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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DICON FIBEROPTICS, INC., Plaintiff and Appellant, v. FRANCHISE TAX BOARD, Defendant and Respondent.	No. ____________ Court of Appeal No. B202997 (Los Angeles County Superior Court No. BC367885)

SUPREME COURT
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Second Appellate District, Division Eight, No. B202997

Los Angeles County Superior Court Case No. BC367885

The Honorable Mel Red Recana, Judge

PETITION FOR REVIEW

EDMUND G. BROWN JR.
Attorney General of California
DAVID S. CHANEY
Chief Assistant Attorney General
PAUL D. GIFFORD
Senior Assistant Attorney General
GORDON BURNS
Deputy Solicitor General
W. DEAN FREEMAN
Supervising Deputy Attorney General
State Bar No. 73869
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2489
Fax: (213) 897-5775
Email: dean.freeman@doj.ca.gov

Attorneys for Defendant and Respondent Franchise Tax Board of the State of California

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Under rule 8.500(b)(1) of the California Rules of Court, the Franchise Tax Board of the State of California (Board), defendant and respondent, petitions for review of a published decision of the Court of Appeal, Second Appellate District, Division Eight, issued on May 7, 2009, which reversed the order of the Los Angeles County Superior Court granting the Board's demurrer without leave to amend.

ISSUES PRESENTED

Revenue and Taxation Code section 23622.7 provides for a tax credit to employers that operate in depressed areas (called *enterprise zones*) and hire disadvantaged workers (called *qualified employees*). In addition to other requirements, an employer seeking to obtain the tax credit must obtain from one of several authorized entities, including the enterprise zone administrator, a *voucher* that certifies that its worker meets the statutory requirements to be a qualified employee. (Rev. & Tax. Code, § 23622.7, subds. (a), (c)(1), (c)(2).)

The issue presented is:

When an employer seeks a tax refund from the Franchise Tax Board for allegedly hiring a qualified employee under Revenue and Taxation Code section 23622.7, and the employer's only supporting documentation is a voucher issued by an enterprise zone agency, is the voucher prima facie evidence that a worker is a "qualified employee" that shifts the burden of proof to the Board?

STATEMENT

1. To encourage economic growth in areas that suffer from persistent unemployment, the Legislature enacted the Enterprise Zone Act, Government Code section 7070 et seq., which allows local governments to apply for and obtain enterprise zone designation for economically depressed areas. (Gov. Code, §§ 7072, subd. (d), 7073, subds. (a) and (b).)

Revenue and Taxation Code section 23622.7 provides a tax credit for enterprise zone businesses that hire eligible disadvantaged workers, or "qualified employees." The amount of the tax credit varies between ten and fifty percent of a worker's wages, depending upon several factors. (Rev. & Tax. Code, § 23622.7, subd. (b)(1)(A).)[1]

Section 23622.7, subdivision (c)(1) allows employers to obtain vouchers from one of several authorized entities—including local job training programs, social services agencies, or enterprise zone administrators—certifying "that a qualified employee meets the eligibility requirements" for the enterprise zone tax credit. (§ 23622.7, subd. (c)(1).) The vouchers at issue here were obtained from an enterprise zone administrator in Richmond, California. (AA at p. 18, lns. 17-18.)[2]

The Board has serious concerns about abuses of the voucher program. Although enterprise zone administrators are established by statute, they often function more like a trade group or marketing organization. (Gov. Code, §§ 7076, subds. (a)(1)(B) and (C), 7076.1, subd. (b).) And while there are a host of statutory restrictions upon employee eligibility, there are few statutory restrictions upon an enterprise zone's issuance of vouchers. For example, vouchers may be issued years after the employment takes place, and employers continue to obtain and produce vouchers from enterprise zones other than the one(s) in which they operate. There is also no requirement that an agency that issues vouchers ever communicate with the employees for whom it is requested to supply

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[1] All subsequent statutory references are to the Revenue and Taxation Code unless otherwise noted.

[2] The designation "AA" refers to the Appellant's Appendix filed in the Court of Appeal. References thereto are indicated by "AA at p. [page], ln. [line]."

vouchers. Nor, until November 26, 2006, was there a requirement that enterprise zone agencies keep any voucher records. (Cal. Code Regs., tit. 25, § 8463, subd. (a)(1).) As the Los Angeles Times reported: "Loopholes, lax oversight and alleged cheating have allowed companies to profit from the state's enterprise zone program, in some cases shaving millions off their tax bills without meeting requirements." (Evan Halper, *State Tax Breaks Benefits Companies, Not Workers*, L.A. Times, Jan. 31, 2006 , at 1, available at 2006 WLNR 6950200.) [3]

2. Dicon Fiberoptics, Inc. does business in an enterprise zone. (Slip Op. at p. 4; AA at p. 17, lns. 9-12.) In November, 2003, Dicon filed an amended tax return for its taxable year ending March 31, 2001—which is treated by law as a claim for refund pursuant to section 19322—in which it claimed over $3 million in enterprise zone tax credits. (AA at p. 15, lns. 9-12.)[4] The Board denied approximately $1 million of the $3 million claim. (AA at P. 19, Ins. 5-6.)

Dicon then filed a tax-refund action against the Board under section 19382. (AA at p. 3, lns. 21-23.) The suit claimed that in order to receive an enterprise zone tax credit an employer need only obtain a voucher from an enterprise zone and present it to the Board upon request. (AA at p. 17, lns. 16-20.) It claimed that the Board wrongfully refused to accept Dicon's vouchers as sufficient, but instead requested additional evidence of employee eligibility. (AA at p. 18, lns. 7-9.) Under Dicon's interpretation

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[3] The Times also noted that officials "are auditing hundreds of companies that they suspect have received dubious credits totaling $100 million." (*Ibid.*)

[4] Unlike deductions, which reduce the amount of income subject to tax, credits are a dollar for dollar reduction in the amount of taxes owed. (*Gray v. Franchise Tax Board* (1991) 235 Cal.App.3d 36, 40)

of section 23622.7, enterprise zone vouchers are conclusive proof of worker eligibility and the Board is barred from auditing or looking behind the vouchers and therefore from requiring additional evidence of worker eligibility.

The Board demurred. In its view, nothing in section 23622.7 barred it from requiring employers to provide additional evidence that their workers met the statutory eligibility requirements. It argued, among other things, that its interpretation was supported by the long-standing rules that the taxpayer has the burden of proof in tax-refund cases (AA at p. 36, ln. 3 to p. 37, ln. 17), and that tax credit statutes must be strictly and narrowly construed against the taxpayer (AA at p. 42, ln. 12 to p. 43, ln. 2). The trial court sustained the Board's demurrer without leave to amend. (AA at pp. 240-241.)

3. Dicon appealed, again arguing that under section 23622.7 vouchers are binding on the Board and conclusive proof of worker eligibility. (Slip Op. at p. 7.) Shortly after oral argument the Court of Appeal ordered the parties to submit letter briefs on the previously unraised issue of whether "the voucher [should] be prima facie evidence that the taxpayer was entitled to receive the voucher, thus placing on the board the burden of proving that the voucher does not support the taxpayer receiving a tax credit." (See Slip Op. at p. 7, fn. 6.) The Board argued, among other things, that interpreting section 23622.7 in a way that would make vouchers prima facie evidence would impermissibly relieve the taxpayer of its historical burden of proof, would be inconsistent with the long-standing rule that tax credit statutes are narrowly construed against the taxpayer, and would violate California Constitution article XIII, section 32's restriction on actions that interfere with the collection of taxes.

Although the Court of Appeal ultimately rejected Dicon's interpretation of section 23622.7 that vouchers are conclusive proof, it did

hold that "vouchers are prima facie proof a worker is a 'qualified employee,' but [the Board] may audit such vouchers" and that "[i]n such an audit, [the Board] bears the burden of rebutting the voucher's prima facie value . . . ." (Slip Op. at p. 7.) The court acknowledged that the Legislature understands how to designate something as prima facie evidence, and that it did not do so here, but the court dismissed this omission as "legislative oversight." (Slip Op. at p. 11, fn. 9.) The court also held that an employer may discard all relevant documents other than the voucher, and no adverse inference arises when an employer does so. (*Id.* at p. 12, fn. 10.)

The Board filed a timely petition for rehearing, which was denied on June 2, 2009. This petition follows.

REASONS FOR GRANTING THE PETITION

The court below held that the Board, rather than the employer, bears the burden of proof when the Board conducts an audit to determine whether an employer is entitled to a tax credit for hiring allegedly disadvantaged workers under section 23622.7. To shift the burden to the Board, the employer is required merely to produce a voucher for the employee; indeed, according to the court below, the employer may discard all other supporting documentation that would establish the worker's qualification for the tax credit.

The decision conflicts with fundamental principles of tax law. It is well-settled that (1) the taxpayer, not the Board, bears the burden of proof when claiming a tax refund unless the Legislature provides otherwise; (2) courts construe statutes that grant tax credits narrowly and strictly against taxpayers; and (3) the Constitution bars pre-payment tax litigation and actions which hinder or interfere with the collection of taxes.

Additionally, if the decision below stands, the Board estimates that the State may eventually lose as much as $150 million in tax revenues, and the decision would make tax refund audits and litigation more difficult and

expensive for the Board at a time when the State faces an unprecedented fiscal crisis.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH LONG-STANDING RULES OF TAX LAW AND EXPOSES THE STATE TO A $150 MILLION LOSS OF TAX REVENUES.

The decision of the Court of Appeal conflicts with three settled principles of tax law. First, in refund actions, tax law has historically, and with very few exceptions, placed the burden of proof on the taxpayer. (*Lewis v. Reynolds* (1932) 284 U.S. 281, 52 S. Ct. 145, 76 L. Ed. 293; *Butler Brothers v. McColgan* (1941) 17 Cal.2d 664, 677.) Second, statutes granting deductions and tax credits "are strictly construed against the taxpayer." (*Miller v. McColgan* (1941) 17 Cal.2d 432, 441-442.) Third, article XIII, section 32 bars pre-payment tax litigation and prohibits courts from hindering or interfering with the Board's collection of taxes. (*Western Oil and Gas Assn. v. State Bd. of Equalization* (1987) 44 Cal.3d 208, 213-14.)

There is also a substantially increased risk that tax credits will be allowed for employees that are statutorily ineligible. In the Board's estimate, the decision of the Court of Appeal places as much as $150 million in tax revenues in jeopardy and increases the cost of the Board's audits and litigation.

Review should be granted to ensure uniformity of law on these important issues.

A. The Court of Appeal's determination that vouchers are prima facie evidence of eligibility for a tax credit shifts the burden of proof to the Board and conflicts with the established rule that the burden of proof is on the taxpayer in tax credit cases.

The Court of Appeal held in this case that vouchers issued by an enterprise zone administrator under section 23622.7, subdivision (c) are "prima facie proof a worker is a 'qualified employee[.]'" (Slip Op. at p. 7.) The court held that the Board "bears the burden of rebutting the voucher's prima facie value . . . ." (*Ibid.*) This interpretation of section 23622.7 conflicts with the rule that taxpayers, not the State, bear the burden of proof.

The rule is well established in this Court. *Butler Brothers v. McColgan* (1941) 17 Cal.2d 664, held in a case where the Franchise Tax Commissioner utilized a formula to allocate the income and deductions of a multi-state corporation that "[t]o rebut the presumption that the formula produced a fair result, the burden is on the taxpayer to make oppression manifest by clear, cogent evidence." (17 Cal.2d at p. 677, internal quotation marks omitted; *El Dorado Oil Works v. McColgan* (1950) 34 Cal.2d 731, 744.) The Court of Appeal has followed suit. (*Todd v. McColgan* (1948) 89 Cal. App. 2d 509, 514 ["The taxpayer cannot merely assert the incorrectness of a determination of a tax or the method used and thereby shift the burden to the commissioner to justify the tax and the correctness thereof."]; *Krumpotich v. Franchise Tax Bd.* (1994) 26 Cal.App.4th 1667, 1671 [rev. den.] [taxpayer claiming a deduction bears the ultimate burden of proving facts to justify the deduction].)

There are, of course, exceptions to the rule, but they are limited to situations where the Constitution or the Legislature shifted the burden to the State. For example, in lawsuits challenging property fees and assessments, article XIIID, section 4(d) of the California Constitution places the burden of proof on local government agencies. (*Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 445.) However, unlike the statute at issue here, the

language in article XIIID, section 4(f) carves out an express exception to the traditional rule: "[i]n any legal action contesting the validity of any assessment, the burden shall be on the agency . . . ." (See also *Auerbach v. Assessment Appeals Bd. No. 2 for County of Los Angeles* (2008) 167 Cal.App.4th 1428, 1439 [Section 167 states that "there shall be a rebuttable presumption affecting the burden of proof in favor of the taxpayer . . . ."]; *Microsoft Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 750, 765 [holding that a particular tax statute, which provides an alternative formula for calculating a business tax, shifts the burden to the party that invokes the statute].)

In addition, the Revenue and Taxation Code contains over 50 different statutes that explicitly make a particular document prima facie evidence. Although most deal with tax agency assessments or liens, they clearly show that the Legislature knows how to make a document prima facie evidence when it so chooses. (See, for example, § 1841 [notice of property tax assessment], § 7058 [mailing certificate of service], and § 7730 [controller's certificate of delinquency].)

By contrast, section 23622.7 says nothing about prima facie evidence, rebuttable presumptions, or the burden of proof. Subdivision (a) states that: "There shall be allowed a credit against the 'tax' (as defined by Section 23036) to a taxpayer who employs a qualified employee in an enterprise zone during the taxable year." (Parenthetical material in original.) Subdivision (b)(4)(A) defines "eligible employee," but again makes no mention of prima facie evidence, rebuttable presumptions, or the burden of proof.

The opinion below, which cites no authority for its holding, appears to rely primarily upon subdivisions (c)(1) and (2) of section 23622.7, which require an employer to obtain a voucher and present it to the Board upon request. The court claimed that Dicon's compliance with subdivisions

(c)(1) and (2) "ought to count for something." (Slip Op. at p. 12.) It does, but not in the way the court determined. Under the Board's interpretation, the statute requires Dicon to obtain and present vouchers as a threshold matter. In other words, vouchers are a prerequisite to the tax credit, not presumptive proof of entitlement thereto. This interpretation is especially reasonable given the Legislature's concern about potential tax abuse in vouchering programs.[5]

The purposes of the rule imposing the burden of proof upon the taxpayer are simple and supported by common sense. In *Honeywell, Inc. v. State Bd. of Equalization* (1982) 128 Cal.App.3d 739, the Court of Appeal explained that the taxpayer (and not the tax collector) creates the transaction which is the subject of the inquiry; the taxpayer has the power to determine the nature of the transaction; the taxpayer has the power to create and retain detailed records or other evidence needed to prove its nature (and proper tax treatment); and the taxpayer also has the power to destroy or conceal the records or other evidence which would establish the taxable nature of such transaction. (*Id.* at pp. 744-745.)

The Court below stated that eligibility documents are not ordinarily within the employer's custody and control. (Slip Op. at p. 12.) This is incorrect. Nothing requires a vouchering agency ever to receive any documents from, or even have any contact with, a prospective employee. In fact, the Board believes that in many cases, if not most, the only documents a vouchering agency receives are from the employer. And nothing bars an employer (or even an agent working for the employer on a

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[5] Originally, section 23622.7 required that eligible employees be participants in certain job programs. In 1994, the Legislature expanded eligibility from program participants to those eligible to participate in the programs. In making this change, the Legislature expressed concern with the added potential for tax abuse. (Slip Op. at p.3.)

contingency basis) from directly contacting voucher agencies and obtaining vouchers years after the fact. In fact, the Board is concerned that this practice is becoming increasingly common.

Against this backdrop the Board is especially concerned about the court's conclusion below that employers have "no duty to maintain the relevant documents" and are free to discard them. (Slip Op. at p. 12, fn. 10.) Again, this conflicts with the general rule, which is that taxpayers must bear the consequences for failing to maintain adequate records.

> Fairness dictates that those persons responsible for paying the tax should maintain sufficiently complete records that the Board or other tax collecting agencies can determine if the correct amount of taxes have been paid. If the records are so deficient that a proper audit cannot be made, the defaulting record-keeping taxpayer must bear the consequences.

(*Paine v. State Bd. of Equalization* (1982) 137 Cal.App.3d 438, 444 (*Paine*).)[6] As a matter of policy, the person having the power to create, maintain, and provide the evidence should carry the burden of proof. (*Morris v. Williams* (1967) 67 Cal.2d 733, 760.)

The court below also stated that making vouchers prima facie proof was necessary to promote the purpose of the tax credit. (Slip Op. at p. 12.) However, there are two reasons this is incorrect. First, as noted above, nothing bars an employer from obtaining its vouchers years after the close of the tax year at issue. Searching through personnel records in an effort to find eligible employees years after they were hired does nothing to promote enterprise zone employment. Second, enterprise zones are in any event

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[6] Even though *Paine* is a sales tax case, the argument therein is nearly identical to the one Dicon made here. As in this case, the taxpayers in *Paine* claimed that certificates they received from third parties established that their sales were tax-exempt. The court rejected the claim: "Nor were they excused from their tax liability by merely maintaining a file of exemption certificates." (*Ibid.*)

ineffective and studies show that enterprise zone tax credits do not increase employment. The legislative record cites a California Policy Seminar study which found that "[enterprise zone] programs had virtually no impact on business activity." (AA at p. 203.)

The court below additionally relied upon Board staff's statements to the Legislature that the enterprise zone agencies "ought to shoulder the laboring oar in issuing vouchers." (Slip Op. at p. 13.) However, the Board's desire to have the vouchering agencies issue the vouchers is not only consistent with the Board's interpretation that vouchers are threshold prerequisites to the tax credit, but also consistent with the Board's concern with controlling its own costs and workload.

The opinion's reasons for holding that vouchers are prima facie evidence do not justify its departure from established California tax law, which imposes the burden of proof on the taxpayer. Even though there are exceptions to the general rule, this case is so far afield from those exceptions that they do not and cannot provide it with any support. Because this case does not fall within any exception to the general rule, it conflicts with the long line of cases properly imposing the burden of proof on taxpayers, not tax agencies.

B. The Court of Appeal's broad interpretation of section 23622.7 in favor of the taxpayer conflicts with the settled rule that tax credit statutes are construed strictly and narrowly against the taxpayer.

The decision below conflicts with the established standard for interpreting statutes granting tax credits. This Court long ago held that income tax credits are a matter of legislative grace and are strictly and narrowly construed against the taxpayer. (*Miller v. McColgan* (1941) 17 Cal.2d 432, 441-442 [tax credit statute must be "strictly construed against the taxpayer"]; *Great Western Financial Corp. v. Franchise Tax Bd.* (1971) 4 Cal.3d 1, 5 [tax credit statute is "to be narrowly construed against the

taxpayer"].) All doubts must be resolved in favor of the Board. (*General Motors Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 773, 790.) In construing a tax credit statute, it does not matter if the taxpayer's interpretation is reasonable, or even if it is more reasonable than the Board's interpretation. If the taxing authority's "interpretation . . . is reasonable it must . . . be adopted. It is of no moment that the statute may be ambiguous, or that a contrary construction might also be reasonably permissible." (*Hospital Service of California v. City of Oakland* (1972) 25 Cal.App.3d 402, 406.)

Omitting these settled principles, the court below interpreted section 23622.7 broadly in favor of the taxpayer. For example, although the Board explained that the Legislature has explicitly provided for prima facie evidence in over 50 separate statutes in the Revenue and Taxation Code and thus clearly knows how to make something prima facie evidence when it chooses to, the court below speculated that the "most likely explanation" is merely "legislative oversight." (Slip Op. at p. 11, fn. 9.) Of course, because the court's "most likely explanation" supported the taxpayer's interpretation, the decision below conflicts with the rule set forth by this Court in *General Motors* "resolving all doubts in favor of the Board." (39 Cal.4th at p. 790.)

Indeed, the decision below is also problematic for future cases because the court suggested that, if the statute is unclear, the Legislature can resolve any ambiguity: "If, however, we have incorrectly deduced what the Legislature would have enacted if it had directed its attention to the matter, the Legislature is free to correct us by amending the statute to make its intention clear." (Slip Op. at p. 11, fn. 9.) Again, the settled rule is that tax "credit statute[s] must be strictly construed against the taxpayer," (*Miller v. McColgan, supra,* 17 Cal.2d at p. 442), and the Board's interpretation must be upheld if reasonable. (*General Motors Corp. v.*

Franchise Tax Bd., *supra,* 39 Cal.4th at p. 790.) Unless overturned, the decision below will encourage courts to resolve ambiguities in favor of the taxpayer, reject the Board's interpretation of a tax-credit statute even if it is reasonable, and rely on the Legislature to make any corrections. Because this case deals with a tax credit, the decision of the Court of Appeal conflicts with the long-standing rule that tax-credit statutes are strictly and narrowly construed against the taxpayer.

C. The decision of the Court of Appeal conflicts with article XIII, section 32 of the California Constitution, which bars pre-payment tax litigation and prevents courts from interfering with the Board's audits and collection of taxes.

Not only did the Court of Appeal hold that vouchers issued by an enterprise zone administrator are prima facie proof a worker is a qualified employee, but it also held that the vouchers' status as prima facie evidence and corresponding shift in the burden of proof apply at the audit stage. (Slip Op. at p. 7.) Audits routinely result in tax assessments and accordingly often occur before the payment of the disputed tax. The imposition and application of the court's rules during the audit—as opposed to applying instead at the trial level—gives taxpayers the opportunity to raise court challenges to the Board's audit determinations before they pay their taxes, a practice often referred to as "pre-payment tax litigation."

By opening the door to pre-payment tax litigation, the court's interpretation of section 23622.7 conflicts with the historical rule of this and other California courts that article XIII, section 32 bars pre-payment lawsuits and prevents courts from hindering or impairing the Board's collection of taxes.

Article XIII, section 32, bars courts from taking actions "to prevent or enjoin the collection of any tax." It provides that "[a]fter payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid,

with interest, in such manner as may be provided by the Legislature." This Court has explained that the first part of article XIII, section 32 bars injunctions against the collection of state taxes, while the second part restricts courts "from expanding the methods for seeking tax refunds expressly provided by the Legislature." (*Woolsey v. State of California* (1992) 3 Cal.4th 758, 792.) Together, they "establish that the sole legal avenue for resolving tax disputes is a postpayment refund action." (*State Bd. of Equalization v. Superior Court* (1985) 39 Cal.3d 633, 638.) By allowing taxpayers to bring pre-payment actions, the decision of Court of Appeal conflicts with this Court's decisions explaining that article XIII, section 32 limits taxpayers' legal relief solely to post-payment tax refund actions.

The Board does not claim that a rule making vouchers prima facie evidence itself violates article XIII, section 32, but rather by explicitly imposing that rule at the audit stage the decision of the Court of Appeal effectively authorizes pre-payment tax litigation, which does violate article XIII, section 32. In this case, Dicon's lawsuit challenged the Board's authority to audit the vouchers it received. Although this case is a post-payment tax refund case where the audit occurred after the payment of the tax, audits more routinely precede the payment of the disputed tax and result in tax assessments. The decision of the Court of Appeal making vouchers prima facie proof at the audit stage applies both in cases where the payment precedes the audit and where the audit precedes the payment. Taxpayers may therefore, in cases where the audit precedes the payment of the disputed tax, use the decision of the Court of Appeal as authority to file court actions against the Board seeking to enjoin it from making tax assessments based upon disputed vouchers.

The underlying policy behind article XIII, section 32's bar on pre-payment litigation is that even though litigation is pending, the state must

be able to collect its revenues "so that essential public services dependent on the funds are not unnecessarily interrupted." (*Pacific Gas & Electric Co. v. State Bd. of Equalization* (1980) 27 Cal.3d 277, 283.) "[S]trict legislative control over the manner in which tax refunds may be sought is necessary so that government entities may engage in fiscal planning based on expected tax revenues." (*Woosley*, *supra,* 3 Cal.4th at p. 789.) Article XIII, section 32 is to be "construed broadly" in support of its provisions. (*State Bd. of Equalization v. Superior Court, supra*, 39 Cal.3d at p. 639.) It "applies if the prepayment judicial determination sought would impede tax collection." (*Western Oil and Gas Assn. v. State Bd. of Equalization* (1987) 44 Cal.3d 208, 213.)

Because a general rule holding that vouchers are prima facie proof at the audit stage applies equally whether or not the disputed taxes have been paid, it should have been rejected by the court below. The rule violates article XIII, section 32, and it conflicts with the many cases of this Court and other Courts of Appeal barring attempts to litigate disputed taxes before they are paid.

D. If the decision of the Court of Appeal is allowed to stand the State may lose as much as $150 million in tax revenues.

The amount of enterprise zone credits approved each year by the Board is extremely large, approximately $300 million. The credits may be approved in one of several ways. Credits may be claimed on a tax return, which the Board summarily reviews and accepts, or they may be approved after a full Board audit or examination. Or, in cases where the taxpayer's claim for a tax credit is rejected at the audit stage, the taxpayer may pursue its administrative remedies with the Board, or ultimately file a tax-refund lawsuit.

The taxable year at issue in this case is 2001. Since that time, California taxpayers have claimed approximately $2 billion in enterprise zone tax credits. If even 5% of the credits claimed are for employees who do not satisfy the statutory requirements of section 23622.7, the decision of the Court of Appeal may deprive the State of $100 million of tax revenues because it shifts to the Board the nearly impossible burden of proving years after the fact that thousands of employees did not meet the statutory eligibility requirements. This burden is further exacerbated because the decision of the Court of Appeal has also given employers the green light to destroy all relevant documents other than vouchers. In fact, the Board estimates that if the decision below stands, the State may lose as much as $150 million in tax revenues, and face enhanced administrative burdens at both the audit and litigation stages.

The Court of Appeal's opinion conflicts with settled principles of this Court on burden of proof in tax-refund cases, the construction of tax credit statutues, and the restrictions of article XIII, section 32. It conflicts with numerous other Court of Appeal cases, renders the state vulnerable to tax abuse, and may cost the state up to $150 million in tax revenues. This Court should grant review to resolve these important issues and to restore uniformity to California tax law.

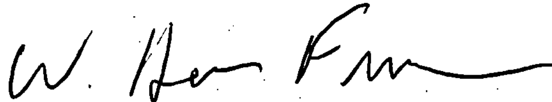
CONCLUSION

The petition for review should be granted.

DATED: JUNE 15, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DAVID S. CHANEY
Chief Assistant Attorney General
PAUL D. GIFFORD
Senior Assistant Attorney General
GORDON BURNS
Deputy Solicitor General
W. DEAN FREEMAN
Supervising Deputy Attorney General



W. DEAN FREEMAN
Supervising Deputy Attorney General

Attorneys for Defendant and Respondent Franchise Tax Board of the State of California

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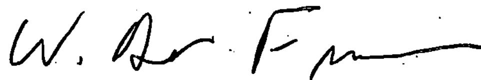
CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 5,546 words.

Dated: June 15, 2009

EDMUND G. BROWN JR.
Attorney General of California
DAVID S. CHANEY
Chief Assistant Attorney General
PAUL D. GIFFORD
Senior Assistant Attorney General
GORDON BURNS
Deputy Solicitor General
W. DEAN FREEMAN
Supervising Deputy Attorney General



W. DEAN FREEMAN
Supervising Deputy Attorney General

Attorneys for Defendant and Respondent Franchise Tax Board of the State of California

ATTACHMENT

COPY OF COURT OF APPEAL DECISION

DICON FIBEROPTICS, INC. v. FTB

COURT OF APPEAL CASE NO. B202997

Filed 5/7/09

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

DICON FIBEROPTICS, INC., Plaintiff and Appellant, v. FRANCHISE TAX BOARD, Defendant and Respondent.	B202997 (Los Angeles County Super. Ct. No. BC 367885)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mel Red Recana, Judge. Reversed and remanded.

Bird, Marella, Boxer, Wolpert, Nessim, Drooks & Lincenberg, Thomas R. Freeman and Paul S. Chan; Dakessian Law Firm; Akerman Senterfitt and Marty Dakessian for Plaintiff and Appellant.

Silverstein & Pomerantz, Amy L. Silverstein and Edwin P. Antolin for Deluxe Corp. as Amicus Curiae on behalf of Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, W. Dean Freeman, Felix Leatherwood, Mark P. Richelson and Ronald Ito, Deputy Attorneys General, for Defendant and Respondent.

Dicon Fiberoptics, Inc., appeals from the trial court's judgment sustaining without leave to amend the demurrer of the Franchise Tax Board to Dicon's complaint seeking refund of a tax credit for employing disadvantaged workers. To receive the credit, Dicon submitted vouchers to the board certifying Dicon had employed disadvantaged workers. After auditing the vouchers, the board partially denied the tax credit to Dicon. Dicon contends the board has no legal authority to audit its vouchers, a contention we reject. We nevertheless conclude Dicon states a cause of action that the board exercised its audit power improperly, and therefore the trial court erred in sustaining the board's demurrer. Accordingly, we reverse and remand.

FACTS AND PROCEEDINGS

Certain areas and localities in California suffer from persistently high unemployment, poverty, and anemic economic growth and activity. Hoping to remedy these problems, the Legislature enacted Government Code section 7070 et seq., which is known as the Enterprise Zone Act (Act). The Act's purpose is to reduce obstacles the Legislature believes impede private investment and business in economically depressed areas in California. (See Gov. Code, § 7071, subd. (a).) The Act permits city and county governments containing depressed regions within their jurisdictions to apply to the Department of Housing and Community Development (DHCD) for designation of those regions as "Enterprise Zones." (Gov. Code, §§ 7072, subd. (a), 7073, subds. (a), (b).) Businesses operating within an Enterprise Zone that hire certain categories of disadvantaged workers – known as "qualified employees" – earn tax credits for the wages they pay those workers. (Rev. & Tax. Code, § 23622.7.) Depending on the length of time of employment, the tax credit is between 10 and 50 percent of a worker's wage. (*Id.*, subd. (a).)

In 1994, the Legislature expanded the categories of qualified employees covered by the Act from *participants* in certain economic assistance and job programs to those

eligible to participate in those programs.[1] (Assem. Com. on Revenue and Taxation, Analysis of Sen. Bill No. 1770 (1993-1994 Reg. Sess.) as amended June 2, 1994.) Lawmakers anticipated that because a worker's *eligibility* to participate in a job or assistance program involved standards less black-and-white than confirming *actual* participation, the Legislature's expansion of the types of workers whose employers could receive a tax credit increased the risk of tax abuse. Thus, administrative regulations governing the credit required the local entity operating an Enterprise Zone to establish a vouchering program to certify a worker satisfied the statutory criteria of a "qualified employee." (Cal. Code Regs., tit. 25, § 8463, subd. (a)(1).) Depending under which job or assistance program a worker was deemed a "qualified employee," a vouchering program required a variety of documents to prove the worker met the statutory criteria. (Rev. & Tax. Code, § 23622.7; Cal. Code Regs., tit. 25, §§ 8463, 8466.) Following a vouchering program's receipt of documents proving a worker was a "qualified employee," the business employing the worker could receive a voucher from local authorities identified by the program.[2]

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1 The programs included the Job Training Partnership Act (JTPA) and its successor program, the Workforce Investment Act; the Greater Avenues for Independence Act of 1985 (GAIN); dislocated workers eligible for unemployment insurance benefits; disabled workers eligible for enrollment in a "state rehabilitation program;" and workers receiving Supplemental Security Insurance, Aid to Families with Dependent Children, food stamps, or state or local general assistance (Rev. & Tax. Code, § 23622.7, subd. (b)(4)(A)(iv)(I), (II), (IV)(aa), (V) & (VII)).

2 In greater detail, California Code of Regulations, title 25, section 8463, states: "Administration of a Vouchering Program. [¶] (a) Each enterprise zone shall have and maintain a vouchering plan containing policies and procedures for the operation of a vouchering program. The plan shall meet the following criteria: [¶] (1) The plan shall have written vouchering policies and procedures that ensure compliance with Revenue and Taxation Code Sections 17053.74 and 23622.7, Government Code Section 7070 et seq., California Code of Regulations title 10, chapter 7.8 commencing with Section 5600, and this subchapter 21. [¶] (2) The plan shall require any [employer] Applicant requesting a voucher to provide documentary evidence to substantiate that the employee for whom a voucher is requested satisfied immediately preceding the commencement of

Appellant Dicon Fiberoptics does business in an Enterprise Zone. Dicon alleges it complied with all requirements for earning the tax credit for employing qualified employees in an Enterprise Zone. Among those requirements, it obtained vouchers from any one of several state or local entities who certified Dicon's employees fit within categories of workers covered by the Act. (Rev. & Tax. Code, § 23622.7, subd. (c).)[3] In November 2003, Dicon submitted a claim for refund of taxes for the taxable year ending in March 2001. Submitting vouchers showing it had employed qualified workers in the 2000-2001 tax year, Dicon sought a credit of more than $3.6 million. Almost three years later in October 2006, respondent Franchise Tax Board (FTB) denied $1.1 million of the requested refund. Dicon alleges FTB's denial was improper because FTB wrongfully refused to accept some of Dicon's vouchers. FTB demanded instead that Dicon provide the documents underlying the local agencies' issuance of the vouchers.

Dicon appealed to the State Board of Equalization, which dismissed the appeal in March 2007. Dicon thereafter filed the lawsuit at issue in this appeal. Seeking recovery of the $1.1 million credit, Dicon alleges FTB improperly rejected its vouchers. Dicon alleges it did not have the documents FTB demanded because they related to the personal circumstances of Dicon employees that made them "qualified employees," such as a criminal record and other impediments to employment, that were private to employees and beyond Dicon's custody and control.

FTB demurred to the complaint. It argued that Revenue and Taxation Code section 23622.7 governing the tax credit and vouchers did not vest local employment or

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employment, the requirements of subdivision (b)(4)(A)(iv) of Revenue and Taxation Code Sections 17053.74 or 23622.7 as a qualified employee."

3 Subdivision (c) of Revenue and Taxation Code section 23622.7, provides: "The taxpayer shall . . . . [¶] (1) Obtain from the Employment Development Department [EDD], as permitted by federal law, the local county or city Job Training Partnership Act administrative entity, the local county GAIN office or social services agency, or the local government administering the enterprise zone, a certification [commonly called a "voucher"] that provides that a qualified employee meets the eligibility requirements specified in clause (iv) of subparagraph (A) of paragraph (4) of subdivision (b)."

social service agencies with exclusive authority to certify a worker as a "qualified employee." Thus, the statute did not obligate FTB to accept vouchers from local agencies, and did not prohibit FTB from asking Dicon for the documents on which the local agencies based their decisions. Because Dicon had not supplied the documents FTB demanded, FTB asserted Dicon failed to state a cause of action. The trial court agreed and sustained the demurrer without leave to amend. The court entered judgment for FTB, and this appeal followed.

DISCUSSION

Dicon contends the court erred by sustaining FTB's demurrer to Dicon's complaint for failing to state a cause of action. According to Dicon, the statute's plain language vests local employment and social services agencies with sole authority to issue vouchers.[4] Such authority would be meaningless, Dicon reasons, if FTB could second-guess the agency by auditing the voucher. Consequently, Dicon asserts its complaint states a cause of action for a tax refund by alleging FTB lacked authority to reject its vouchers.

Dicon also contends the trial court compounded its error by sustaining the demurrer without leave to amend. According to Dicon, even if FTB had the authority to audit vouchers, the court erred in denying Dicon leave to amend its complaint to allege FTB mishandled its audit of the vouchers and wrongfully denied the tax credit.

We agree the court erred in sustaining FTB's demurrer. A complaint states a cause of action if it alleges facts that entitle the plaintiff to relief under any theory. In reviewing the trial court's order sustaining a demurrer, we disregard the complaint's legal theories and conclusions. (*TracFone Wireless, Inc. v. County of Los Angeles* (2008) 163 Cal.App.4th 1359, 1368.) Instead, we look to whether the complaint states facts that

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[4] The statute also permits the state Employment Development Department to issue vouchers, but this appeal involves vouchers issued by local agencies. (Rev. & Tax. Code, § 23622.7, subd. (c)(1).)

support a cause of action under any theory. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Mills v. U.S. Bank* (2008) 166 Cal.App.4th 871, 884.) We know of no authority that imposes a higher pleading standard for a cause of action for a tax refund than other causes of action. (Accord *McHugh v. County of Santa Cruz* (1973) 33 Cal.App.3d 533, 544 ["The complaint in an action to recover taxes paid under protest must allege sufficient specific facts to support a conclusion that assessments complained of were excessive or invalid. [Citations.] The allegations must be liberally construed with a view to substantial justice as required under a general demurrer . . . ."].) The complaint need not establish the statute, case law, or legal rule that the taxing authority violated, but need only allege that the authority erred. (*Jibilian v. Franchise Tax Bd.* (2006) 136 Cal.App.4th 862, 866, fn. 3 [court reviewing demurrer disregards complaint's erroneous legal conclusions].) It follows, therefore, that a taxpayer's complaint states a cause of action for a tax refund if it alleges the plaintiff paid the tax, filed a tax return, requested the refund, and the tax authority denied the refund. Here, Dicon contends FTB lacked the authority to reject Dicon's vouchers certifying Dicon's workers were qualified employees. That contention is a legal conclusion that we may disregard. For reasons we will explain, we conclude FTB may in fact audit vouchers. But even when we disregard Dicon's mistaken legal contention, its complaint nevertheless alleges facts sufficient to state a cause of action for a tax refund. Accordingly, the court erred in sustaining FTB's demurrer.

We hold alternatively that if a cause of action for a tax refund must identify the taxing authority's particular legal error in denying the refund, the trial court erred here in denying Dicon leave to amend its complaint. Dicon's opposition to FTB's demurrer requested leave to amend, and its opening brief on appeal describes the proposed amendments.[5] Those amendments allege that even if FTB had the authority to audit the

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5 The concluding paragraph in Dicon's opposition to FTB's demurrer requested leave to amend, but did not describe the amendments Dicon proposed. Dicon's failure to identify its amendments for the trial court does not preclude Dicon from rectifying its

vouchers, it did so incorrectly here. For example, Dicon alleges FTB applied an unlawfully demanding standard of proof in auditing the vouchers. Dicon also alleges FTB improperly refused to accept vouchers for workers whose eligibility to participate in certain economic assistance and jobs programs made them qualified employees warranting vouchers.

The trial court's error in sustaining FTB's demurrer warrants reversal of the court's judgment and remand for further proceedings. For the trial court's and parties' guidance after remand, we address the unanswered legal question looming over these proceedings: Does FTB's authority to examine and audit tax returns permit FTB to reject a voucher issued by a local employment or social services agency?[6] FTB answers "yes." Dicon, in contrast, says a local agency's decision is binding on FTB and answers "no." Thus, according to Dicon, FTB must limit its review of vouchers to confirming Dicon in fact obtained the voucher from one of the local agencies identified in the statute; FTB may not, Dicon asserts, review the local agency's underlying decision to issue the voucher. We hold vouchers are prima facie proof a worker is a "qualified employee," but FTB may audit such vouchers. In such an audit, FTB bears the burden of rebutting the voucher's prima facie value, typically by proving the worker did not meet the criteria to be a "qualified employee."[7] In trying to meet that burden, FTB may not rely on the employer's failure to produce during the audit documents establishing a worker's

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omission by identifying its proposed amendments on appeal. (*Lee v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 848, 854 ["regardless of whether a request therefore was made, unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion"].)

6 We asked for and received supplemental letter briefs from the parties on a voucher's evidentiary weight in an audit and the attendant burden of proof.

7 We do not intend our holding today to restrict FTB's audit powers, to limit the scope of the audits it conducts, or hamstring its authority to gather evidence relevant to the correctness of a tax return. Rather, we direct our holding to the *weight* FTB must give, in the absence of any other evidence, to vouchers during audits.

eligibility to the extent regulations governing the tax credit charge the enterprise zone, not the employer, with the obligation to maintain documents of workers' eligibility.

FTB rests its assertion of authority on its powers to examine and audit tax returns. FTB asserts Revenue and Taxation Code section 23622.7's empowerment of local employment and social agencies to issue vouchers does not override FTB's authority to examine and audit those vouchers. Under Revenue and Taxation Code section 19032, FTB has the right to examine Dicon's tax returns for their correctness. (§ 19032 ["As soon as practicable after the return is filed, the Franchise Tax Board shall examine it and shall determine the correct amount of the tax"].) And under section 19504, FTB may demand Dicon produce documents "relevant" to FTB's examination of the return in an audit. Section 19504 states:

> "The Franchise Tax Board, for the purpose of . . . ascertaining the correctness of any return . . . shall have the power to require by demand, that an entity of any kind . . . provide information or make available for examination or copying at a specified time and place, or both, any book, papers, or other data which may be relevant to that purpose."

Dicon, on the other hand, notes Revenue and Taxation Code section 23622.7 principally mentions local entities as authorized to issue a voucher. The statute permits the following to certify a worker is a qualified employee: "the Employment Development Department . . . the local county or city Job Training Partnership Act administrative entity, the local county GAIN office or social services agency, or the local government administering the enterprise zone." From the statute's express identification of authorized entities, and particularly its focus on local ones, Dicon contends the Legislature vested only those entities with the power to issue vouchers, with a particular preference toward the issuance of vouchers by local agencies. Citing the principle that a statute's expression of some things necessarily excludes other things (*De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal.App.4th 890, 911, fn. 8 ["*Expressio unius est exclusio alterius*"]), Dicon concludes that the statute's failure to mention FTB means the Legislature intended FTB

to have no part in issuing vouchers, meaning FTB could not overrule or second-guess issuing agencies by auditing their decisions.

FTB answers that the statute does not explicitly say local agencies have exclusive authority over vouchers. Noting that repeal by implication is disfavored, FTB concludes that the statute's silence about FTB preserves FTB's customary power to examine and audit. We conclude FTB has the better argument based on public policy, the voucher's purpose, and legislative history.

Dicon reasons the Legislature authorized local agencies to issue vouchers because a worker's status as a "qualified employee" sometimes depends on a particular Enterprise Zone's local economy and job market. For example, qualified employees include long-term unemployed workers with "limited opportunities for employment or reemployment in the same or similar occupation *in the area* in which the individual *resides*." (Rev. & Tax. Code, § 23622.7, subd. (b)(4)(A)(iv)(IV)(cc), italics added.) Qualified employees also include formerly self-employed persons who are currently unemployed "as a result of general economic conditions in the *community in which he or she resides*." (*Id.*, subd. (b)(4)(A)(iv)(IV)(dd), italics added.) FTB asserts, however, that Dicon overstates the expertise of local agencies. FTB notes that most categories of "qualified employees" do not involve local conditions and are proven by evidence which FTB and local agencies are equally capable of reviewing. Such documents include medical reports, information from statewide jobs programs, and media reports. (Cal. Code Regs., tit. 25, § 8446.) As to this point, we conclude FTB makes the more persuasive claim.

Another reason we conclude FTB may audit vouchers is the State Board of Equalization so held in *The Matter of the Appeal of Deluxe Corporation* (Dec. 12, 2006, No. 297128) 2006 Cal. Tax Lexis 432.[8] The State Board of Equalization rested its

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[8] We acknowledge agency decisions do not control our interpretation of statutes, but those decisions can help our analysis by informing us of administrative and regulatory customs and practices. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 8.)

holding on three points. First, the statutes granting FTB the powers to examine and audit tax returns contain broad language and do not carve out exceptions for decisions by other governmental bodies. (Rev. & Tax. Code, §§ 19032, 19504.) Second, decisions by local agencies generally do not bind state government. Finally, for a few years in the mid-1990's, Government Code former section 7076 entitled taxpayers to request a refund of their voucher application fee if FTB rejected the voucher. (Enacted by Stats. 2004, ch. 225, § 14, p. 293 and repealed by Stats. 2006, ch. 634, § 1, pp. 210-211.) Although this refund provision existed only from mid-2004 through 2006 after Dicon had already claimed its tax credit, the provision's existence contemplated that FTB from time to time might reject a voucher.

Dicon urges us not to draw too strong an inference from a taxpayer's short-lived right to seek a refund of the application fee. Dicon emphasizes that the right to a refund arose after Dicon had applied in 2003 for the tax credit it earned in its 2000-2001 tax year. Dicon contends that a later Legislature's enactments do not reveal a previous Legislature's intent. Hence, according to Dicon, a later Legislature's implied ratification of FTB's power to reject vouchers does not mean an earlier Legislature envisioned FTB having that power. In any case, Dicon notes, FTB might have any number of reasons for rejecting a voucher other than reversing a local agency's classification of a worker as a qualified employee. For example, FTB might reject the voucher because the employer hired the worker before the state conferred Enterprise Zone status to the employer's geographical area. (See Rev. & Tax. Code, § 23622.7, subd. (b)(4)(A)(iii).) Or the employer might not merit the voucher because the worker did not work enough hours for the employer. (*Id.*, subd. (b)(4)(A)(i), (ii).) Among the prerequisites for a voucher, local agencies judged only one of them – whether a worker was a "qualified employee." (*Id.*, subds. (b)(4)(A)(iv), (c)(1).) We pay heed to Dicon's caution against placing undue emphasis on the right to seek a refund. We do not, for example, deem the right to be dispositive. Nevertheless, it weighs, along with the other factors we cite, in FTB's favor.

Dicon asserts *The Matter of the Appeal of Deluxe Corporation* deserves little weight because the decision does not discuss the State Board of Equalization's ruling of *In the Matter of the Appeal of Robert J. and Vera Cort* (May 21, 1980) 1980 WL 4984. We find the failure of *Deluxe Corporation* to discuss *Cort* is not fatal to *Deluxe Corporation*'s analysis because the decisions are distinguishable. In *Cort*, tax law prohibited a landlord operating substandard rental property from deducting his business expenses. A property's substandard designation came from state or local housing agencies. (Rev. & Tax. Code, § 17274, subd. (b)(1)(A), (B); *Cort*, 1980 WL 4984, *2.) A substandard designation was binding on FTB, which could not review the housing agency's decision. *Cort* is distinguishable because a property's designation as substandard presumably followed an actual (or at least the right to) adjudicatory hearing in which the landlord could challenge the designation. Having been tested in an adversarial proceeding, the substandard designation was likely reliable and worthy of deference. Here, in contrast, no adversarial proceeding likely preceded a local agency's award of a voucher. Thus, the voucher deserved much less weight before FTB than did the substandard housing designation in *Cort*.

Although we hold FTB may audit a voucher, we conclude from the statutory framework governing vouchers that they are prima facie evidence an employee is a qualified worker. As prima facie evidence, a voucher shifts to FTB the burden of demonstrating an employee is not a qualified worker for which no voucher should have issued.[9] We conclude FTB properly bears this burden for several reasons. First, an

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[9] Noting that the Legislature understands the principle of prima facie evidence (see, e.g., Rev. & Tax. Code, § 7058 [notice of assessment is "prima facie evidence" of regularity of assessment proceedings]), FTB contends the Legislature's failure to use the phrase "prima facie" in Revenue and Taxation Code section 23622.7 means the Legislature intended no such value for the vouchers. We think legislative oversight is the most likely explanation for the statute's silence about the voucher's evidentiary weight. If, however, we have incorrectly deduced what the Legislature would have enacted if it had directed its attention to the matter, the Legislature is free to correct us by amending the statute to make its intention clear.

employer who submits a voucher to FTB has followed the statute's requirements to (1) obtain a voucher from any one of several agencies identified in the statute, and (2) present the voucher to FTB. The employer's compliance with the statute ought to count for something. Second, the documents supporting a worker's certification as a "qualified employee" are not ordinarily within the employer's custody and control, either when initially applying for a voucher from the local agency, or possibly years later during an FTB audit. Surveying the types of workers entitled to "qualified employee" status, we note that many categories involve disadvantaged workers for whom the impediments to employment involve conditions that are potentially embarrassing to a worker, such as limited literacy and criminal convictions. Documents proving such employment obstacles are not readily shared between worker and employer, especially not years later during an audit. Indeed, the statute does not require the employer to retain the documents supporting a worker's designation of "qualified employee" and administrative regulations require only the Enterprise Zone manager to keep the documents.[10] (Cal. Code Regs., tit. 25, § 8463, subd. (a)(3).) FTB appeared mindful of workers' privacy concerns when it drew the Legislature's attention to FTB's desire to minimize intrusive record keeping by an employer. FTB told the Legislature:

> "The vouchering process serves numerous functions for all parties affected, including the taxpayer, FTB, and DHCD, such as: [¶] . . . [¶] 2. Provides an up-front verification process for taxpayers regarding the determination of whether a potential employee is a 'qualified employee.' [¶] 3. Minimizes intrusiveness into the employee's personal life and provides confidentiality for the employee since the agency that administers the public assistance program is the one that issues the voucher. [¶] 4. Allows the employer (taxpayer) to retain less documentation to support a claim that an employee is a 'qualified employee.' " (Cal. Franchise Tax Board, analysis of Sen. Bill No. 1097 (2003-2004 Reg. Sess.) Aug. 18, 2004, as amended July 27, 2004, p. 3, emphasis added.)

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10 Because the statute imposes no duty on the employer to maintain the relevant documents, an adverse inference does not arise from the employer's retention of only the voucher while discarding documents it is not obligated to retain.

Another reason to extend prima facie status to a local agency's voucher is to promote the tax credit's purpose of encouraging employers to hire disadvantaged workers. The employer ordinarily has some reassurance of receiving the credit if it knows after having received a voucher that FTB bears the burden of proving the voucher was unjustified. If FTB may reassess perhaps years later a worker's status as a "qualified employee," the employer has less confidence in receiving a credit, particularly if the employee no longer works for the employer. Reducing an employer's confidence in receiving the tax credit is a disincentive to hiring a disadvantaged worker, thereby undermining the reason for the Enterprise Zone.

A third reason for granting prima facie status to a voucher is FTB told the Legislature that local agencies ought to shoulder the laboring oar in issuing vouchers. Commenting on voucher programs, FTB stated public inquiries about certification of employees under such programs risked increasing FTB's workload. FTB informed the Legislature that local agencies responsible for issuing vouchers were familiar with matters involving certification – one of the arguments Dicon makes in support of a voucher's prima facie value. Thus, FTB told the Legislature, FTB intended to direct to local agencies all inquiries about vouchers. FTB stated:

> "Although [FTB] does not administer the determination and certification of employees as eligible under the jobs programs criteria, [FTB] staff is required to explain the criteria in forms and instructions and respond to taxpayer inquiries regarding the qualification and certification of employees. Thus, [FTB] staff is concerned that undefined terms, such as 'economically disadvantaged individual' and 'dislocated worker,' could cause disputes regarding whether an individual is a qualified employee. [¶] However, Trade and Commerce Agency and EDD staff have indicated that these definitions are understood by those familiar with the TJTC [Targeted Jobs Tax Credit], JTPA, and GAIN programs and those responsible for certifying the employees. [¶] If questions regarding these definitions arise, [FTB] would refer all taxpayer questions regarding determination and certification of employees to the certifying agencies. This would likely increase the workload for those agencies." (Cal. Franchise Tax Board, summary analysis of Sen. Bill No. 2023 (1995-1996 Reg. Sess.) Sept. 6, 1996, as amended Aug. 31, 1996, p. 6.)

A fair reading of Dicon's complaint in light of the amendments Dicon proposes supports the allegation that FTB disregarded the prima facie weight of Dicon's vouchers when it audited them. If true, FTB erred in rejecting those vouchers unless FTB rejected them for some reason other than Dicon's failure to produce documents establishing its workers were "qualified employees."

DISPOSITION

The judgment is reversed. The trial court is directed to vacate its order sustaining the demurrer of the Franchise Tax Board and enter a new order overruling the demurrer. Appellant Dicon to recover its costs on appeal.

CERTIFIED FOR PUBLICATION

RUBIN, ACTING P. J.

WE CONCUR:

BIGELOW, J.

O'NEILL, J.*

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* Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Dicon Fiberoptics, Inc. v. Franchise Tax Board of the State of California**
Case No.: **California Supreme Court No. __________________________**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 16, 2009, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Thomas R. Freeman, Esq.
Paul S. Chan, Esq.
Brid, Marella, Boxer, Wolpert, Nessim, Drooks & Lincenberg, P.C.
1875 Century Park East 23rd Floor
Los Angeles, California 90067-2561

Marty Dakessian, Esq.
Dakessian Law Firm, P.C.
430 West Colorado Street
Glendale, California 91204

Clerk of the Superior Court
Los Angeles County Superior Court
111 North Hill Street
Department 45
Los Angeles, California 90012

Clerk, Court of Appeal
Second Appellate District, Division Eight
300 South Spring Street
2nd Floor
Los Angeles, California 90013
(Hand-delivered)

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 16, 2009, at Los Angeles, California.

Kathi Palacios
Declarant

Signature

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