, regarding all the employees who constitute part of the service links and who benefit, according to the custom, from tip money.
- b) We are aware that following this judgment, and subsequently following arrangement's taking effect, such or other changes may occur in the restaurant industry, which may adversely affect in some or other degree some of the restaurant owners, their employees or the dining public. Nevertheless, we believe that from an overall perspective, the aforementioned arrangement is a necessary and called-for arrangement pursuant to the basic values of our legal system, and ultimately will benefit all.
- c) The obvious should be clarified and specified, it being that this judgment of ours does not obviate regulation of the issue of tips in whole by the legislator, and this is also desirable and called-for.

The poem has not ended, it is only beginning” - conclusion

121. The appeal in the Buda case is accepted in all concerning the appellant's principled argument (D.A. Importing & Restaurant Managing Ltd.) regarding classification of tips as wages for the purpose of the Minimum Wage Law, and in all concerning revoking its charge with payment of minimum wage differentials as a result thereof. The case shall be returned to the Regional Court in order to make the necessary calculations based on these rulings, as stated in

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section 119 above. The appellant's arguments related to sick pay – are rejected. Given the outcome, Mr. Buda shall bear the appellant's expenses for its appeal and attorney fees in a total rate of NIS 5,000, to be paid within 30 days from today.

122. The appeal in the Keyes case is rejected. In accordance with the policy of awarding expenses in national insurance proceedings, each party shall bear its own expenses.

Handed down today, 10 Nissan 5778 (March 26, 2018) in the presence of the parties.

(Signature)	(Signature)	(Signature)
President Yigal Plitman presiding judge	Varda Wirth Livne, Deputy President	Leah Glicksman, Judge
(Signature)		(Signature)
Ilan Itah, Judge		Roy Poliak, Judge
(Signature)		(Signature)
Ms. Michal Biron Ben Gera, Public Representative (Employees)		Mrs. Yodfat Harel Buchris, Public Representative (Employers)