

CALIFORNIA STATE BOARD OF EQUALIZATION
APPEALS DIVISION SUMMARY FOR BOARD HEARING

In the Matter of the Petition for Redetermination)
Under the Sales and Use Tax Law of:)
CYPRESS SEMICONDUCTOR) Account Number: SR GH 100-351292
PROCUREMENT, LLC) Case ID 445411
Petitioner) San Jose, Santa Clara County

Type of Transaction: Sale of semiconductor manufacturing equipment

Audit period: 10/01/04 – 09/30/07

<u>Item</u>	<u>Disputed Amount</u>
Unreported sale of leased equipment	\$16,974,727
Tax as determined:	\$1,872,525.53
Adjustment - Appeals Division	- 472,110.54
Proposed redetermination, protested	<u>\$1,400,414.99</u>
Proposed tax redetermination`	\$1,400,414.99
Interest through 4/30/11	<u>492,479.32</u>
Total tax and interest	<u>\$1,892,894.31</u>
Monthly interest beginning 5/1/11	<u>\$ 8,169.09</u>

This matter was scheduled for Board hearing on January 27, 2011, but was postponed at petitioner’s request because its representative had a scheduling conflict.

UNRESOLVED ISSUE

Issue: Whether petitioner made a taxable sale of the equipment at issue. We find that it did.

In 2003, Cypress Semiconductor Corporation (CSC) created petitioner as a single member limited liability company. Petitioner began purchasing equipment in 2004, and did not pay sales tax reimbursement in connection with those purchases. Petitioner then leased the equipment to CSC. The lease agreement provided that title to the leased equipment remained with petitioner, and CSC would be in default if it attempted to sell or transfer the equipment. CSC installed the leased equipment at its fabrication facility known as Silicon Valley Technology Center (SVTC). The equipment was attached to the foundation, to the building, or to other pieces of equipment. CSC owned the realty, furnishings, and equipment except, as relevant here, the equipment owned by petitioner and leased to CSC. In

1 January 2007, CSC sold SVTC, apparently as a turnkey semiconductor fabrication facility, to
2 Semiconductor Technology Services (STS), transferring ownership of all on-site assets, including the
3 equipment CSC had leased from petitioner. Following that sale, CSC paid \$16,974,727 to petitioner
4 for the previously-leased equipment. Petitioner did not report that sale as taxable.

5 The Sales and Use Tax Department (Department) concluded there had actually been two sales
6 involved in the transfer of the fabrication facility to STS: a sale by CSC to STS of the land, building(s)
7 and all other assets owned by CSC and a taxable sale of the equipment by *petitioner* to STS.

8 Petitioner denies that it sold the equipment to STS, claiming that CSC, as the entity controlling
9 petitioner, sold the equipment as part of the sale of the fabrication facility. Citing California Code of
10 Regulations, title 18, section (Regulation) 1596, subdivision (c), petitioner claims that the transfer of
11 equipment was not subject to tax because the sale of the fabrication facility was a transfer “in place” of
12 affixed fixtures or machinery and equipment, and removal of the fixtures or machinery and equipment
13 by the seller was not contemplated by the contract of sale.

14 Four key facts are undisputed: 1) petitioner was the owner of the equipment throughout the
15 term of the lease and at least until CSC sold SVTC to STS; 2) petitioner was not a party to the
16 agreement that transferred ownership of SVTC from CSC to STS; 3) upon its purchase of SVTC from
17 CSC, STS became the owner of the equipment previously owned by petitioner; and 4) petitioner
18 received consideration for the transfer of title to the equipment. Thus, since the equipment was owned
19 by petitioner before the sale and by STS after the sale, the one thing we know with absolute certainty is
20 that petitioner transferred title to the equipment to *someone*, either CSC or STS. Based on our review
21 of the contract for the sale of SVTC and the lease between CSC and petitioner, and taking into account
22 that CSC was the sole owner of petitioner, we find that CSC sold the entire facility of SVTC, including
23 the subject equipment, to STS. However, in order to have done this, CSC must have acquired title to
24 the equipment from petitioner. Thus, whether CSC acquired title to the subject equipment because of
25 its very act of executing a contract that sold the equipment with the real property, or it acquired the
26 equipment at some point before the sale of SVTC was effected, we find that, at the moment of sale of
27 SVTC, CSC owned the equipment and the real property to which it was attached, and it sold the entire
28 SVTC with no intent that the equipment be severed from the real property. On that basis, we conclude

1 that the sale of SVTC by CSC to STS was a sale of real property that was not subject to sales tax.
2 (Cal. Code Regs., tit. 18, § 1596, subd. (c).) The remaining question is how tax applies to the sale of
3 equipment by petitioner to CSC.

4 During the term of the lease of the subject equipment to CSC, petitioner retained title to the
5 leased equipment. CSC then acquired title to the subject equipment from petitioner so that CSC could
6 sell the entire SVTC facility, including the subject equipment, to STS. Since, as petitioner argues and
7 we find, the sale of SVTC was a sale of real property, petitioner did not sell the equipment to CSC for
8 resale in the form of tangible personal property. Rather, once CSC purchased the equipment from
9 petitioner and owned the equipment as well as the real property to which it was attached, the
10 equipment constituted real property for purposes of Regulation 1596. As such, whether the sale of the
11 equipment to CSC occurred at some point before the sale of the entire facility by CSC to STS or the
12 sale occurred essentially contemporaneously with the sale by CSC of the SVTC facility, that sale of
13 equipment was a retail sale. We therefore conclude that tax applies to petitioner's sale of the
14 equipment to CSC.

15 **RESOLVED ISSUE**

16 Although petitioner's primary contention is that there was no taxable sale of equipment, it also
17 argued that, if there was a taxable sale, the measure of tax was overstated. The Department had
18 calculated the measure of tax at \$22,697,278, using the total amount paid for the transfer (\$53,000,000)
19 and a ratio of the net book value of this equipment to the net book value of all land, buildings, and
20 other property transferred. However, petitioner was paid \$16,974,727, based on the allocation by CSC
21 and STS of the sale price of SVTC. Since the amount paid to petitioner was the same amount that
22 CSC and STS, a third party, agreed was the portion of the selling price of SVTC allocable to the
23 equipment, it appears that petitioner's sale price of the equipment to CSC was set as if at arm's length.
24 We therefore find that the amount subject to tax is \$16,974,727.

25 **OTHER DEVELOPMENTS**

26 None.

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28 Summary prepared by Deborah A. Cumins, Business Taxes Specialist III