

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of:  
**R. CARR**

) OTA Case No. 19064927  
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**OPINION**

Representing the Parties:

For Appellant: Shawn Spaulding, Attorney

For Respondent: Christopher T. Tuttle, Tax Counsel III

For Office of Tax Appeals: Oliver Pfof, Tax Counsel

K. GAST, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19331, R. Carr (appellant) appeals alleged deemed denials by respondent Franchise Tax Board (FTB) of appellant’s claims for refund of \$16,164 for the 2016 tax year and \$19,542 for the 2017 tax year.

Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

**ISSUE**

Whether appellant is entitled to the claimed income tax withholding credits for the 2016 and 2017 tax years, which, if allowed, would provide Office of Tax Appeals (OTA) jurisdiction over these years and entitle appellant to the amounts stated in his refund claims.

**FACTUAL FINDINGS**

1. Solvis Staffing Services, Inc. (Solvis) employed appellant as its president/CEO from the early part of 2016, through February 14, 2017, when appellant resigned. Solvis was in the business of supplying temporary staffing to third-party employers. Appellant’s primary responsibilities were to grow the business, obtain workers’ compensation

- insurance for Solvis's temporary workers, and pay unemployment and payroll taxes associated with Solvis's temporary workers.
2. On January 15, 2018, appellant filed an amended 2016 California income tax return, after receiving a corrected 2016 Form W-2 (i.e., W-2c) from Solvis. The W-2c increased appellant's previously reported taxable wages and also increased his total California income tax withholdings to \$75,069. On this amended return, appellant reported the revised taxable wages and income tax withholdings, and after recomputing an increased tax due of \$58,905, requested a refund of \$16,164 (\$75,069 - \$58,905).
  3. On April 15, 2018, appellant filed a joint 2017 California income tax return<sup>1</sup> that reported tax due of \$340 and total income tax withholdings of \$19,882, as reported by Solvis on 2017 Forms W-2.<sup>2</sup> On this return, appellant requested a refund of \$19,542 (\$19,882 - \$340).
  4. In a series of letters, FTB informed appellant it could not verify the California income tax withholdings allegedly made by Solvis that he claimed on his 2016 amended and 2017 original returns. To get credit for the withholdings, FTB requested appellant submit proof of Solvis's payments to the California Employment Development Department (EDD)<sup>3</sup> and Quarterly Wage and Withholding Reports for 2016 and 2017.<sup>4</sup> Appellant submitted EDD e-services printouts for 2016 showing total withholdings for appellant of \$75,069, and a Quarterly Contribution Return and Report of Wages (Form DE 9C) for

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<sup>1</sup> Although appellant filed a joint 2017 California income tax return with his spouse, his spouse did not sign the appeal letter. Therefore, his spouse is not a party to this appeal.

<sup>2</sup> Solvis issued two 2017 Forms W-2 that reported a total of \$19,882 in California income tax withholdings: one to appellant reporting \$19,575 and the other to his spouse reporting \$307.

<sup>3</sup> In general, the EDD administers California's unemployment insurance, disability insurance, and paid family leave programs. It also audits and collects payroll taxes and maintains employment records for California workers.

<sup>4</sup> The record reflects FTB subsequently issued notices denying the withholdings at issue in full. Specifically, for the 2016 tax year, in Notice of Tax Return Change – Revised Balance dated April 30, 2018, FTB reduced appellant's claimed withholdings from \$75,069 to zero and requested payment of the full tax reported on that amended return of \$58,905, plus a penalty, interest, and fees. Likewise, for the 2017 tax year, in Notice of Tax Return Change – Revised Balance dated June 4, 2018, FTB reduced appellant's claimed withholdings from \$19,882 to zero and requested payment of the full tax reported on that return of \$340, plus interest and fees. Appellant did not pay these amounts for either 2016 or 2017 because, as he contends on appeal, he should get credit for paying the principal tax due through withholdings made by Solvis.

2017 showing total withholdings for appellant and his spouse of \$19,882. FTB did not accept these documents as proof of payments.

5. Because FTB had not issued any notice denying his refund claims for 2016 and 2017 (i.e., his amended 2016 return filed on January 15, 2018, and his 2017 return filed on April 15, 2018), appellant treated FTB's inaction as deemed denials of his claims and filed this instant appeal with OTA on June 18, 2019.

### DISCUSSION

A taxpayer bears the burden of proving entitlement to a refund claim. (*Appeal of Jali, LLC*, 2019-OTA-204P.) In an action for refund, a taxpayer cannot assert error and thus shift to the state the burden to justify the tax. (*Dicon Fiberoptics, Inc. v. Franchise Tax Bd.* (2012) 53 Cal.4th 1227, 1235.) Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) A preponderance of evidence means the taxpayer must establish by documentation or other evidence the circumstances it asserts are more likely than not to be correct. (*Appeal of Estate of Gillespie*, 2018-OTA-052P.)

The resolution of this appeal is controlled by a single factual issue: whether Solvis withheld California income tax from appellant's wages in 2016 and 2017. If Solvis did, as appellant asserts, there is no dispute appellant is entitled to claim those withholdings as a credit on his 2016 and 2017 tax returns and is owed the requested refunds. Thus, in that circumstance, we would have jurisdiction over this appeal because appellant properly deemed his claims for refund denied and filed this appeal with OTA after FTB failed to act on his claims within six months after they were filed with FTB. (R&TC, § 19331; Cal. Code Regs., tit. 18, § 30103(a)(4).) If, however, Solvis did not, as FTB asserts, then appellant has not established any overpayments for 2016 and 2017, and since his refund claims are unperfected, we lack jurisdiction to consider them and his appeal to OTA was prematurely filed. (R&TC, § 19322.1 [for purposes of R&TC section 19331, a refund claim "shall be deemed filed on the date that full payment of the tax is made"].)

The essence of the parties' contentions can be summarized as follows. Appellant asserts Solvis withheld California income tax from his wages, and as a result, he is entitled to a credit for income taxes paid regardless of whether Solvis reported or remitted those withholdings to the EDD. FTB disagrees, arguing that unlike a rank-and-file employee who has little control over

whether taxes are withheld and reported to the EDD, appellant, as president/CEO of Solvis during the years at issue, exercised significant control or oversight over all aspects of the business, including payroll tax withholding and reporting, and thus he caused Solvis to not report or remit to the EDD the claimed withholdings.

Under California law, every employer who pays wages to a resident employee (or to a nonresident employee for services performed in California) generally shall deduct and withhold from those wages for each payroll period, so far as practicable, a sum which is substantially equivalent to the amount of tax reasonably estimated to be due by the employee. (Unemp. Ins. Code (UIC), § 13020(a)(1).)<sup>5</sup> R&TC section 19002(a) provides the following in relevant part: “*The amount withheld* [by the employer] under . . . Section 13020 of the [UIC] during any calendar year shall be allowed to the recipient of the income [i.e., the employee] as a credit against the tax for the taxable year with respect to which the amount was withheld.” (Italics added; see also Cal. Code Regs., tit. 18, § 19002(a).) The parties appear to agree that under R&TC section 19002(a), if the employer *does withhold*, the employee-taxpayer can still claim the withholdings as a credit against the tax for the tax year, even if the employer fails to report or remit such amounts to the EDD. (Cf. *Appeal of DeAmicis* (82-SBE-114) 1982 WL 11791 [an employer’s failure to withhold does not relieve the employee-taxpayer of liability for payment of the tax].) But they disagree factually whether Solvis did actually withhold income tax from appellant’s wages because, as FTB asserts, appellant was the president/CEO of Solvis, which means he exerted control or oversight over all aspects of the business and thus caused Solvis to not withhold or remit the taxes in question.

In situations such as this, the U.S. Tax Court held, in a matter of first impression, that “the proper test to determine whether actual withholding at the source occurred should consider whether the funds *functionally left the control of a taxpayer*. Such a test should not be strictly constrained by the multiple identities one person may have when acting in both a personal and a corporate capacity.” (*May v. Commissioner* (2011) 137 T.C. 147, 153 (*May*), italics added.) In *May*, the taxpayer was not only a shareholder, employee, and officer of the corporation, but he was also president and CEO, had sole check signature authority on the corporation’s bank

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<sup>5</sup> Also, every employer required to withhold any tax under UIC section 13020 must file a withholding report, a quarterly return, and a report of wages with the EDD every calendar quarter and pay over the taxes required to be withheld. (UIC, § 13021.)

account, and was found to be a responsible person for the corporation's failure to remit income tax withholdings (including his own) to the U.S. federal government under Internal Revenue Code (IRC) section 6672.<sup>6</sup> (*Ibid.*) In the court's view, the fact the funds were technically withheld by the employer-corporation was insufficient to show they had passed beyond the functional control of the employee-taxpayer, who, through his role as the corporate CEO, misappropriated the funds back to the corporate account that he controlled, using them to continue operation of the corporation that paid him an annual salary. (*Id.* at pp. 153-154.) Accordingly, the court concluded the taxpayer was not entitled to claim the withholding credits on his federal income tax return. (*Id.* at p. 154.)

We find the tax court's conclusion in *May, supra*, to be well reasoned and persuasive on the issue here and asked the parties for briefing on this case.<sup>7</sup> Appellant argues *May* is factually distinguishable for several reasons. First, unlike the taxpayer in that case, appellant asserts he is not a shareholder of Solvis and therefore he does not have total control of the corporation at every level. Second, also unlike the taxpayer in *May* who was assessed with personal liability for all unremitted withholdings under IRC section 6672, appellant was not assessed personal liability for Solvis's unremitted withholdings by the EDD. Third, the taxpayer in *May* was also assessed a fraud penalty and appellant was not assessed such penalty. On this point, appellant alleges he has personal knowledge that payroll taxes of \$360,000 were actually paid to the EDD in 2016 and this amount exceeds the \$75,069 claimed on his 2016 California tax return. Lastly, appellant contends the liability Solvis owed to the EDD (exceeding \$16 million) arose from

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<sup>6</sup> The IRC requires employers to withhold both federal Social Security and individual income taxes from their employees' wages and pay these taxes to the U.S., but if such employers fail to make these required payments, the IRS, under IRC section 6672(a), may assess penalties against responsible persons within the business in the amount of the unpaid taxes for willfully failing to collect or pay over such taxes.

<sup>7</sup> We find *May, supra*, to be persuasive authority because it deals with Treasury Regulation section 1.31-1(a), which, along with IRC section 31(a), is similar in substance to R&TC section 19002(a). (See generally *J. H. McKnight Ranch v. Franchise Tax Bd.* (2003) 110 Cal.App.4th 978, fn.1, citing *Calhoun v. Franchise Tax Bd.* (1978) 20 Cal.3d 881, 884 [where federal law and California law are the same, federal rulings and regulations dealing with the IRC are persuasive authority in interpreting the applicable California statute].) Treasury Regulation section 1.31-1(a) provides the following in relevant part: "The tax deducted and withheld at the source upon wages . . . is allowable as a credit against the tax imposed by Subtitle A of the Internal Revenue Code of 1954, upon the recipient of the income. If the tax has actually been withheld at the source, credit or refund shall be made to the recipient of the income even though such tax has not been paid over to the Government by the employer." (See also IRC, § 31(a)(1)-(2) [to the same effect].)

either an EDD audit or amended payroll tax return(s) filed by Solvis’s owners after appellant was forced to resign as president/CEO.<sup>8</sup>

FTB counters that *May* is applicable to this appeal. It argues that since appellant held dual roles as both employee and president/CEO of Solvis (as well as serving as a corporate director), the functional control test is appropriately applied here to determine whether the payroll taxes due to the EDD “actually left appellant’s control and may be deemed actually withheld from his wages.” FTB asserts that because appellant has been found by the EDD to be a “responsible person” under UIC section 1735 for the tax years at issue, he has failed to demonstrate the claimed income tax withholdings functionally left his control.<sup>9</sup>

As support, FTB submits an email from the EDD to FTB that is dated December 13, 2021, which states the following: “Per our research, a [UIC section] 1735 investigation case was opened and it was determined that the liability is out of statutes and therefore the case was closed without issuing any assessments against the Responsible Party. *Also, [appellant] is one of the responsible parties.*” (Italics added.) UIC section 1735 generally provides that an officer, major stockholder, or other person, having charge of the affairs of a corporation, “who willfully fails to pay” contributions or withholdings on the date on which they become delinquent “shall be personally liable for the amount of the contributions, withholdings, penalties, and interest due and unpaid by such employing unit.” FTB thus asserts the EDD found appellant willfully failed to pay the income tax withholdings owed by Solvis, even though the EDD was time-barred from assessing him personally.

Based on a careful review of the parties’ contentions and the evidentiary record, we find appellant has not shown by a preponderance of the evidence he is entitled to the claimed withholdings. We first address FTB’s allegation that appellant was found by the EDD to be a

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<sup>8</sup> Appellant elaborates on this point. He indicates he was “forced to resign when the owner(s) of Solvis would not disclose pertinent information about the ‘staffing employees’ contracted under Solvis. It is appellant’s belief that Solvis was assessed additional payroll tax debt (from an audit or amended payroll returns) based on employees he had no control or knowledge of while working for Solvis.”

<sup>9</sup> FTB cites to a precedential tax decision issued by the California Unemployment Insurance Appeals Board, which found the petitioner there to be a responsible person under UIC section 1735, for the proposition that provision does not require a showing of intent to defraud the government to establish the failure to remit payroll taxes was willful. (*Appeal of Robert Lake Johnston* (1986) Cal. Unemp. Ins. App. Bd., No. P-T-446.) While we are not bound by this decision for our purposes here, we independently note it supports that consideration of UIC section 1735 is relevant here, just as the tax court’s consideration of IRC section 6672 was relevant in *May*, because the decision concludes that both provisions are “sufficiently similar.”

responsible person under UIC section 1735. Appellant argues the email from the EDD cannot be relied on because it is not a valid assessment against him under UIC section 1735 and the email does not address the elements of that section or provide analysis or factual representations proving he knew of Solvis's payroll tax debt or acted willfully. We agree with appellant on this point and place little, if any, evidentiary weight on the email. We do not know what kind of investigation, if any, the EDD conducted and whether it made any factual or legal conclusions supporting appellant was a responsible person.

But that does not end the matter. We do not read *May* as requiring a finding that the taxpayer is personally liable for failure to remit withholdings to the federal or state government as a necessary condition to prove the funds never left the taxpayer's functional control. Rather, what is required under the functional control test is a holistic analysis of whether the taxpayer exerted the requisite control over the withholdings in the taxpayer's dual identities as both an employee-taxpayer and the employer.

We find the evidence appellant submits to be unhelpful for purposes of determining the extent of his role as president/CEO of Solvis or his knowledge of, or involvement with, Solvis's failure to remit payroll taxes to the EDD. For example, as support that he was not responsible for Solvis's payroll tax issues, appellant submits court documents, including a second amended complaint he filed in 2021 against various individuals and entities who owned (or were affiliated with) Solvis. In that complaint, he alleges the named defendants caused him financial and emotional harm because, among other things, they "secretly palm[ed] off tax and workers['] compensation liability to [Solvis]," "where [appellant] served as president, without [appellant] and certain other Solvis employees knowing." He also alleges they "secretly transferr[ed]" tax liability to Solvis, without paying taxing authorities who "have looked to [appellant] to satisfy" Solvis's tax and other liabilities. However, appellant has not provided any evidence to support these allegations. (See *Appeal of Gorin*, 2020-OTA-018P [unsupported assertions are insufficient to satisfy a taxpayer's burden of proof].)

Appellant also submits a contemporaneous resignation email dated February 14, 2017, in which he states the following: "After countless attempts to obtain payroll documents and unverifiable payroll tax returns, I am formally resigning as President and Director of [Solvis]. Because of this I was NOT able to run Solvis effectively and efficiently." (Emphasis in original.) While this email tends to show appellant was frustrated with his inability to access

payroll documentation during his tenure as president/CEO at Solvis, we do not believe the email, along with appellant's other evidence, rises to the level of showing, by a preponderance of the evidence, that he lacked the ability to control Solvis's payroll tax withholding and reporting.

Appellant additionally submits documents establishing he did not legally own Solvis or any of its affiliates. But that fact does not show he lacked control of the corporate affairs of Solvis, including its payroll tax withholding and reporting obligations. We do not believe a lack of business ownership necessarily proves whether the funds functionally left appellant's control.

Critically, we also find unhelpful the EDD e-services printouts for 2016 showing total withholdings for appellant of \$75,069, the Quarterly Contribution Return and Report of Wages (Form DE 9C) for 2017 showing total withholdings for appellant and his spouse of \$19,882, and appellant's 2016 and 2017 Forms W-2 (including the corrected W-2c for 2016) showing the claimed withholdings. If anything, these documents just show what amounts Solvis reported, rather than what amounts were actually paid over, to the EDD, and they shed no light on the issue of whether the amounts left appellant's functional control. Indeed, it is undisputed Solvis owed to the EDD liabilities exceeding \$16 million. Although appellant contends that liability arose from either an EDD audit or amended payroll tax return(s) filed by Solvis's owners after appellant was forced to resign as president/CEO, he has submitted no evidence to support the assertion that no portion of the liability arose while he was president/CEO.

Lastly, appellant claims he directed Solvis to pay payroll taxes of approximately \$360,000 to the EDD in 2016, as shown in the 2016 EDD e-services printouts, and since this amount exceeds the \$75,069 claimed on his amended California tax return for that same year, he should at least get credit for the \$75,069. However, even if \$360,000 was remitted to the EDD, appellant has not shown what portion, if any, of that amount was his own withholdings.

In short, while appellant has made many allegations, he failed to provide credible evidence to establish both the amounts allegedly withheld from him by Solvis and these amounts functionally left his control as president/CEO of Solvis. Appellant was not simply a rank-and-file employee of Solvis. In general, for rank-and-file employees, income tax withholdings can be substantiated by third-party employer reporting and/or payments made to the EDD. But when, as here, the taxpayer is the president/CEO of a company and/or otherwise in control of the company's payroll tax reporting and payment obligations, a further evidentiary showing is required to prove that actual withholding at the source occurred (i.e., the funds functionally left



the taxpayer’s control). Otherwise, a taxpayer in control of such reporting obligations could fabricate the taxpayer’s own withholding records with no economic effect to either the taxpayer or the company if the payroll taxes are never paid to the EDD.

Accordingly, we find appellant has not satisfied his burden of showing he is entitled to the claimed income tax withholding credits for the 2016 and 2017 tax years. We thus conclude we do not have jurisdiction over appellant’s unperfected refund claims.

HOLDING

Appellant is not entitled to the claimed income tax withholding credits for the 2016 and 2017 tax years. Consequently, since appellant’s refund claims are unperfected, we lack jurisdiction to consider them and his appeal to OTA was prematurely filed.

DISPOSITION

OTA lacks jurisdiction over this appeal and therefore appellant is not entitled to the claimed refunds for the 2016 and 2017 tax years.

DocuSigned by:  
*Kenneth Gast*  
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Kenneth Gast  
Administrative Law Judge

We concur:

DocuSigned by:  
*Josh Lambert*  
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Josh Lambert  
Administrative Law Judge

DocuSigned by:  
*Andrea L.H. Long*  
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Andrea L.H. Long  
Administrative Law Judge

Date Issued: 3/29/2022