IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CYPRESS SEMICONDUCTOR CORPORATION, Plaintiff,	)	
v.	)	C.A. No.: 11C-10-103 FSS CCLD **(E-FILED)**
SVTC TECHNOLOGIES, LLC, Defendant.	)	

Submitted: March 9, 2012
Decided: June 29, 2012

ORDER

Upon SVTC Technologies, LLC's Motion for Judgment on the Pleadings - *DENIED*.

This contract dispute stems from a California semiconductor factory's sale. For present purposes, the factory had two components: (1) the realty, building, furnishings, etc., owned by the seller, and (2) five pieces of manufacturing equipment, leased by the seller from a wholly-owned subsidiary. After the sale, California's tax collector audited the transaction and taxed the subsidiary on the equipment's transfer. In the process, the tax collector held that as to the ultimate buyer, the equipment's transfer was tax exempt.

Under the contract, an asset purchase agreement, the buyer agrees to pay any tax "imposed by reason of the Purchased Assets provided hereunder. . ." Accordingly, the parties disagree as to whether the tax imposed on the subsidiary, a separate taxpayer and a non-party to the contract, is embraced by the contract. This case will eventually decide who pays the tax imposed on the subsidiary.

I.

The pleadings and the documents to which they refer show that on January 29, 2007, Plaintiff, Cypress Semiconductor Corporation, and Defendant, SVTC Technologies, LLC's predecessor, Semiconductor Technology Service, LLC, signed an Asset Purchase Agreement for CSC's Silicon Valley Technology Center, a turnkey, semiconductor fabrication facility. (After the sale, STS renamed itself SVTC.) Although CSC was the seller, the sale included not only the realty, furnishings, etc., but also five affixed pieces of equipment with individual software – assets owned by Cypress Procurement, LLC, CSC's subsidiary, and leased to CSC.

Through the Agreement, CSC, in effect, promised to acquire the equipment and software owned by its subsidiary (Procurement) and sell them to SVTC along with the rest of the factory, which CSC already owned outright. As California's State Board of Equalization, a tax collector by another name, would eventually put it: "The only way that CSC could have performed its obligations under

the [Agreement] to transfer title to the subject equipment to [SVTC] is if it held title to the equipment at the time or acted on behalf of the title holder."[1]

The parties were concerned about tax consequences and in the Agreement's Section 2.5 the parties agreed to rely on California's Sales and Use Tax Regulation 1596(c), an exemption, to reduce their overall tax burden on the Purchased Assets.[2] The Agreement also had clauses, set-out below, which assigned to SVTC "any" liability for the sale's tax consequences.[3]

After the sale closed, CSC credited Procurement with $16.97 million to cover the equipment's cost. Procurement, however, paid no tax on those proceeds. Thus, as mentioned in the introduction and explained next, California eventually found Procurement was delinquent and it taxed Procurement on what Procurement received from CSC. This case specifically concerns CSC's claim that although neither Procurement nor the payment made to it by CSC are mentioned in the Asset Agreement, and Procurement is neither a party to the Agreement nor this litigation, SVTC nonetheless must reimburse CSC for the tax it paid on Procurement's behalf. CSC's claim flows from the Agreement's assignment of "any" tax liability to SVTC.

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[1] Pl.'s Supp. Br. In Opp. to Def.'s Mot. for. J. On the Pleadings Ex. R at 8 ("February 23, 2010 California State Board of Equalization Decision and Recommendation.").

[2] *See* Cal. Code Regs. tit. 18, § 1596.

[3] Pl.'s Supp. Br. In Opp. to Def.'s Mot. for. J. On the Pleadings Ex. H at 16-17 ("January 29, 2007 Asset Purchase Agreement.").

II.

In August 2007, California's Sales and Use Tax Department, the enforcement arm of California's State Board of Equalization, after auditing the SVTC transaction, determined there had been a taxable but unreported event – the sale of leased equipment by Procurement. The Department concluded that Procurement, a California seller's permit holder, had underpaid its California sales and use tax, and the Department assessed tax and interest against Procurement.

On March 7, 2008, pursuant to Section 9.2(b) of the Asset Agreement, CSC demanded that SVTC indemnify CSC for the tax imposed on Procurement. On April 24, 2008, SVTC rejected CSC's demand, but it agreed to help CSC contest the tax assessment, which it did. Meanwhile, the Department denied the contest filed by Procurement and issued its Notice of Determination on April 18, 2008, stating Procurement owed approximately $1.9 million in tax, plus accrued interest. On May 8, 2008, Procurement petitioned for redetermination.

On February 23, 2010, the SBE's Appeals Division recommended that the SBE impose the tax and interest, except that it reduced the recommended "measure of tax," thereby lowering the tax assessment to $1.4 million.[4] Not that it

[4] *Id.* Ex. T at 3 ("August 31, 2010 California State Board of Equalization Supplemental Decision and Recommendation."); *see also* February 23, 2010 California State Board of Equalization Decision and Recommendation.

matters here, the Appeals Division basically decided that as to the measure of tax, the auditors had to accept the value placed on the equipment by the parties, rather than the higher, book value the auditors had come up with.

On March 24, 2010, PricewaterhouseCoopers, Procurement's tax advisor, filed a Request for Reconsideration of Decision and Recommendation. On August 31, 2010, the Appeals Division issued a supplemental decision standing by its earlier recommendation, but slightly amplifying its justification. After a postponement at Procurement's request, the SBE heard the Appeal's Division's recommendation on April 27, 2011. On May 2, 2011, the SBE's Board Proceedings Division, "as a courtesy," informed Procurement that the SBE had accepted the Appeal Division's recommendation as to the measure of tax. The courtesy letter told Procurement to expect a formal notice from the SBE.

The SBE's formal notice is a single-page, "Billing and Refund Notice," dated May 17, 2011, issued to "CYPRESS SEMICOND. PROC. LLC." The notice simply says:

> The Board concluded that petitioner made a taxable sale of the equipment at issue, and no further adjustments are warranted to the measure of tax. Accordingly, the Board ordered the tax redetermined to $1,404,414.99.[5]

[5] *Id.* Ex. U.

It also warns that an additional penalty would be added if the tax and interest were not paid by June 16, 2011. The notice appears to be the SBE's final word on the tax imposed by virtue of the leased equipment's transfer.

On May 26, 2011, a CSC vice-president over-nighted a letter to SVTC notifying SVTC of the May 17, 2011 notice, and demanding that SVTC remit the amount due.[6] On May 31, 2011, Procurement paid the tax and interest, which stopped further interest from accruing and headed-off the penalty threatened by the May 17, 2011 notice.[7] On June 6, 2011, as it had done in response to CSC's demand in 2008, SVTC replied that it was not liable for Procurement's taxes. SVTC's June 6, 2011 denial precipitated this litigation.[8]

III.

Initially, CSC filed suit in California. SVTC moved to dismiss, citing Delaware as the parties' contractually agreed-upon forum.[9] CSC voluntary dismissed, and on October 12, 2011, it re-filed here, alleging breach of contract over the tax payment. On November 2, 2011, SVTC answered, but also filed this motion for

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[6] *Id.* Ex. V.

[7] *Id.* Ex. W.

[8] *Id.* Ex. X.

[9] *See* Def.'s Mot. for. J. On the Pleadings 5 n.3.

judgment on the pleadings.[10]

On December 19, 2011, the court heard oral argument and allowed CSC to provide supplemental evidence supporting an inference that the parties contemplated SVTC's paying the sales tax imposed on Procurement and paid by CSC on May 31, 2011.

On January 31, 2012, CSC submitted its supplemental evidence: an e-mail from SVTC's financier, SVTC's pre-sale due diligence, and tax advisor reports. On March 9, 2012, SVTC responded.

IV.

Basically, three Asset Purchase Agreement provisions are at issue. Section 2.1 states, in pertinent part:

> Upon . . . Closing, [CSC] shall . . . convey . . . to [SVTC] . . . all of [CSC's] . . . following properties: all of the wafer fabrication and related equipment and other fixed assets primarily related to the Business located with the Seller's Facilities.

Section 2.5 states, in pertinent part:

> [SVTC] shall be responsible for any . . . transfer Taxes and any sales, use or other Taxes imposed by reason of the transfers of Purchased Assets provided hereunder. . . .

[10] Super. Ct. Civ. R. 12(c).

Section 9.2(b) states, in pertinent part:

> Subsequent to the Closing, [SVTC] shall indemnify [CSC] against any damages incurred by [CSC] for any Liabilities for Taxes attributable to the Purchased Assets for any Post-Closing Tax Period and any Transfer Taxes that are the responsibility of [SVTC] pursuant to Section 2.5 of this Agreement.

(A fourth, noncontroversial section provides that a potential tax, e.g. a transfer tax, sales tax, use tax, etc., is generically referred to as a "transfer tax."[11] Accordingly,"sale" and "transfer," or "sales tax" and "transfer tax" are used interchangeably here.)

CSC argues the relevant provisions, read together, require SVTC to pay the tax imposed on Procurement because it was imposed by reason of the transfer of Purchased Assets and it is attributable to them. As mentioned, CSC focuses heavily on the Agreement's reference to "any" tax and "any liability." According to CSC, "any" tax includes every tax imposed on anyone, including a non-party, if the tax was caused by the Purchased Assets' sale. And by the same token, "any" liability includes CSC's obligation (if that is what it is) to reimburse Procurement for the tax. Therefore, under the Agreement, SVTC must reimburse CSC for the tax CSC paid on Procurement's behalf, because it was occasioned by the Purchased Assets transfer to

[11]Asset Purchase Agreement at 12.

SVTC.

SVTC focuses on Section 2.5, arguing the "Purchased Assets provided hereunder" only refers to the agreed upon CSC-SVTC asset transfer, not the asset transfer from Procurement for CSC's benefit, which made the agreed upon CSC-SVTC transfer possible. Nor does the contract require that SVTC must cover a tax imposed on a non-party to both the Agreement and this lawsuit. Similarly, it does not require reimbursing CSC for a tax paid by CSC on any non-party's behalf. SVTC tacitly agrees it would have had to reimburse for "any" tax imposed by the SBE on CSC stemming from the CSC-SVTC transfer. Because, however, the SBE expressly held that the CSC-SVTC transfer was non-taxable, SVTC does not have to pay any tax imposed on Procurement, even if CSC covered it.

V.

Contract interpretation is a question of law.[12] On a motion for judgment on the pleadings, this court must view the complaint's non-conclusory allegations and any inferences drawn from them in a light most favorable to CSC. The court may also consider documents and matters of record referred to in the complaint, such as the tax determinations in the SBE proceeding, giving rise to the disputed liability.

A motion for judgment on the pleadings is like a motion to dismiss in

[12] *O'Brien v. Progressive Northern Ins. Co.,* 785 A.2d 281, 286 (Del. 2001).

that it admits, for the motion's purpose, the opposing party's allegations but contends that they are insufficient at law.[13] The motion presents a question of law and cannot be granted where the pleadings raise any material issue of fact.[14]

As mentioned, CSC alleges SVTC breached the contract. A breach of contract claim's elements are generally: (I) a contractual obligation between parties; (ii) a breach; and (iii) damages.[15] When interpreting a contract, the court gives effect to all provisions contained in the contract's four corners.[16] "When a contract is clear and unambiguous, [the court gives] effect to the plain-meaning of the contract's terms and provisions."[17] If a contract is unambiguous, extrinsic evidence may not be used to interpret the parties' intent, vary the contract's terms, or create an ambiguity.[18]

Disagreement over interpretation does not render a contract ambiguous.[19] Courts must be circumspect when considering a contract's language, especially when the contact is between sophisticated, commercial entities. "[C]reating an ambiguity

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[13] *Fagnani v. Integrity Fin. Corp.*, 167 A.2d 67, 75 (Del. Super. 1960).

[14] *Id.*

[15] *Interim Healthcare, Inc. v. Spherion Corp.,* 884 A.2d 513, 548 (Del. Super. 2005).

[16] *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012)

[17] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159-60 (Del. 2010).

[18] *Eagle Industries, Inc. v. DeVilbiss Health Care, Inc.,* 702 A.2d 1228, 1232 (Del. 1997).

[19] *Interim Healthcare, Inc.,* 884 A.2d at 546.

where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented."[20]

An ambiguity, however, exists when the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings.[21] Where a contract is ambiguous, the court must look beyond its language to ascertain the parties' intentions.[22] Extrinsic evidence, such as prior communications and course of dealing, must be considered to resolve the ambiguity.[23]

VI.

In California, a "transfer of title to or possession of tangible personal property for consideration," is a sale of personal property.[24] Leased fixtures are deemed tangible personal property if the lessor has the right to remove them in the event of breach or termination of the lease.[25] Apparently, the lease between Procurement and CSC stated that the equipment remained Procurement's personal property even though it was affixed, and gave Procurement the right to remove it

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[20] *O'Brien*, 785 A.2d at 288 (*quoting Rhone-Poulenc Basic Chems. Co. v. American Motorists Ins. Co.,* 616 A.2d 1192, 1196 (Del. 1992)).

[21] *GMG Capital Investments, LLC*, 36 A.3d at 780.

[22] *Id.*

[23] *Id.* at 784.

[24] Cal. Rev. & Tax. Code § 6006.

[25] *Id.* § 6013.3.

upon CSC's default. On its face, therefore, it appears that the transfer of title and possession of the leased equipment amounted to a sale of personal property.

Sales tax is imposed on all personal property sales in California, unless the sale is specifically exempt.[26] Regulation 1596(c) provides, in pertinent part:

> The transfer 'in place' of affixed . . . machinery and equipment . . . is taxable as a sale of personal property when removal of the . . . machinery or equipment by the seller or purchaser is contemplated by the contract of sale.[27]

By negative implication, therefore, Regulation 1596(c), creates an exemption. If there is a sale of fixed assets remaining in place, there is no tax. The equipment's sale to SVTC fits the Regulation 1596(c) exemption, and the SBE has consistently held to that effect.

So far, besides its being the tax man, the parties have let the court wonder why the SBE was so interested taxing Procurement on this deal. The court sees a clue in the February 23, 2010, Decision and Recommendation where the Appeals Division mentions that when Procurement originally bought the equipment, it paid no sales tax; nor did it pay tax when it turned around and leased the equipment to CSC. Accordingly, as far as the court can tell, had the whole deal been ruled

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[26] *Id.* § 6051.

[27] Cal. Code Regs. tit. 18, § 1596(c)

exempt, California would miss the $1.4 million tax on $17 million of personal property.

Anyway, the Appeals Division struggled to find its way of keeping the tax from slipping entirely through the SBE's fingers. First, in its February 23, 2010, Decision and Recommendation, the Appeals Division saw the asset transfer as two transactions: "CSC's sale of its realty and other assets to [SVTC] and [Procurement's] sale of its equipment to [SVTC] with CSC acting as Procurement's agent."[28] As the Appeals Division saw it, Procurement leased its assets to CSC, so CSC never owned them. Accordingly, the Appeals Division determined Procurement never sold its assets to CSC. Moreover, Procurement was not entitled to claim that the equipment was sold in place, because Procurement did not own the building to which the equipment was attached. Thus, the Regulation 1596(c) exemption did not apply.[29]

Not that it matters much now, the Appeals Division also recommended reducing the tax measure used by the Department. The Appeals Division accepted the actual purchase price, rather than the book value the auditors arrived at.

In its Request for Reconsideration of the February 23, 2010, Decision and Recommendation, Procurement asserted that CSC's sale of SVTC, including the

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[28] Feb. 23, 2010 Decision at 9-10.

[29] *Id.* at 10.

equipment, was through a single, integrated asset purchase agreement satisfying Regulation 1596(c)'s requirements for tax avoidance. In its August 31, 2010, Supplemental Decision and Recommendation, the Appeals Division held:

> The one thing that we know with absolute certainty is that [Procurement] transferred title to the equipment *to someone*, and the transferee had to be either CSC or [SVTC].[30]

If the transfer had been directly to SVTC, it could not have been from CSC, as CSC never held title to the equipment. In that case, it had to have been, as originally determined, that CSC transferred the five pieces of equipment to SVTC as Procurement's agent, with CSC turning over to Procurement its $16.97 million share of the sale's total proceeds.[31] If, however, CSC were not Procurement's agent, as Procurement argued, then the only other possibility is Procurement sold its assets to CSC, thus enabling CSC to sell the entire facility to SVTC.[32] Either way, the SBE viewed the equipment's transfer by Procurement *"to someone*" as a taxable, non-exempt transaction on Procurement's part.

VII.

At the December 19, 2011 oral argument, the court stated:

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[30] Aug. 23, 2010 Supplemental Decision at 4.

[31] *Id.*

[32] *Id.*

> [CSC has] leave to present [] evidence that supports the idea that this contract contemplated the transfer of the equipment from Procurement . . . to CSC, . . . and that [CSC] had in mind the tax that was going to be occasioned and having in mind that they would not be paying it and then it would become part of [SVTC's] obligation.[33]

CSC's preview of its extrinsic evidence consists of: (1) an e-mail from SVTC's financier; (2) SVTC's pre-sale due diligence; and (3) SVTC's having hired tax advisors. CSC also highlights Sections 2.1 and 2.5, two contested contractual provisions.

The e-mail from SVTC's financier, states, in part:

> Pursuant to the Asset Agreement, [SVTC] is responsible for paying sales and use taxes on the transaction. . . . It is our understanding that assets will be acquired from CSC and its wholly owned subsidiary, Procurement.

Arguably, this e-mail shows SVTC knew it was buying taxable, Procurement-owned assets for which SVTC might be responsible under the Agreement.

Second, CSC alleges SVTC's due diligence also put SVTC on notice that it was buying assets from both CSC and Procurement. Therefore, SVTC could be liable for transfer taxes. The pleadings allege SVTC spoke with CSC about how the

[33] Hr'g Trans. 40:16-41:6, Dec. 19, 2011.

assets were held, toured facilities, and "understood that assets would be acquired from Cypress Semiconductor and its wholly owned subsidiary Cypress Procurement."[34]

Third, CSC alleges the tax advisors' reports suggest SVTC would be liable for Procurement-CSC's transfer tax. PricewaterhouseCoopers's report listed CSC's assets subject to California's sales and use tax. Ernst & Young then estimated SVTC's tax liability based on PricewaterhouseCoopers's asset values.

In fairness, the tax advisors' reports, themselves, do not suggest that the contract contemplated SVTC's paying Procurement's transfer taxes if CSC chose to cover them. Both tax advisors considered the transaction to be between CSC and SVTC only.[35] Procurement is not mentioned anywhere in Ernst & Young's report. Additionally, CSC admits that "Procurement was not explicitly listed as a party to the agreement."[36]

CSC argues two pivotal contractual provisions support its interpretation. Section 2.1 requires CSC to transfer the "Purchased Assets" to SVTC, including assets owned by CSC and Procurement. CSC argues this provision puts SVTC on notice about CSC's transferring assets from subsidiaries.

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[34] *See* Pl.'s Supplemental Br. In Opp. to Def.'s Mot. For J. on the Pleadings at 11.

[35] *Id.* Ex. F at 10. *See also id.* Ex. B at 2.

[36] Pl.'s Supplemental Br. In Opp. to Def.'s Mot. For J. on the Pleadings at 6.

CSC, in its core argument, contends Section 2.5 supports its interpretation, because Section 2.5 does not limit SVTC's tax liability. Again, Section 2.5 states:

> For purposes of determining the Closing Date Transfer Taxes, [CSC] will rely . . . on the [California Sales and Use Tax Regulation 1596] exemption, and [SVTC] hereby acknowledges [CSC's] reliance on such exemption; *provided, however,* that nothing in the foregoing clause shall limit [CSC's or SVTC's] liability for Transfer Taxes pursuant to Section 2.5 and Article IX.

By reading Sections 2.1 and 2.5 together, it is reasonable to argue SVTC knew it was acquiring assets from CSC and its subsidiary in a way that would indirectly result in a reimbursable liability for CSC. Thus, under Sections 2.5 and 9.2(b), SVTC indirectly assumed Procurement's tax obligation.

Taking into account what the court can glean from the pleadings and associated documents, the court cannot, as a matter of law, accept SVTC's argument that the "any" tax and "any liability" provisions do not apply to a tax that would not have been imposed but for the factory's sale to SVTC. In other words, there are two reasonable ways to view the Agreement when it comes to the tax in question. That means the Agreement is ambiguous.

Along with the rest, such as the negotiation history, the court is

interested in knowing why CSC covered the tax. The court also wants to know whether the tax was, in effect, a recapture from the equipment's purchase in 2004, and, if so, what that means. The court is, however, optimistic that the case will lend itself to summary judgment or a limited fact-finding process in the end.

VIII.

For the foregoing reasons, SVTC's motion for judgment on the pleadings is **DENIED.**

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary (Civil)
pc: Kathleen Furey McDonough, Esquire
Michael B. Rush, Esquire
Raymond J. DiCamillo, Esquire
Kevin M. Gallagher, Esquire