THE STATE OF SOUTH CAROLINA
In The Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Case No. 2009-ALJ-17-0160
Appellate Case No. 2012-212203

Carmax Auto Superstores West Coast, Inc., ... Respondent/Petitioner

v.

South Carolina Department of Revenue, ... Petitioner/Respondent.

BRIEF OF PETITIONER/RESPONDENT
SOUTH CAROLINA DEPARTMENT OF REVENUE

Adam N. Marinelli (Bar No. 79031)
Counsel for Litigation
Roxanna M. Tinsley (Bar No.78641)
Counsel for Litigation
Milton G. Kimpson (Bar No. 7917)
Chief Counsel for Litigation
PO Box 11265
Columbia, SC 29211
Attorneys for Petitioner/Respondent
South Carolina Department of Revenue

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

STATEMENT OF ISSUES ON APPEAL

I. DID THE COURT OF APPEALS ERR BY IGNORING THE PLAIN LANGUAGE OF S.C. CODE ANN. § 12-6-2320 (SUPP. 2009) IN FINDING THAT THE DEPARTMENT OF REVENUE (DEPARTMENT OR PETITIONER/ RESPONDENT) HAS THE BURDEN OF PROOF TO SHOW AN ALTERNATIVE ACCOUNTING METHOD IS "MORE APPROPRIATE THAN ANY COMPETING METHODS?"

II. DID THE COURT OF APPEALS ERR IN INTERPRETING MEDIA GENERAL COMMUNICATIONS, INC. AND MEDIA GENERAL HOLDINGS, INC. v. SOUTH CAROLINA DEPARTMENT OF REVENUE, 388 S.C. 138, 694 S.E.2d 525 (2010), TO REQUIRE THE DEPARTMENT TO SHOW THAT ITS ALTERNATIVE METHOD OF APPORTIONMENT FOR TAXES, PURSUANT TO § 12-6-2320, IS "MORE APPROPRIATE THAN ANY COMPETING METHODS?"

III. IS THE COURT OF APPEALS' DECISION IN THE INSTANT CASE APPEALABLE IN LIGHT OF THIS COURT'S DECISION IN CHARLOTTE-MECKLENBERG HOSP. AUTH. V. S.C. DEP'T OF HEALTH & ENVTL CTRL., 387 S.C. 265, 692 S.E.2d 894 (2012), AND BONE V. U.S. FOOD SERV., 404 S.C. 67, 744 S.E.2d 552 (2013)?

STATEMENT OF THE CASE

This matter came before the Administrative Law Court (ALC) in accordance with the Administrative Procedures Act, S.C. Code Ann. § 1-23-310, et. seq. (2005) for a contested case hearing. CarMax Auto Superstores West Coast, Inc. (Respondent/ Petitioner or taxpayer) filed for a contested case hearing with the ALC to challenge a Department Determination issued by the Department upholding the assessment of corporate income tax on the taxpayer based on an alternative apportionment method.

The ALC heard the matter on February 18 and 19, 2010 and issued a ruling on April 22, 2010, upholding the Department's alternative apportionment method but dismissing the taxpayer's assessed penalties. The taxpayer filed a Motion for Reconsideration which the ALC denied. The taxpayer filed its appeal of the ALC decision in the South Carolina Court of Appeals. The Court of Appeals heard the matter on January 26, 2012 and issued an opinion on March 14, 2012, which held the ALC erred in placing the burden of proof on the taxpayer to show the Department's alternative apportionment method was not reasonable. The Court of Appeals reversed and remanded the matter to the ALC for a reconsideration of all issues.

After receipt of the Court of Appeals opinion, the Department filed a Petition for Rehearing pursuant to Rule 221, SCACR. The Court of Appeals subsequently denied the Department's Petition for Rehearing on May 7, 2012. Both parties petitioned this Court for certiorari. The Court certified the case for review by order dated August 29, 2013.

STATEMENT OF FACTS

The taxpayer, a subsidiary of CarMax, Inc., is a retailer of used light trucks and automobiles, and operates retail locations in California, Utah, and Nevada.[1] Prior to 2004, the taxpayer also managed certain CarMax intangible property and received income from related entities for the use of that intangible property. The taxpayer received those royalties from South Carolina retailers for the use of intangible property in this State and from retailers in other states.[2]

CarMax Auto Superstores, Inc. (East), a related subsidiary of CarMax, Inc., operates CarMax retailers in several eastern states, including South Carolina. Prior to 2004, East paid a percentage of its sales to the taxpayer pursuant to a royalty agreement in exchange for the use of intangible personal property managed by the taxpayer. East has regularly filed South Carolina corporate income tax returns on its retail income and has claimed sizable deductions from that income for those royalties and other payments made to the taxpayer for South Carolina tax purposes.[3]

CarMax Business Services, LLC (CBS) is another CarMax, Inc. subsidiary that was formed in 2005 as part of a restructuring of CarMax, Inc. At that time, the intangible property previously held by the taxpayer was placed in CBS in exchange for a 93.5%

---

[1]ALC Order, p.2, para. 1; Tr., p. 96,: lines 9-12, p. 98, line 13 (Joint Appendix, Vol. 1, p. 5, para. 1; Joint Appendix, Vol. 1, p. 117, lines 9-12; p. 119, line 13).

[2]ALC Order, p.2 (Joint Appendix, Vol. 1, p. 5).

[3]ALC Order, p.2 (Joint Appendix, Vol. 1, p. 5).

interest in the CBS income distributions. East also contributed certain assets and turned over the CarMax financing operations to CBS in exchange for a 6.5% interest in CBS.[4]

CBS provides various services to all CarMax entities and retailers, including, but not limited to, managing the intangibles and handling financing services. CBS receives a per car fee from retailers for its various management services and financing income in the form of interest and fees from CarMax customers who financed their purchases. CBS also securitizes the consumer finance contracts and sells them to third party investors.[5] CBS is treated as a pass-through entity for tax purposes and pays no taxes in South Carolina. All income from CBS flows to the taxpayer and East based on their respective percentage ownership interests. The taxpayer does not sell cars in South Carolina, such that it's only South Carolina income and only business activity within this State is derived from CBS' royalty and financing activities.[6]

The taxpayer filed amended returns for the tax years 2002-2007 employing its chosen apportionment method under S.C. Code Ann. § 12-6-2290 (Supp. 2009) – also referred to as the gross receipts method. This formula calculated the taxpayer's apportionment ratio by dividing its gross receipts from financing and intangibles in South Carolina by the taxpayer's gross receipts from financing, intangible, and retail sales

---

[4]ALC Order, p.2 (Joint Appendix, Vol. 1, p. 5).

[5]ALC Order, p.3 (Joint Appendix, Vol. 1, p. 6).

[6]ALC Order, p.3 (Joint Appendix, Vol. 1, p. 6).

everywhere the taxpayer does business, resulting in a reported taxable income of $1,668,555. The taxpayer's gross receipts method yielded the following income tax due:[7]

2002: $14,717
2003: $11,532
2004: $7,840
2005: $6,883
2006: $3,879
2007: $3,670
Total: $48,523[8]

The Department audited the taxpayer for corporate income tax years 2002, 2003, 2004, 2005, 2006, and 2007. The resulting proposed assessment, including penalties and interest, totaled $829,490.00.[9] This was summarized as follows:

Income Tax	$488,300.00
Interest	$129,828.00
Penalty	$211,362.00
Total	$829,490.00

The Department employed an alternative apportionment formula under the provisions of § 12-6-2320(A)(4) finding that the taxpayer's use of the standard gross receipts apportionment formula failed to fairly represent its business activity within this State. The Department's alternative formula employed an apportionment ratio based on the taxpayer's South Carolina income from intangibles and financing over the taxpayer's

[7]See Tr. Ex. 4, CarMax West Amended Tax Returns, 2002-2007 (Joint Appendix., Vol. 2, Part I, p. 503). The taxpayer filed its original South Carolina corporate income tax returns for years 2002-2007 utilizing S.C. Code Ann. § 12-6-2250 (Supp. 2009) – the three-factor double weighted sales formula. This formula calculates a taxpayer's taxable income in South Carolina by computing a ratio of taxpayer's total property, payroll, and sales.

[8]Under the Department's calculations, the taxpayer had taxable net income in South Carolina of $10,731,006.00, which presented significant distortion between the tax owed under the taxpayer's proposed method.

[9]See Department Determination (Joint Appendix, Vol. 2, Part I, p.497).

intangibles and financing income from everywhere else that it does business. By focusing on the kind of business the taxpayer conducted within South Carolina, this alternative method of apportionment sought to impose tax on a fair measure of the taxpayer's South Carolina business by preventing the taxpayer from diluting its income by inflating the denominator of its apportionment ratio by including sales of autos from its retail operations in California, Utah, and Nevada. The proposed assessment also included the income from the sale of securitized consumer lending contracts in the taxpayer's South Carolina income. The taxpayer filed a timely protest and the Department issued its Determination upholding the proposed assessment. The taxpayer thereafter filed for a contested case hearing before the ALC. The ALC issued its ruling after a full hearing of all issues. In its Order, the ALC upheld the Department's audit findings but did not award the penalties as assessed.

The Court of Appeals heard the case and issued an order reversing and remanding the case to the ALC. The crux of the Court of Appeals' opinion concerned the burdens of proof under § 12-6-2320(A). That is, when a multistate taxpayer files a South Carolina return using a standard apportionment formula, it must accurately reflect its business activity within this State. In the event the standard formula fails to fairly reflect the extent of the taxpayer's business activity within this State, the Department may require the use of an alternative apportionment method.

The Court of Appeals ruled that the Department has both the initial burden to prove that the taxpayer's chosen standard method does not accurately reflect its business activity within this State, and the burden of proving that its alternative method is "more

appropriate than any competing methods."[10] The plain language of § 12-6-2320 does not support the latter conclusion, and such holding presents an insurmountable obstacle for the Department in the administration of that code section, as will be discussed at length below.

ARGUMENTS

The question of statutory interpretation is one of law for the court to decide. CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 73, 716 S.E.2d 877, 881 (2011). A reviewing court may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law. See Alltel Commc'ns, Inc. v. S. Carolina Dep't of Revenue, 399 S.C. 313, 316, 731 S.E.2d 869, 870-71 (2012), reh'g denied (Sept. 20, 2012) (citing S.C. Code Ann. § 1–23–610(B)(a), (d) (Supp. 2011)). At issue here is a pure question of law – what is the proper burden of proof the proponent of an alternative apportionment method must bear under § 12-6-2320 after a showing that a standard apportionment formula does not fairly represent a taxpayer's business activity within the state.

I. The Court Of Appeals Erred By Ignoring The Plain Language Of § 12-6-2320 In Finding That The Department Has The Burden Of Proof To Show An Alternative Accounting Method Is "More Appropriate Than Any Competing Methods."

[10]The requirement to show that an alternative method is "more appropriate than any competing methods" is inconsistent with an earlier statement in the Court of Appeal's opinion ". . . the Department bears the burden of proving its alternative accounting method is reasonable and more fairly represents CarMax West's business activity in South Carolina."

The Department is granted wide discretion by the Legislature in the application of alternative methods when there is a failure of the statutory methods to reflect the business activity of a taxpayer. Section 12-6 2320(A) provides as follows:

> (A) If the allocation and apportionment provisions of this chapter do not fairly represent the extent of the taxpayer's business activity in this State, the taxpayer may petition for or the department may require, in respect to all or any part of the taxpayer's business activity, **if reasonable**:
> (1) separate accounting;
> (2) the exclusion of one or more of the factors;
> (3) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in the State; or
> (4) the employment of **any other method** to effectuate an equitable allocation and apportionment of the taxpayer's income.

(Emphasis added). According to the statute, once there is an adequate showing that standard allocation and apportionment formulas under S.C. Code Ann. §§ 12-6-2250 and 12-6-2290 do not fairly represent the extent of the taxpayer's business in this State, the Department may require any of the accounting methods enumerated in subparagraphs (1) - (5) of § 12-6-2320(A), if "reasonable."[11] The statute does not require that the proponent of an alternative accounting method - whether the Department or even the taxpayer - show that the proffered method is more appropriate than any other "competing methods."[12] Instead, in the absence of evidence to the contrary, an alternate accounting method should be upheld if "reasonable."

---

[11]Moreover, the correct standard of proof, as articulated by the Court of Appeals, for both the evidentiary prongs assumed by the proponent of an alternative formula, is "preponderance of the evidence."

[12]In practice, such evidence could be part of any case the proponent of an alternate apportionment method pursues under the terms of § 12-6-2320, but only in

When construing a statute, the cardinal rule is to ascertain the intent of the Legislature. Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Id. at 23, 570 S.E.2d at 336. The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

In the instant case, § 12-6-2320(A) clearly provides that once the first prong is satisfied – that the standard formula fails to fairly represent the extent of the taxpayer's business activity in this State – an alternative apportionment formula may be required by the Department if "reasonable." The second prong of the proponent's burden of proof is consequently met once the proponent shows that its alternative method is "reasonable."[13] The clear language of the statute does not require the proponent to show that the chosen

---

response to the introduction of some competing method by the party opposing alternative apportionment. In the event an opposing party does not come forward with evidence of a competing method, the proponent's showing that the alternative formula is reasonable necessarily satisfies the statute.

[13]It is significant to note that the taxpayer has characterized the second prong of the burden of proof in similar terms. The taxpayer urged the Court of Appeals to require the Department to establish by clear and convincing evidence that the standard statutory apportionment method does not reflect the extent of the taxpayer's business in South Carolina and that the alternative separate accounting method is reasonable" (Appellant's Final Brief, p. 13) (Joint Appendix, Vol. 3, p. 1077). Aside from the taxpayer's use of an incorrect standard of proof, the Department is in agreement with the taxpayer's characterization of the substantive burden of proof under § 12-6-2320(A).

apportionment method is more appropriate than competing methods.[14] Once the proponent of the alternative method has satisfied both prongs, the proponent has met its burden of proof and use of the alternative formula should be upheld.

The Department's interpretation of § 12-6-2320(A)'s two pronged burden of proof is straightforward, logical, and avoids absurd results. By proving that the standard method of apportionment fails to fairly reflect the extent of a taxpayer's business within South Carolina and then proposing a "reasonable" alternative, the proponent of any alternative method naturally will have already shown that at least one method of apportionment is not proper. In the absence of specific evidence of competing formulas produced by the party opposing the proffered alternative method, the proponent should not be required to speculatively defend against endless permutations of alternate formulas. To hold otherwise would re-write the plain language of the statute and work an absurd result not intended by the General Assembly. State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964) (A statute must be interpreted so as to avoid absurd results.).

II. The Court Of Appeals Erred In Interpreting *Media General Communications, Inc. And Media General Holdings, Inc. v. South Carolina Department Of Revenue*, 388 S.C. 138, 694 S.E.2d 525 (2010), To Require The Department To Show That Its Alternative Method Of Apportionment For Taxes, Pursuant to § 12-6-2320, Is "More Appropriate Than Any Competing Methods.

[14] A review of other jurisdictions that have analyzed similarly worded apportionment statutes reveals that no state requires the proponent of an alternative method to prove its supremacy against all others. See e.g. Union Pacific Corp. v. Idaho State Tax Comm'n, 139 Idaho 572 (2004); Microsoft Corp. v. Franchise Tax Board, 39 Cal.4th 750 (2006); Ruby Const. Co., Inc. v. Department of Revenue, Com. ex rel. Carpenter, 578 S.W.2d 248 (Ky. Ct. App. 1978).

Media General is the most recent case issued by this Court interpreting § 12-6-2320. The Court ruled that the language in § 12-6-2320(A)(4) providing for "the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income" allowed the taxpayer therein to use a combined entity apportionment method to determine its tax liability. Heretofore, inasmuch as South Carolina had always been a "separate entity" State, combined entity reporting had not been recognized as a proper method for apportionment of income, even as an alternative method under § 12-6-2320. Media General, 388 S.C. at 149-50; 694 S.E.2d at 530-31.

For purposes of the instant case, it is important to recognize that the taxpayer in Media General was the proponent of the alternative method of apportionment, meaning the taxpayer bore the burden of justifying its use of a formula other than standard apportionment. The taxpayer satisfied its initial burden under § 12-6-2320(A) by virtue of the parties' stipulation that the standard statutory methods of apportionment did not fairly measure the taxpayer's business activity in South Carolina. Id. at 146, 694 S.E.2d at 529. Secondly, based upon its audit findings, the Department acknowledged that the combined entity apportionment method propounded by the taxpayer "did fairly measure the taxpayers' business activity in South Carolina." Id.[15] This was tantamount to a showing by the taxpayer that its chosen alternative method of apportionment was

[15]The Department's role is to fairly administer the tax laws. S.C. Code Ann. § 12-4-10 (2000). In particular, S.C. Code Ann. § 12-6-2210(B) (2000) provides in pertinent part: "[i]f a taxpayer is transacting or conducting business partly within and partly without this State, the South Carolina income tax is imposed upon a base which reasonably represents the proportion of the trade or business carried on within this State." (Emphasis added).

"reasonable" within the meaning of § 12-6-2320(A) – the second prong of the burden of proof test to be satisfied by the proponent of an alternative apportionment method.

After the Media General taxpayer satisfied both its initial and second level burdens of proof under § 12-6-2320(A), the burden then shifted to the Department to propound a competing method of apportionment. This burden shifting is illustrated by the following excerpt:

> **We emphasize that, as a general rule, the Department need not automatically use the method requested by a taxpayer, as it has the discretion to select an alternative method that fairly measures the taxpayer's income in South Carolina.** In this case, however, the Department never recalculated Taxpayers' incomes using any other alternative method, and the Department stipulated that use of the combined entity apportionment method proposed by Taxpayers does result in a fair computing of Taxpayers' business activities in South Carolina. Accordingly, we uphold the ALC's determination that the combined entity apportionment method should be utilized by the Department for the tax period in question.
>
> * * *
>
> The Department concedes the standard apportionment formulas allowed under South Carolina law result in a statutory distortion of Taxpayers' incomes and that the combined entity apportionment method would fairly represent their business activities in South Carolina. We agree with the ALC that the legislature has placed no explicit limitation the alternative methods that may be used under section 12-6-2320(A)(4), and consequently we affirm the ALC's ruling that the Department is authorized to use the combined entity apportionment method. **Although the Department has the discretion to select an alternative method, the ALC has ordered in this case that the method be applied and we affirm this determination as the Department has not established that another method would be more appropriate.** This ruling is limited to the tax period in question, and the Department may employ any other appropriate alternative method for future tax years.

Id. at 151-52, 694 S.E.2d at 531-32 (emphasis added).

Once the taxpayer in Media General met the requirements of § 12-6-2320(A) by showing that the standard apportionment method did not "fairly represent the extent of the taxpayer's business activity in this State" and that the chosen apportionment method resulted in a fair measure of its in-state business activities (i.e., the method was "reasonable"), the Department then had the further opportunity, as the party opposing the use of the proffered method, to show that a more appropriate alternative method existed. In Media General, the Department did not make such a showing, thus the Court determined that the combined entity apportionment method, because it was reasonable, was the method to be used to calculate the taxpayer's South Carolina income tax liability. Id.[16] In the instant case, once the Department demonstrated that the standard apportionment method did not fairly reflect the taxpayer's business activity within South Carolina and that the proffered alternative method was reasonable, the burden then shifted to the taxpayer, the opponent of the proffered alternative method, to show that a more appropriate alternative method existed. The taxpayer failed to make such a showing.[17] In the absence of evidence propounded by the taxpayer that the reasonable

[16]In such cases, in the event the Department responds to the taxpayer's proffer of an alternative formula with an alternative equally as reasonable, arguably the Department's method may enjoy some presumption of correctness based on § 12-6-2210(B), and the Media General Court's observation that "the Department need not automatically use the method requested by a taxpayer, as it has the discretion to select an alternative method that fairly measures the taxpayer's income in South Carolina." Id. (emphasis added).

[17]In fact, the ALC order recites that the taxpayer raised:

> . . .two primary arguments challenging the reasonableness of the Department's method. First, the taxpayer argues that

alternative apportionment method selected by the Department was not as well suited to measure the taxpayer's business activity as some competing formula, the Department's proffered method of apportionment should be upheld.

III. The Court of Appeals' Decision In The Instant Case Is Appealable In Light Of This Court's Decisions In *Charlotte-Mecklenberg Hosp. Auth. v. S.C. Dep't Of Health & Envtl Ctrl.*, 387 S.C. 265, 692 S.E.2d 894 (2012), And *Bone v. U.S. Food Serv.*, 404 S.C. 67, 744 S.E.2d 552 (2013).

The Administrative Procedures Act (APA) governs judicial review of administrative agency decisions. S.C. Code Ann. § 1-23-390 of this Act states "[a]n aggrieved party may obtain a review of a final judgment of the circuit court or the court of appeals pursuant to this article by taking an appeal in the manner provided by the South Carolina Appellate Court Rules as in other civil cases." This section limits this Court's appellate jurisdiction to final judgments. In the present case, the parties appealed the ALC's order to the Court of Appeals. The ALC's order was a final judgment inasmuch as it disposed of the whole subject matter of the action, and thus, was appealable under the APA. The Court of Appeals then remanded this matter back to the ALC to reconsider all issues based on the Department's burden to establish its alternative apportionment method is "more appropriate than any competing methods." The issue

---

> a unitary business, or a portion of one, cannot be subject to a separate accounting. Second, the taxpayer argues that the Department's method in this case attempts to reach extraterritorial income; that is, income that is not properly taxable in South Carolina.

(ALC Order, p. 11) (Joint Appendix, Vol. 1, p. 125). These counter arguments fall woefully short of the kind of specific evidentiary challenges to reasonableness contemplated by the Media General Court.

before this Court is whether the Court of Appeals' "more appropriate than any competing methods" ruling is considered a final judgment appealable under the APA.

This Court has recently discussed the ability of the courts to review interlocutory agency decisions. In Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health and Envtl Ctrl., this Court held that S.C. Code Ann. § 1-23-610 determines whether a court has jurisdiction to hear an appeal from an agency decision, not the more general jurisdictional statute S.C. Code Ann. § 14-3-330. 387 S.C. 265, 692 S.E.2d 894 (2012). In that case, this Court held that § 1-23-610(A)(1) "provides that judicial review may only be sought from a ***final*** decision of the ALC." Id. at 266, 692 S.E.2d at 894. In Charlotte-Mecklenburg, the parties filed notices of appeal of an ALC order that granted a motion for partial summary judgment and remanded the case to the Department of Health and Environmental Control (DHEC) to "determine whether any of the applicants were entitled to the certificate of need." Id. This Court certified the appeals and dismissed them under the premise that the ALC order was not immediately appealable. Id. This Court found that because the ALC remanded the matter to DHEC, there was not a final decision of the ALC. Id. at 267, 692 S.E.2d at 895. Therefore, the matter was not immediately appealable under § 1-23-610. Id.

The case at bar can be readily distinguished from Charlotte-Mecklenburg. Here the ALC did not issue an order ruling for partial summary judgment. Rather, the instant case was fully heard, the merits were ruled upon, and the ALC issued a final order. Unlike in Charlotte-Mecklenburg where DHEC had yet to make necessary determinations on eligibility for certificate of need, the ALC decision here disposed of the entire subject matter of the action, "leaving nothing to be done but to enforce by execution" what had

been determined. See, Good v. Hartford Accident & Indemnity Co., 201 S.C. 32, 21 S.E.2d 209 (1942) To that extent, the existence of a final ALC order on the merits should distinguish this instant case from Charlotte-Mecklenburg, as the plain language of the APA's requirements is satisfied. Furthermore, in the instant case, the Court of Appeals did not address the merits of the ALC's findings, but erroneously altered only the burden of proof - a purely legal question - and remanded the action for a new hearing in accordance with the newly announced, albeit incorrect, legal standards. The Court of Appeals' inclusion of the "more appropriate than any competing methods" burden of proof constitutes a legal issue that should be considered appealable, particularly since that burden of proof will only force the litigants to retry the case on the merits under the erroneous burden, appeal the exact same issue to this Court, and then try the case a third time under still yet another remand pursuant to the correct burden of proof. This flies in the face of judicial economy, and prejudices both parties to bear the costs of trebled, superfluous litigation, as will be further discussed below.

Building on the Charlotte-Mecklenburg decision, this Court also affirmed a Court of Appeals ruling in Bone v. U.S. Food Service in which the Court of Appeals dismissed the matter because the circuit court remanded the case to the Workers' Compensation Commission (WCC) for further proceedings to resolve factual issues. 404 S.C. 67, 744 S.E.2d 552 (2013). In Bone, the single commissioner found that the Petitioner failed to show that she sustained an injury in the course of her employment. Id. at 71, 744 S.E.2d at 555. The full commission upheld the single commissioner's findings. Id. The circuit court reversed those findings and remanded the matter to the agency to find that Bone did sustain a compensable injury. Id. The employer appealed to the Court of Appeals

while Bone moved to dismiss. Id. at 72, 744 S.E.2d at 555. The Court of Appeals agreed with Bone and dismissed the appeal. That decision was then presented to this Court. Id. at 73, 744 S.E.2d at 555. In reviewing the case, this Court found that the circuit court's order remanding the matter to the Commission for further factual determinations was not a final order, and thus, under S.C. Code Ann. § 1-23-390, the order was not immediately appealable. Id. at 84, 744 S.E.2d at 562.

It is vital to note here that the meaning of "final judgment" as used in § 1-23-390 was an issue decided in Bone. That Court looked to the plain and ordinary meaning of the phrase, relying on Black's Law Dictionary, which defines a final judgment as "[a] court's last action that settles the rights of the parties and disposes all issues in controversy, except for the award of costs . . . and enforcement of the judgment." Bone, 404 S.C. at 78, 744 S.E.2d at 558-59 (quoting Black's Law Dictionary 919 (9th ed. 2009)). However, the Bone Court went on to declare that "[t]he legislative policy expressed in section 1-23-390 is intended to avoid the **undue delay and waste of judicial resources** caused by interlocutory appeals." 404 S.C. at 81, 744 S.E.2d at 560 (emphasis added). It is well settled law that:

> [h]owever plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it. . . . would defeat the plain **legislative intention**. [Cite Omitted] If possible, the court will construe the statute so as to escape the absurdity and carry the **intention** into effect.

Kiriakides v. United Artists Comm., Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (citing Stackhouse v. Rowland, 86 S.C. 419, 68 S.E. 561 (1910).

The holding in Bone is also distinguishable from the instant case since a ruling here that the burden of proof issue is not appealable, would cause undue delay and waste judicial resources. The appeal in Bone was based upon the factual finding that a compensable injury had occurred, which has drastically different legal implications than the error of law presented here. To deny the Department's appeal of the error of law imposing this erroneous burden of proof would not only undermine the legislative intent behind § 1-23-390, but force the parties to retry an action in which the finder of fact must entertain countless permutations of "other competing methods" to determine if the Department's proposed method is the most reasonable. This is an absurd result, and a complete waste of judicial resources, as the erroneous burden of proof is an insurmountable obstacle for the ALC to apply to this case. Furthermore, as previously stated, any new ALC order applying that incorrect burden would result in another appeal to the Court of Appeals on the same issue previously heard. If the Court of Appeals chooses to affirm the second ALC order using the erroneous burden, only then may the Department's appeal be heard by this Court based on a final judgment by the ALC. Assuming *in arguendo* that this Court then agrees with the Department that the "more appropriate than any competing methods" burden is erroneous, the matter would likely be remanded to the ALC for yet a third time.[18]

[18]While the Bone Court's analysis tends toward the creation of a bright-line rule that an appellate remand of a case to an administrative agency necessarily means that the decision to remand is not appealable, it must be pointed out that this Court, albeit pre-Bone, has recently reviewed and decided a case in which the Court of Appeals remanded a matter to the ALC for further proceedings. In Alltel Communications, Inc. v. SC Department of Revenue, 399 S.C. 313, 731 S.E.2d 869 (2012), this Court accepted certiorari to review a decision of the Court of Appeals to remand a case to the ALC for further "factual development." The ALC issued a decision on cross motions for

The most efficacious and obvious solution, should this Court choose to exercise its discretion to consider the Court of Appeals' decision to impose the "more appropriate than any competing methods" burden, would be to charge the ALC with the correct burden of law to decide the alternative apportionment matter, and thus avoid undue delay and a waste of judicial resources. The Department contends that this result would echo this Court's underlying goals in the Charlotte-Mecklenburg and Bone decisions, and prevent the waste of time, money, and judicial resources for all involved.

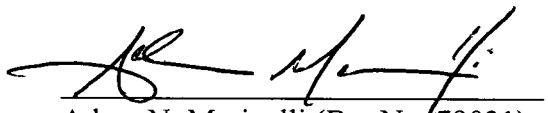
CONCLUSION

The Court of Appeals erred in determining that § 12-6-2320 and this Court's holding in Media General imposes the duty of proving an alternative apportionment method is the most reasonable out of any competing methods. Moreover, the burden of proof issue should be considered appealable by this Court, despite the decisions of Charlotte-Mecklenburg and Bone, as the original ALC order constitutes a final judgment and the Court of Appeals' decision to remand with an erroneous burden of proof would cause undue delay, waste judicial resources, prejudice both parties, and not provide an adequate remedy at law for the Department.

---

summary judgment finding that the taxpayer, a mobile telephone company, was not liable for a license fees as a "telephone company" within the meaning of S.C. Code Ann. § 12-20-100. The Court of Appeals reversed the ALC and remanded the case for further factual development. Noting that the case involved purely legal questions of statutory interpretation, this Court reviewed the Court of Appeals' decision and reversed the same. Most notably for the purposes here, in a footnote, the Court referenced the fact that " a remand to the ALC for further factual development would be futile in light of the 63 joint stipulations filed by the parties." The Department asserts that this comment is at least an implicit recognition of the principle in play here. Remand of the instant case to the ALC to employ an incorrect burden of proof is futile inasmuch as the case will undoubtedly end right back at this Court at some point. Like in Alltel, the sole issue before this Court concerning burden of proof is a legal issue which ought to be decided by this Court prior to any remand.

Respectfully Submitted,



Adam N. Marinelli (Bar No. 79031)
Counsel for Litigation
Roxanna M. Tinsley (Bar No.78641)
Counsel for Litigation
Milton G. Kimpson (Bar No. 7917)
Chief Counsel for Litigation
PO Box 11265
Columbia, SC 29211
Attorneys for Petitioner/Respondent
South Carolina Department of Revenue
MarineA@sctax.org
CourtOrders@sctax.org

October 30, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

IN THE ORIGINAL JURISDICTION

Carmax Auto Superstores West Coast, Inc., ... Respondent/Petitioner

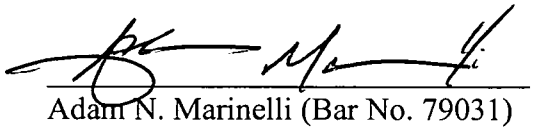
v.

South Carolina Department of Revenue, ... Petitioner/Respondent.

Appellate Case No. 2012-212203

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



Adam N. Marinelli (Bar No. 79031)
Counsel for Litigation
Roxanna M. Tinsley (Bar No.78641)
Counsel for Litigation
Milton G. Kimpson (Bar No. 7917)
Chief Counsel for Litigation
PO Box 11265
Columbia, SC 29211
Attorneys for Petitioner/Respondent
South Carolina Department of Revenue
MarineA@sctax.org
CourtOrders@sctax.org

October 30, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Case No. 2009-ALJ-17-0160
Appellate Case No. 2012-212203

Carmax Auto Superstores West Coast, Inc., ... Respondent/Petitioner

v.

South Carolina Department of Revenue, ... Petitioner/Respondent.

PROOF OF SERVICE

I, Jean M. O'Connor, do hereby certify that I have caused to be mailed, postage pre-paid, a copy of the Petitioner/Respondent's Brief and Notice of Appearance in the above referenced matter to John C. von Lehe, Jr., Esquire and Bryson M. Geer, Esquire, 151 Meeting Street, 6th Floor, Charleston, SC 29401-2239 this 30th day of October 2013.

Jean M. O'Connor