In the Supreme Court of the State of California

DICON FIBEROPTICS, INC.,

Plaintiff and Appellant,

v.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Defendant and Respondent.

Case No. S173860

Court of Appeal, Second Appellate District, Case No. B202997
Los Angeles County Superior Court, Case No. BC367885
The Honorable Mel Red Recana, Judge

REPLY BRIEF ON THE MERITS

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INTRODUCTION

Dicon urges the Court to adopt a more sweeping interpretation of the relevant statutes than even the court below. Revenue and Taxation Code section 23622.7 provides a tax credit for enterprise zone businesses that hire "qualified" employees. The lower court held that a certification (or *voucher*) issued by an enterprise zone manager is prima facie proof that the employee is "qualified." Dicon goes further, arguing that the Legislature delegated the "exclusive" authority to make this income tax determination to the entities that issue vouchers, thereby carving out an exception to the Board's authority to review tax returns and determine the amount of income tax owed. (Answer Brief at pp. 13, 18.) Curiously, although Dicon says that this alleged delegation does not impair the Board's authority (Answer Brief at p. 20), it simultaneously asserts that the Board may only deny a claim for a tax credit if the Board proves that the entity that issued the voucher abused its discretion. (Answer Brief at p. 37.)

Dicon's main problem is the statute itself. Nothing in it says that a voucher is prima facie evidence, or that entities that issue vouchers have exclusive authority to determine tax credits, or that the Board's authority is limited to the abuse-of-discretion standard. Nor does the statute create an exception from the settled law that a taxpayer must affirmatively establish all elements of a tax credit (*New Colonial Ice Co. v. Helvering* (1934) 292 U.S. 435, 440, 54 S.Ct. 788, 78 L.Ed. 1348; *Transit Lines v. Commissioner* (1943) 319 U.S. 590, 593, 87 L.Ed. 1607, 63 S.Ct. 1279), that taxpayers "have the burden of showing that they clearly come within the terms of the exemption" (*Cedars of Lebanon Hospital v. County of Los Angeles* (1950) 35 Cal.2d 729, 734), that 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; *Great Western Financial Corp. v. Franchise Tax Bd.* (1971) 4 Cal.3d 1, 5), and that all doubts must be

resolved in favor of the Board. (*General Motors Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 773, 790.)

Certainly the Legislature could make all of these changes for this particular tax credit, but the statute at issue here merely delegates authority to issue a voucher. While the voucher may expedite the process where the Board accepts it, as is often the case, it does not immunize the taxpayer from an audit. The Board retains its authority to conduct an audit and determine the amount of income tax in the traditional manner.

ARGUMENT

I. SECTION 23622.7 DOES NOT LIMIT THE BOARD'S AUTHORITY TO MAKE THE INCOME TAX DETERMINATION THAT AN EMPLOYEE IS OR IS NOT "QUALIFIED."

A. Section 23622.7 Does Not Delegate Authority to Make Income Tax Determinations.

Dicon claims that "[s]ection 23622.7(c) expressly delegates responsibility for determining whether hired workers meet the 'qualified employee' requirement to . . . [zone managers.]" (Answer Brief at p. 8.) Because the Board is not listed in subdivision (c), Dicon reasons that the "express delegation language precludes a construction that would allow the [Board], under the guise of performing its general auditing functions, to second-guess the . . . [zone manager's] expert judgment[.]" (*Id.* at pp. 8-9.) Dicon claims the Board's interpretation "would defeat the clearly expressed legislative intent to vest the expert agencies with discretion to determine whether a hired worker is a 'qualified employee.'" (*Id.* at p. 9.)

First and foremost, the plain language of the statute does not support Dicon's arguments. In *Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263 (*Lennane*) this Court explained that: "In construing statutes, we must determine and effectuate legislative intent. . . . If there is no ambiguity in

the language of the statute, then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs." (*Id.* at p. 268; internal quotation marks omitted.)

There is no ambiguity here. The plain language of section 23622.7 does not, in fact, delegate to zone managers the authority to make the income tax determination of whether an employee has met the requirements of section 23622.7, subdivision (b)(4)(A)(iv) (as Dicon claims), or make vouchers prima facie evidence (as the court below held). Subdivision (c) merely gives zone managers (and others), the authority to issue *vouchers*, which are required by the statute. Dicon is asking the Court to add language to the statute.

Second, even if the statute is ambiguous, rules supporting the Board's interpretation establish that a statute granting a tax credit "must be strictly construed against the taxpayer" (*Miller v. McColgan*, *supra*, 17 Cal.2d at pp. 441-442), and that taxpayers "have the burden of showing that they clearly come within the terms of the exemption" (*Cedars of Lebanon Hospital v. County of Los Angeles*, *supra*, 35Cal.2d at p. 734 (*Cedars of Lebanon*)). In addition, this Court resolves "any doubts in favor of the Board" (*General Motors Corp. v. Franchise Tax Bd.*, *supra*, 39 Cal.4th at p. 790 (*General Motors*)) even though the taxpayer "may contribute to the public welfare and serve the interests of the state" (*Cedars of Lebanon*, *supra*, 35 Cal.2d at p. 734). These rules together led the Court of Appeal in *Hospital Service of California v. City of Oakland* (1972) 25 Cal.App.3d 402 (*Hospital Service*) to conclude that if a 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." (*Id.* at p. 406; *Alpha Therapeutic Corp. v. Franchise Tax Bd.* (2000) 84 Cal.App.4th 1, 6.)

Dicon and the Court of Appeal would apply these rules against the Board. For example, the court held below that the "most likely explanation" of the Legislature's failure to provide in section 23622.7 that vouchers are prima facie evidence was merely "legislative oversight." (*Dicon Fiberoptics, Inc. v. Franchise Tax Board* (2009) 173 Cal.App.4th 1082, 1092, fn. 9 (*Dicon*).) Dicon's interpretation, like that of the appellate court, construes the Legislature's silence against the Board, and violates the rules set out above: it fails to construe section 23622.7 strictly against taxpayers as required by *Miller v. McColgan*; it fails to resolve doubts in favor of the Board as required by *General Motors*; and it relieves taxpayers of the burden of establishing that they come within the actual terms of the statute as required by *Cedars of Lebanon*. It also fails to adopt the Board's reasonable interpretation as required by *Hospital Service*.[1]

Third, Dicon's reliance upon the alleged expertise of zone managers is misplaced. (Answer Brief at pp. 13-17.) It is reasonable that when the Legislature added the voucher requirement in 1994 to address its concern that looser eligibility standards would increase the risk of tax abuse, it selected entities with knowledge of the subject matter to issue the vouchers. It is also reasonable that the Legislature hoped that vouchers would increase efficiency and help to expedite the process because the Board may

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[1] When the Legislature expanded the pool of workers eligible for the tax credit in 1994, it added the voucher process out of concern that its new "softer" standards increased the risk of tax abuse through mistake and fraud. The voucher requirement imposes an extra layer of scrutiny over employee eligibility, and operates in concert with the Board's traditional authority to audit and assess taxes, which is firmly established under existing law. The voucher process complements the review/audit process and enhances its efficiency by allowing the Board to rely on vouchers in those situations where it has confidence in their accuracy, while requiring evidence in those cases where it does not.

accept them without further documentation or an audit, as it often does. But these points are consistent with the Board's interpretation.

Moreover, Dicon overstates the importance of local expertise. Most eligibility categories are based upon objective criteria, such as residing in a targeted employment area, being age 55 or over, or being a veteran (see Rev. & Tax. Code, § 23622.7, subd. (b)(4)(A)(iv)), "and are proven by evidence which [the Board] and local agencies are equally capable of reviewing." (*Dicon, supra*, 173 Cal.App.4th at p. 1090; citing Cal. Code Regs., tit. 25, § 8446.) And in some instances the expertise being called on does not belong to the zone manager at all. For example, contrary to Dicon's claims (Answer Brief at pp. 14-15), Workforce Investment Act (WIA) eligibility determinations are not made by zone managers, but are based on "document[s] issued by the local WIA case manager . . . stating that the employee is enrolled in, or eligible for, WIA Intensive Services[.]" (Cal. Code of Regs., tit. 25, § 8466, subd. (a)(2).)

Finally, Dicon's interpretation would result in unequal application of the program across the state and even within the same local areas. If Dicon is correct, each voucher provider in each area can apply its unique interpretation. As a result, similarly situated employers might qualify for a tax credit in one location, but not another. Moreover, the same employer in the same location might qualify according to one voucher provider's criteria, but not under the criteria of another provider. Dicon cites nothing to suggest that the Legislature intended to adopt such an arbitrary approach to this tax credit. It is far more reasonable for the statewide agency with expertise in tax matters, i.e., the Board, to examine the tax return, including the claimed tax credit, and "determine the correct amount of the tax." (See Rev. & Tax Code, § 19032.) That is its core mission, after all.

In sum, the statute's plain language supports the Board's position. But even if the statute is ambiguous, the Board has offered a reasonable and better interpretation of the Legislature's intent that the Court should adopt.

B. Dicon's Interpretation Violates the Rule Against Implied Repeals.

Dicon's interpretation impliedly repeals, in part, both the Board's explicit authority under section 19032 to audit returns and assess taxes, and the rule in section 19801 that the Board is not bound by determinations of any other state officers. This Court strongly presumes that the Legislature does not impliedly repeal statutes. (*Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 419 (*Western Oil*).)

The Legislature delegated broad authority to the Board to review returns, demand records, and determine the correct amount of any tax. "As soon as practicable after a return is filed, the Franchise Tax Board shall *examine* it and shall *determine* the correct amount of tax." (Rev. & Tax. Code, § 19032; emphasis added.) In "ascertaining the correctness of any return . . . [the Board] shall have the power to require by demand . . . information or . . . any book, papers, or other data[.]" (Rev. & Tax. Code, § 19504, subd. (a).) If the Board *determines* additional tax is owing, it *shall* send the taxpayer a notice of proposed assessment. (Rev. & Tax. Code, § 19033.)[2]

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[2] Dicon also claims that section 23622.7, subdivision (c) is a specific statute that trumps the Board's general power to "determine the correct amount of corporate taxes[.]" (Answer Brief at p. 19.) However, as explained above, courts exercise a strong presumption against the implied repeal of a statute (*Western Oil*, *supra*, 49 Cal.3d at p. 419), and Dicon's interpretation impliedly repeals, in part, the statutes that govern the Board.

(continued...)

Moreover, even if a state agency (a zone manager is not a state agency) made such a determination, it would still be subject to Board review. (Rev. & Tax. Code, § 19801 [In determining any issue of law or fact "neither the [Board] . . . nor any court is bound by the determination of any other officer . . . of the state."]; see also *Appeal of Ida Arvida Rogers* (50-SBE-016), decided August 10, 1950 [Board not bound by the Secretary of State's determination of the filing date of a certificate of dissolution for purposes of determining the correct tax.].)

Because Dicon's interpretation of the statute conflicts with these statutes by restricting the Board's authority, its interpretation would violate the rule against implied repeals. The Legislature knows how to restrict the Board's authority. It has not done so here.

II. DICON'S REMAINING ARGUMENTS LACK MERIT.

A. Employers Are Not Relieved from Keeping Records.

Dicon is mistaken in stating that section 23622.7 "limits the taxpayer's recordkeeping obligation" to obtaining a voucher and providing it to the Board. (Answer Brief at p. 19.) Dicon claims, and the Court of Appeal held, that subdivision (c) allows employers to destroy documents that would support a voucher "[b]ecause the statute imposes no duty on the employer to maintain [other] documents[.]" (*Dicon, supra*, 173 Cal.App.4th at p. 1092, fn. 10.)

Dicon's interpretation adds language to the statute that contradicts existing law. While section 23622.7 expressly requires an employer to obtain and retain vouchers, it does not expressly relieve a taxpayer from its

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(...continued)
Under the Board's interpretation, there is no conflict and no implied repeal. "[T]he two [statutes] may stand together." (*Id.* at pp. 419-420.)

record-keeping obligations under existing law. Section 19504 gives the Board broad authority to demand books, records, and other information from taxpayers. Section 19133 provides for the imposition of a penalty for a taxpayer failing or refusing to provide requested information. In addition, California Code of Regulations, title 18, section 19032, subdivision (a)(5) provides that "[a] taxpayer has a duty to maintain relevant records and documents[.]"[3] Dicon's position, if adopted, would impliedly repeal the taxpayer's existing duty under these provisions to maintain documents. (See *Western Oil*, *supra*, 49 C.3d at pp. 419-420 [courts exercise a strong presumption against the implied repeal of a statute, and "are bound, if possible, to maintain the integrity of both statutes if the two may stand together."].)[4] The Board's interpretation properly limits subdivision (c) to its plain language and maintains the integrity of all the affected statutes.

B. Dicon's Interpretation Does Not Address the Legislature's Concern with Fraud and Mistake.

Dicon argues that its interpretation "protects against the risk of fraud or mistake without exposing hiring employers to prove-up procedures that might dilute the statutory incentive structure." (Answer Brief at p. 28.) The Court of Appeal also believed that "[r]educing an employer's confidence in receiving the tax credit is a disincentive to hiring a

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[3] Effective April 24, 2003, prior to Dicon's filing of its amended return in November 2003.

[4] The appellate court also relied on California Code of Regulations, title 25, section 8463, subdivision (a)(3), which requires the Enterprise Zone manager to keep documents. (Dicon, *supra*, 173 Cal.App.4th at p. 1092.) However, the regulation only became effective on November 27, 2006, after Dicon's claim was denied. Moreover, because the regulation specifically governs administration of vouchering programs, one would not expect it to affirmatively eliminate an *employer's* record-keeping obligations, especially in light of existing law establishing that duty.

disadvantaged worker, thereby undermining the reason for the Enterprise Zone." (*Dicon*, *supra*, 173 Cal.App.4th at p. 1093.) However, Dicon and the appellate court ignore the Legislature's concern about tax abuse. With all due respect to the Court of Appeal, the tax credit is not granted for hiring any "disadvantaged" worker, but for hiring a statutorily qualified one. The voucher program does not relieve employers of responsibility for proving that their employees are "qualified" when they claim the tax credit. If the Legislature had intended this, it could easily have done so. If it was more concerned about employer convenience than tax abuse, it could have said so. It did neither.

Dicon and the Court of Appeal also ignore that without Board authority to review employee eligibility, zone managers have no incentive to identify fraud or mistake, or to deny vouchers to *ineligible* employees. Dicon's interpretation results in weaker protections (only review by a zone manager or other non-Board entities) at the same time that eligibility requirements were loosened. Dicon would have us believe that just when stronger protections were needed, the Legislature weakened them. This makes no sense. Dicon's interpretation of section 23622.7 *increases* the risk of fraud and mistake and the likelihood of hiring credits being granted for *ineligible* employees, while the Board's does not. The Board's interpretation is reasonable and consistent with the Legislature's intent.

C. There Was No Prejudice.

Dicon claims that it was prejudiced by unreasonable delay in the Board's audit, characterizing it as an ambush or trap. It claims that in October 2006, when the Board partially denied its claim for refund, it "had no access to additional documentation necessary to support hiring credits earned in the year ending March 31, 2001." (Answer Brief at p. 32.) Dicon suggests that this alleged prejudice supports its interpretation of the statute

because the Legislature would not have created such a trap. But the Board's audit was not an ambush, and there was no prejudice. And by adopting the Board's position in this case, employers would not suffer prejudice in the future because the Court will have removed any uncertainty about employers' duty to maintain supporting records.

Dicon's claims it was ambushed because the Board delayed seeking documentation for five and a half years, from March 2001 until October 2006. However, Dicon focuses on the wrong dates. Dicon did not claim enterprise zone tax credits on its original tax return in March 2001, but rather in an amended return filed in *November 2003*, almost three years after the close of its taxable year. (AA at p. 15, lns. 9-12.) Nor does Dicon's complaint allege the date on which the Board notified Dicon of the audit (which is normally long before the audit is concluded). Having filed a multi-million dollar tax credit claim on an amended return almost three years after its taxable year ended, and having failed to allege when it was notified of the audit, Dicon cannot claim prejudice.

Moreover, of course, Dicon should have known that taxpayers must keep relevant documents when they claim tax credits. Given the Board's authority under section 19504 to demand records and other information from taxpayers, and the general rule under section 19057 that the Board has four years after a return (original or amended) is filed in which to assess additional taxes, the only employers that would suffer are those that discard documents in defiance of existing law. In addition, because Dicon failed even to seek vouchers for almost three years after the tax year in question, it is clear that it did not rely on the vouchers when it decided to hire these employees. It simply sought a tax credit years after hiring them.

Any trap here would result from Dicon's interpretation, which would hamstring the Board and reward taxpayers who hide their tax-credit claims for years, then plead that the supporting records no longer exist. By

contrast, under the Board's interpretation, both employers and the Board would understand their obligations at the outset.

D. Documents Are Available to Employers.

Dicon claims that "employers lack access to the type of personal and financial documentation that might provide further verification[.]" (Answer Brief at p. 32.) It claims that "[t]his type of documentation is highly confidential to the employees" and moreover "is protected by the employee's right to privacy under the California Constitution[.]" (*Id.* at pp. 32-33.) The Court of Appeal agreed. (*Dicon*, *supra*, 173 Cal.App.4th at p. 1092.) Contrary to Dicon's argument, employers either possess or have access to this information.

Under California Code of Regulations, title 25, section 8463, subdivision (a)(3) (hereafter regulation), zone managers are required "to retain and keep confidential a copy of each voucher application received and each voucher issued and their supporting documentation." The same regulation provides that these records are accessible to employer/applicants and the Board, and that they must be maintained for at least five years. Therefore, even if an employer did not have possession of the documents, it has access through the zone manager. Of the three entities involved, the employer, the zone manager and the Board, the Board is the only one that does not create or maintain any of the records.

Although employers, employer's agents, or prospective employees may seek vouchers, the typical voucher applicant is an employer or its agent, as suggested by the language of regulation 8463(a)(2) which provides that "any Applicant requesting a voucher [must] provide documentary evidence to substantiate that the employee for whom a

voucher is requested satisfied [the eligibility requirements.]"[5]

Even more typical, unfortunately, is that employers (or their agents) directly contact voucher agencies *years* after the fact to obtain vouchers. (See Opening Brief at pp. 10-11.) The practice is not prohibited, or even *unusual*, because there is no requirement that zone managers ever meet or speak with the subject employees.[6] And here, given Dicon's admission that "Dicon sought agency certification of its hired workers' qualified status in November 2003," it presumably did have supporting documents at that time. (Answer Brief at p. 32.)

E. The Board's Interpretation Harmonizes Existing Law.

The Board agrees with Dicon that in construing statutes courts must determine legislative intent. (Answer Brief at p. 35.) The Board also agrees that "statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Ibid.*; internal quotation marks omitted.) The Board does *not* agree, though, that Dicon's interpretation of section 23622.7 accomplishes this goal.

Dicon recognizes a conflict between the Board's statutory authority to audit and assess taxes and its claim that section 23622.7, subdivision (c) delegates authority to zone managers to make final income tax determinations of employee eligibility. But it argues that the two can be

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[5] The Board is not aware of even one voucher that has been obtained by an employee. However, it is theoretically possible for an employee to do so.

[6] But even if a prospective employee did directly obtain a voucher, the employer will still know when it is based on something potentially embarrassing because the basis for eligibility is stated on the voucher; it is not kept from employers. (A sample voucher form appears on the internet at: <http://www.ci.rialto.ca.us/documents/downloads/EZ1form.pdf>.)

harmonized by *limiting* the Board's authority to audit and assess taxes "by restricting the [Board's] role in confirming the accuracy of properly-issued vouchers." (*Ibid.*) Dicon would limit the Board's statutory authority to avoid a conflict with its interpretation. That, however, only serves to underscore the conflict. It absolutely fails to *harmonize* Dicon's interpretation with the Board's existing legal authority.

Contrary to Dicon's claim, it is not possible to *harmonize* the statutes by limiting the Board's broad general power to audit and assess taxes under section 19032, or by ignoring the rule under section 19801 that the Board may not be bound by another agency's determination. On the other hand, there is *no conflict* under the Board's interpretation because (1) it preserves the Board's broad general power to audit and assess taxes, (2) it follows the rule that the Board is not bound by another agency's determination, and (3) it is consistent with the plain language of section 23622.7, which requires a voucher as a separate and additional requirement. Because the Board's interpretation harmonizes section 23622.7 with existing law, and it is reasonable, it must be adopted. (*Hospital Service*, *supra*, 25 Cal.App.3d at p. 406.)

F. Dicon's Interpretation Shifts the Burden of Proof.

In its opening brief the Board argued that the Court of Appeal's decision effectively shifted the burden of proof onto the Board, and was thus contrary to the historical rule in tax-refund litigation that the burden of proof is on taxpayers. This long-standing rule is based on sound policy; the only exceptions being where lawmakers or voters explicitly shift the burden of proof.

Dicon claims that the Board has confused the "burden of proof" with the "burden of production." According to Dicon, the lower court "ruled that a taxpayer-employer's burden of production shifts to the [Board] upon

production of a voucher issued by a certifying agency because the voucher is prima facie evidence of the hired worker's qualified status." (Answer Brief at p. 42.) But the Court of Appeal's ruling does indeed shift the burden of proof.

Evidence Code section 602 states that: "A statute providing that a fact . . . is prima facie evidence of another fact establishes a rebuttable presumption." (Evid. Code, § 602.) The appellate court held that a fact (a voucher) is prima facie evidence that a worker is an "eligible employee" under section 23622.7, subdivision (b)(4)(A)(iv), which accordingly established a "rebuttable presumption" under Evidence Code section 602. Under Evidence Code section 601, "[e]very rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof." (Evid. Code, § 601.) Dicon claims the presumption in this case affects the burden of producing evidence, rather than the burden of proof. It does not.

In *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, this Court explained that the distinction between a presumption affecting the burden of producing evidence and one affecting the burden of proof is that the former is "'established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied'" (*id.* at p. 694; quoting Evid. Code, § 603), while the latter is "'established to implement some public policy[.]'" (*Id.* at 695; quoting Evid. Code, § 605.) The purpose of a presumption affecting the burden of producing evidence "relates solely to judicial efficiency, and does not rest on any public policy extrinsic to the action in which it is invoked" (*id.* at p. 694); however, the purpose of a presumption affecting the burden of proof "relates to public policy goals 'other than or in addition to the policy of facilitating the trial of actions.'" (*Id.* at p. 695; quoting Cal. Law Revision Com. com. on Evid. Code, § 605.)

The Court of Appeal's presumption affects the burden of proof because it "relates to public policy goals 'other than or in addition to the policy of facilitating the trial of actions.'" (*Ibid.*) The lower court reasoned that the voucher presumption is necessary to further the public policies behind enterprise zone hiring credits. (*Dicon, supra*, 173 Cal.App.4th at p. 1093 ["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."].) Dicon's arguments also rely on public policy. (Answer Brief at p. 25 ["What the (Board) fails to acknowledge is that the Legislature chose to reduce the risk of fraud or mistake by delegating certification authority to the experts -- the EDD and local agencies -- not the (Board)."]; Answer Brief at p. 25 ["This certification procedure was the Legislature's plainly chosen method for balancing incentive promotion and fraud prevention."]

The public policy behind the appellate court's presumption in this case is similar—if not identical—to that found in two other cases. In *Hewitt v. Meaney* (1986) 181 Cal.App.3d 361, which dealt with the presumption of intended easement, the court held that "[i]t seems reasonable to conclude the presumption of an intent to create an easement is one affecting the burden of proof, because it serves the public policy of freeing land for use." (*Id.* at p. 367.) In *Gillette v. Work. Comp. App. Bd.* (1971) 20 Cal.App.3d 312, the court held that the presumption under Labor Code section 3212 that a fireman's heart trouble is presumed to arise out of his employment was one affecting the burden of proof. (*Id.* at p. 320 ["We think that it must be conceded that if the presumption applies here it is one of public policy"].)

Because the presumption advocated by Dicon and found by the Court of Appeal in this case was "established to implement some public policy," it is a presumption affecting the burden of proof. (Evid. Code, § 605.)

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Dated: May 5, 2010

Respectfully submitted,

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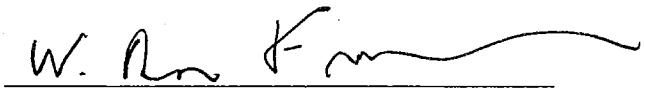

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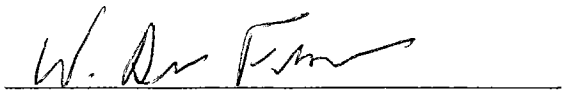
CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 4,282 words.

Dated: May 5, 2010



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Dicon Fiberoptics, Inc. v. Franchise Tax Board of the State of California**

Case No.: **S173860**

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 May 6, 2010, I served the attached **REPLY BRIEF ON THE MERITS** 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:

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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 May 6, 2010, at Los Angeles, California.

ROSITA V. EDUARDO
Declarant

Signature

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