RECEIVED
OCT 30 2013
S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Case No. 09-ALJ-17-0160-CC

Appellate Case No. 2012-212203

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

v.

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

---

BRIEF OF RESPONDENT/PETITIONER

Pursuant to Rule 242(i) of the South Carolina Appellate Court Rules, Respondent/Petitioner CarMax Auto Superstores West Coast, Inc. ("CarMax West"), submits its Brief in the above appeal of the decision of the Court of Appeals captioned CarMax Auto Superstores West Coast, Inc. v. South Carolina Department of Revenue, 2012 WL 832985, Op. No. 4953 (Ct. App. March 14, 2012). Appendix ("App.") p. 1168. For the reasons set forth below, this Court should rule upon all issues upon which the Court of Appeals failed to rule in its decision.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

QUESTIONS PRESENTED FOR REVIEW

I. **Did the Court of Appeals Err in Failing to Rule that CarMax West was a Unitary Business?**

II. **Did the Court of Appeals Err in Failing to Rule that the Financing Receipts at Issue Should Not Be Sourced to South Carolina?**

III. **Did the Court of Appeals Err in Failing to Rule that the South Carolina Department of Revenue's ("SCDOR") Assessment Violates CarMax West's Constitutional Rights?**

IV. **Is the Court of Appeals' Decision in the Instant Case Appealable in Light of this Court's Decisions in Charlotte-Mecklenberg Hosp. Auth. v. S.C. Dep't of Health & Envtl Ctrl., 3878 S.C. 365, 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

Procedural History and Case Issues

A. CarMax West's Protest of SCDOR Assessment

This case involves a protest by CarMax West of an assessment of corporate income taxes and penalties imposed by SCDOR for the income tax years ending in 2002-2007. CarMax West filed a request for contested case hearing with the Administrative Law Court ("ALC") and asserted the following basic claims regarding the income taxes assessed by SCDOR: (1) SCDOR should not have deviated from the standard statutory apportionment method for multi-state taxpayers, which would impose a tax based on South Carolina's fair share of all of CarMax West's net income and instead applied an erroneous attempt at separate accounting to tax only a portion of CarMax West's income consisting of royalty payments by an affiliate, CarMax Auto Superstores East, Inc. ("CarMax East") (which does business in South Carolina) for the use of intellectual property owned by CarMax West;[1] (2) SCDOR should not have sourced CarMax West's income from financing receipts to South Carolina because the activities related to earning that income took place out of state; (3) SCDOR's assessment violated CarMax West's constitutional rights; and (4) SCDOR should not have assessed a penalty against CarMax West.

[1] This issue involved numerous sub-issues, including whether CarMax West was a unitary business, whether SCDOR could separate a unitary business, whether the standard apportionment method reasonably reflected CarMax West's business activities in this State and whether SCDOR's alternative formula failed to do so.

B. The ALC's Decision

On April 22, 2010, the ALC found in favor of SCDOR on all issues except the penalty, which the ALC dismissed. See App. pp. 4–21, Order. Despite universal authority to the contrary, the ALC held that the burden of proof was on CarMax to prove that the standard apportionment method reasonably reflected CarMax West's business activities in this State and that the method chosen by SCDOR did not. Id. at 9. Additionally, although numerous South Carolina cases (both Supreme Court and Court of Appeals) hold that a unitary business may not be segregated and its parts separately taxed, the ALC refused to make any findings as to whether CarMax West was a unitary business stating that it was "not outcome determinative" (see App. p. 13, Order; App. pp. 993–994, CarMax West's Motion for Reconsideration (section B)) and then upheld SCDOR's separate accounting based on its finding that CarMax West failed to meet its burden of showing that the standard method reasonably reflected its in-state activities and that the method chosen by SCDOR did not. Id. at 10-15. The ALC also held that the financing receipts should be sourced to South Carolina despite the uncontested evidence that all income-producing activities were performed out of state. Id. at 15–16. Finally, the ALC held that the assessment did not violate CarMax West's constitutional rights. Id. at 18-21.

C. The Appeal of the ALC's Decision

CarMax West appealed the ALC's decision to the Court of Appeals, which issued its decision in this matter on March 14, 2012. See CarMax Auto Superstores West Coast, Inc. v. South Carolina Department of Revenue, 2012 WL 832985, Op. No. 4953 (S.C. Ct. App. March 14, 2012), App. p. 1168. In its opinion, the Court of

Appeals correctly concluded that the burden of proof should have been placed on SCDOR to establish by a preponderance of the evidence that the standard statutory apportionment method used by CarMax West did not reasonably reflect its business activities in South Carolina and that SCDOR's alternative accounting method did. Id. at 1172. The Court of Appeals reversed and remanded the case to the ALC "for a reconsideration of all issues." Id. Although, several issues in this case are not impacted by the change in the burden of proof, the Court did not consider or rule upon any of these other issues, including whether CarMax West is a unitary business, whether the financing receipts should be sourced to South Carolina and whether the assessment violated CarMax West's constitutional rights.

D. Petitions for Writ of Certiorari to this Court

CarMax West and SCDOR each filed a petition for writ of certiorari to this Court on June 6, 2012. App. pp. 1254-1277 and 1278-1294. On August 29, 2013, this Court granted in part and denied in part both parties' Petitions. The Court granted CarMax West's Petition as to the following questions:

I. Did the Court of Appeals Err in Failing to Rule that CarMax West was a Unitary Business?

II. Did the Court of Appeals Err in Failing to Rule that the Financing Receipts at Issue Should Not Be Sourced to South Carolina?

III. Did the Court of Appeals Err in Failing to Rule that SCDOR's Assessment Violates CarMax West's Constitutional Rights?

App. pp. 1398-1399. The Court granted SCDOR's petition as to the following questions:

I. Did the Court of Appeals err by ignoring the plain language of S.C. Code Ann. § 12-6-2320 (Supp. 2009) by finding that the Department of Revenue (Department or Petitioner) has the burden of proof to show an alternative accounting method is "more appropriate than the 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?"

Id. The Court also requested that both parties brief the following question: Is the Court of Appeals' decision in the instant case 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. 365, 692 S.E.2d 894 (2013) and Bone v. U.S. Food Serv., 404 S.C. 67, 744 S.E.2d 552 (2013)? Id. [2]

STATEMENT OF FACTS

A. Formation of CarMax

CarMax, Inc. ("CarMax") was formed in 1993 and is the nation's largest specialty retailer of used cars and light trucks (hereinafter "vehicles"). App. p. 58, lines 18-19 and p. 60, line 8. Its primary business is to purchase, recondition, market, sell and finance those vehicles. It was originally formed as a subsidiary of Circuit City Stores, Inc. ("Circuit City"). App. p. 60, lines 12-17. In 2002, Circuit City's shareholders approved the separation of CarMax from Circuit City. App. p. 58, lines 18-21. CarMax is now a separately held, publicly traded holding company. Id.

[2] The initial briefs were originally due on September 30, 2013; however, on September 13, 2013, this Court granted both parties a 30-day extension such that the initial briefs are now due October 30, 2013.

B. Corporate Structure of CarMax

CarMax was created with and inherited upon its spin-off a corporate structure that mirrored Circuit City's structure: CarMax operated as a holding company and wholly owned two operating entities, CarMax West, the taxpayer in this case, which sold vehicles in the western United States and owned substantially all of CarMax's intellectual property, and CarMax Auto Superstores, Inc. ("CarMax East"), which sold vehicles in the eastern and mid-western states (where most of CarMax's retail operations were at the time) and provided the group's corporate, back office support and finance functions. App. p. 61, line 16- p. 62, line 4; see also App. p. 661, Chart Regarding Organizational Structure of CarMax (Pre-Reorganization). During the early years of the audit period (2002-2004), CarMax East paid CarMax West a royalty for its use of the intellectual property.

The inherited corporate structure was not common to the vehicle sales industry and began to cause numerous problems, particularly on the financing side, ranging from confusion amongst regulatory agencies and potential investors of the retail installment contracts to licensing issues. App. p. 68, line 8- p. 71, line 10. Thus, in 2004, CarMax management determined that certain changes to the corporate structure/organization would be beneficial to the business, and it created CarMax Business Services, LLC ("CBS") to: (1) house the financing functions/operations (CarMax Auto Finance or "CAF"); (2) provide certain shared services to the companies in the group; and (3) own

the intellectual property. App. p. 64, lines 2-15; see also App. p. 662, Chart Regarding Organizational Structure of CarMax (Post-Reorganization).[3]

CBS was created as a multi-member limited liability company (taxed as a partnership) between CarMax West and CarMax East, with the former contributing the intellectual property and the latter contributing the financing operations and certain other corporate assets. App. p. 63, lines 14-21; p. 67, lines 23-25.[4] Since the restructuring, CBS has charged CarMax West and CarMax East a per vehicle management services fee (as determined by an independent study), which includes an intellectual property royalty component. The income from the management fees flows up to CarMax West and CarMax East as a result of their interests in CBS. CBS also generates income through its financing division (CAF), which also flows up to CarMax West and CarMax East. App. p. 67, lines 15-20.

---

[3] The first change, which separated the financing functions from the retail operations, made the securitization process for vehicle financing contracts less cumbersome, lessened confusion for regulators, simplified the regulatory compliance process and provided greater liability protection for the separate businesses. App. p. 68, line 8- p. 71, line 10. The second and third changes brought about greater efficiencies and cost savings across all of the CarMax entities by centralizing general management functions, including human resources, information systems, finance and accounting; retail functions, including real estate support services, strategic analysis, advertising and marketing (including the CarMax website); and intangible asset management for intellectual property, trademarks and trade names, marketing programs, customer data, etc. App. at 72, line 18- p. 74, line 14. The aforementioned evidence presented at trial showed that CBS was formed for valid business reasons, and there was no evidence presented to the contrary. SCDOR attempted to suggest that a purpose of CarMax's restructuring was to create a tax advantage, but the evidence in the record does not support this, and the ALC made no finding to that effect.

[4] An accounting firm performed an independent study to determine the value of CarMax West's and CarMax East's respective contributions to CBS (App. p. 64, lines 19-25), which in turn determined their respective ownership interests in CBS -- CarMax West owns 93.5% while CarMax East owns 6.5%. (App. p. 65, lines 8-10).

C. CarMax West's Connection to South Carolina

CarMax West sells vehicles in the western United States and does no business in South Carolina. App. p. 77, line 24 - p. 78, line 8. It has no employees, no facilities and no tangible property in South Carolina. App. p. 78, lines 2-6. Due to the absence of a physical presence in the state, CarMax West neither requires nor receives any substantive services or benefits from the State of South Carolina. App. p. 78, lines 9-11. Its only connection to this State is the royalty payments it has received from CarMax East for the use of the CarMax intellectual property that CarMax East uses to sell vehicles in this state (via payments directly to CarMax West from 2002-2004 and, subsequently, via its partnership interest in CBS, which has received such payments from CarMax East since 2004). App. p. 78, line 12 – p. 79, line 6.

D. CarMax West's Financing Income

As previously stated, CarMax West also earns income from its ownership interest in CBS that is derived from the out-of-state activities of CBS's vehicle financing division (CAF). When CarMax East sells a vehicle in South Carolina, it reports all income from that sale to South Carolina and is taxed by South Carolina. App. p. 106, line 10- 107, line 11. When a purchaser chooses to finance a vehicle purchase, a retail contract installment contract is used. App. p. 69, lines 12-17. Subsequent activity of CAF, which occurs *after* the initial sale and is related to servicing and securitizing these retail installment contracts, takes place *outside the state of South Carolina.* App. p. 110, lines 15-22; p. 111, lines 12-15. Specifically, CBS associates located in Georgia service the contracts assigned to CBS by, for example, receiving interest payments from customers, answering questions from customers

regarding payments and collecting on amounts due and unpaid. These associates also do the work of converting pools of the contracts into asset-backed securities that are then sold to third party investors. App. p. 104, line 20 - p. 109, line 5 and p. 110, lines 15-22. These out of state activities produce the revenue that SCDOR seeks to tax through its assessment.

E. Unitary Nature of the Taxpayer

The evidence presented at trial regarding the integrated organization, systems and operations of CarMax West shows that it was a unitary business pre-reorganization (2002-2004) and that CarMax West and CBS (the "pass-through" entity in which CarMax West held a 93.5% interest) together are a unitary business post-reorganization (2005-2007).

More specifically, the evidence showed that CarMax West (pre-reorganization) and CarMax West and CBS (post-reorganization) and their operations are highly integrated and interrelated. They have shared ownership and management. See App. p. 79, line 20 – p. 81, line 9; pp. 657-660, CarMax FY 2005 Officers and Directors List (as to shared ownership/management). They also have a number of shared services and systems that create efficiencies and cost savings across the companies, including the centralized management functions, retail functions and intangible asset management. See supra Statement of Facts, § B; see also App. p. 72, line 18 - p. 74, line 14; pp. 605–656, Sample CarMax, Inc. Annual Report. All income earned by CarMax entities is placed in a general account and is used for the benefit of the entire CarMax group of companies. App. p. 81, line 21- p. 82, line 7. All entities hold themselves out to the

public simply as "CarMax." App. p. 77, lines 11-17; see also App. pp. 605–656, Sample CarMax, Inc. Annual Report.

In addition, the various activities of CarMax West (pre-reorganization) and CarMax West and CBS (post-reorganization), including retail sales, financing, marketing and intellectual property management, contribute to and depend upon one another. App. p. 82, lines 19-24; see also App. p.p. 605-656, Sample CarMax, Inc. Annual Report. For example, as CarMax West sells more cars, the value of its intellectual property increases, and as the value of the intellectual property increases and the brand becomes more well-known, CarMax West sells more cars. App. p. 83, lines 1-17. Similarly, because CarMax West can offer financing options to customers through CBS via CAF, it is able to sell more cars, and CBS via CAF is able to provide financing because it has access to CarMax customers. App. p. 83, line 18 - p. 84, line 19.

Additionally, CarMax West's expert in state and local tax, tax accounting and tax policy testified that from a tax accounting standpoint, CarMax West pre-reorganization was and CarMax West and CBS post-reorganization are unitary businesses. App. p. 159, line 8 - p. 160, line 9. Similarly, CarMax West's expert economist testified that from an economic standpoint, CarMax West pre-reorganization was and CarMax West and CBS post-reorganization are unitary businesses. App. p. 203, line 11 - p. 204, line 14 (citing common ownership and management, vertical integration, economies and efficiencies and interdependence among business units in support of his conclusion) and App. p. 205, lines 7-21.

SCDOR provided no testimony or evidence to refute any of the above testimony and evidence. Indeed SCDOR's lone fact witness testified that he thought that the entire CarMax group of companies (which would include the entities at issue in this case as well as related entities that are not at issue) are a unitary business (App. p. 298, lines 20-24 and p. 301, line 18 - p. 302, line 1), while SCDOR's expert economist refused to answer the question of whether or not the businesses are unitary. App. p. 396, lines 15-22 and p. 416, line 19 - p. 417, line 7.

F. CarMax West's Tax Reporting Method

CarMax West filed the tax returns at issue using the standard apportionment method for multi-state taxpayers. Specifically, CarMax West followed the tax return instructions and the guidance in the returns themselves, which dictate that the starting point for determining taxable income is a taxpayer's ***federal taxable income***. App. p. 85, lines 20-25; p. 89, lines 4-9; p. 90, lines 14-25; and p. 91, lines 16-21.[5] CarMax West then made the following statutorily dictated calculation to determine the amount of taxes due to South Carolina:

Federal taxable income
+/– South Carolina adjustments
Apportionable net income
x Apportionment formula (South Carolina receipts/total receipts)
South Carolina taxable income
x South Carolina tax rate
Income tax due to South Carolina

See S.C. Code Ann. §12-6-2290 (Supp. 2007).

[5] See also App. p. 549, Sample SCDOR Corporate Tax Return Instructions (Basis of Return section) and pp. 503–543, CarMax West Amended Tax Returns 2002-2007 (page 1, line 1 of each return).

G. SCDOR's Alternative Method for Separately Taxing Royalties

SCDOR rejected CarMax West's use of the standard statutory method claiming that it does not fairly reflect CarMax West's activity in this State because its income is distorted under that method. SCDOR instead applied what it calls an "alternative method." App. p. 96, lines 4-9. This alternative method does not use federal taxable income as a starting point (see App. pp. 477-485, SCDOR Report of Field Audit), but rather separates and taxes only CarMax West's royalty receipts and thus is an attempt at separate accounting. App. p. 96, lines 4-9 and p. 96, line 20 - p. 97, line 10.

H. SCDOR's Method of Taxing Financing Income

SCDOR also rejected CarMax West's exclusion of the CAF financing income from its apportionment factor numerator.[6] CarMax West did not source this income to South Carolina because the activity producing this income occurred out-of-state. App. p. 110, lines 15-22 (testimony of CarMax West witness that all activity producing the financing income took place out-of-state). The evidence that these activities took place out-of-state was uncontested. See supra Statement of Facts, §D. SCDOR asserted that financing income should be sourced to the state where the customer making payments on the retail installment contract resides rather than the place where the activity producing the income occurs. App. p. 282, lines 9-12; see also pp. 477–485, SCDOR Report of Field Audit; pp. 904–929, Amended SCDOR Audit Report.

[6] CarMax West had reported the financing income as part of its corporate net income but had not included it in the numerator of the apportionment formula as "receipts from within this State."

LEGAL ARGUMENTS

I. The Court of Appeals Erred in Failing to Determine that CarMax West is a Unitary Business.

Both the Court of Appeals and the ALC erred in failing to rule that CarMax West (pre-reorganization) was and CarMax West and CBS (post-reorganization) are unitary businesses. In explaining its refusal to rule, the ALC stated that whether these businesses were unitary was "not outcome determinative." See App. p. 13, Order; App. pp. 993–994, CarMax West's Motion for Reconsideration (section B). CarMax West appealed the ALC's decision to the Court of Appeals as it contends that the evidence was uncontested on this issue at trial[7] and this factual and legal issue must be decided because it is critical to determining the proper apportionment method in this case. However, the Court of Appeals failed to address or rule upon it.

The decisions of the United States Supreme Court, the South Carolina Supreme Court and the South Carolina Court of Appeals firmly establish that a determination of whether a business is unitary is critical to identifying and applying the proper apportionment method. As the United States Supreme Court has explained:

> [When] a unitary business exists, "separate [geographical] accounting, while it purports to isolate portions of income received in various States, may fail to account for contributions to income resulting from functional integration, centralization of management, and economies of scale. Because these factors of profitability arise from the operation of the business as a whole, it becomes misleading to characterize the income of the business as having a single identifiable 'source.'"

[7] See App. pp. 1083-1086, Appellant's Brief, and p. 1158, Reply Brief.

Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 181 (1983) (quoting, Mobil Oil Corp. v. Comm. of Taxes of Vt., 445 U.S. 425, 438 (1980)). Once the determination is made that a business **is** unitary, "a State **must** then apply a formula apportioning the income of that business within and without the State." Id. at 169 (emphasis added).

Consistent with this analysis, the South Carolina Supreme Court has definitively held that a unitary business cannot be subject to a separate accounting like the one imposed in this case by SCDOR, which seeks to isolate and tax only CarMax West's royalty income derived from the use of its trademarks and trade names in South Carolina. In the seminal unitary business case in this State, this Court rejected the taxpayer's argument to separate out and exclude from taxation income from certain out-of-state business activities citing an earlier decision for the proposition that the income of a unitary business "is attributable to all incidents of the business and not to any single activity." Exxon Corp. v. S.C. Tax Comm'n, 273 S.C. 594, 599, 258 S.E.2d 93, 96 (1979), quoting Covington Fabrics v. S.C. Tax Comm'n, 264 S.C. 59, 68, 212 S.E.2d 574, 578 (1975). The taxpayer in Exxon sought to separate income generated by its oil exploration and production activities in other states from its retail sales income from gas stations in South Carolina. The Department opposed this separate accounting method, and the South Carolina Supreme Court agreed holding that the taxpayer could not divide its unitary income producing activities. Id.[8]

[8] For a complete discussion of South Carolina law on the unitary business issue, please see Appellant's Brief at App. pp. 1094–1101; Reply Brief at App. pp. 1155–01157 and 1159–1161.

In this case, CarMax West presented substantial, uncontested evidence at trial that CarMax West (pre-reorganization) was and CarMax West and CBS (post-reorganization) are unitary so that the Court could determine the proper apportionment method as required by Exxon. In determining whether a business is unitary, South Carolina courts apply two main tests: (1) the three unities test; and (2) the contribution-dependence test. Exxon, 273 S.C. at 598, 258 S.E.2d at 95. These tests are not mutually exclusive, and the courts often apply both. Id.; see also Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768, 789 (1992) (discussing unitary business tests of "functional integration, centralization of management, and economies of scale"). Under the three unities test, courts look at whether the business or businesses have unity of ownership, unity of management and unity of operation. Exxon, 273 S.C. at 598, 258 S.E.2d at 95. Under the contribution-dependence test, the court considers whether the "activities of the business in question contribute to or depend on the other activities of the business." Id. at 600, 258 S.E.2d at 96. The courts do not require that it be "necessary" or "essential" that the business or businesses be operated together; cost savings or increased profits gained by operating together are accepted reasons. Id. at 599-601, 258 S.E.2d at 96-97.

The Exxon case provides a model for how to analyze whether a taxpayer operates a unitary business. The Court noted the following regarding Exxon's operations: it held itself out to the public as one company; it employed central staff on which all companies were dependent; it used centralized purchasing techniques that resulted in cost savings throughout the company; it had strong, centralized management over all segments of the company; the structure provided profit stability, reduced risk

and insured full capacity utilization of the company's facilities; it made no attempt to segregate earnings or funds of the various segments; and the various operating activities of the company (exploration, production, refining and marketing) contributed to and depended upon each other. Exxon, 273 S.C. at 601, 258 S.E.2d at 96-97. Based on these findings, the Court held that the taxpayer satisfied both the three unities test and the contribution-dependence test. Id. at 602, 258 S.E.2d at 96-97.[9]

The following facts presented at trial through the testimony of CarMax West's Tax Director support the conclusion that CarMax West (pre-reorganization) was and CarMax West and CBS (post-reorganization) are unitary: the companies have shared ownership and management; the companies have a number of shared services and systems that create efficiencies and cost savings across the companies, including centralized general management functions (such as human resources, information systems, finance and accounting), retail functions (including real estate support services, strategic analysis, advertising and marketing), and intangible asset management (including intellectual property, trademarks and trade names, marketing

[9] See also Eastman Kodak, 308 S.C. 415, 418 S.E.2d 542 (finding that multi-national camera and film corporation that was also doing safe harbor lease transactions involving tangible personal property was a unitary business not capable of separation where only a small portion of leased assets were in South Carolina, the funding for the leasing came from the general corporate treasury and the income benefited the company as a whole); Texaco v. Wasson, 269 S.C. 255, 237 S.E.2d 75 (1977) (finding multi-state oil and gas company that also contracted on a royalty basis with third parties to mine salt and sulphur discovered on prospective oil lands was a unitary business where salt and sulphur was discovered during oil exploration process, which was an integral part of the business); Lowenstein, 298 S.C. 93, 378 S.E.2d 272 (finding affiliated New York textile manufacturing companies that also earned interest income from inter-company loans were unitary where funding for leasing came from general corporate treasury, interest income and loan payments were deposited in general company accounts and used for normal business operations and income benefited company as a whole).

programs and customer data); CarMax entities hold themselves out to the public as simply "CarMax;" all income is placed in a general account and is used for the benefit of the CarMax group of companies as a whole; the various activities of the companies, including retail sales, financing, marketing and intellectual property management contribute to and depend on one another; and the company is functionally integrated. See App. p. 72, line 18 - p. 74, line 14; p. 79, line 20 - p. 81, line 9; p. 82, line 1- p. 84, line 19; see also App. p.p. 657- 660, CarMax FY 2005 Officers and Directors List; App. pp. 605–656, Sample CarMax, Inc. Annual Report; supra Statement of Facts, § B.

In addition, both CarMax West's expert economist and expert tax accountant testified that from an economic standpoint and a tax accounting standpoint respectively, CarMax West (pre-reorganization) was and CarMax West and CBS (post-reorganization) are unitary. (App. p. 159, lines 16- 160, line 9, testimony of expert tax accountant, and App. p. 203, line 11- 204, line 21, testimony of expert economist). Moreover, the evidence and testimony regarding the unitary nature of the CarMax businesses at issue was unrebutted.[10]

Therefore, CarMax West respectfully requests that this Court enter a finding based on the uncontested evidence at trial that CarMax West (pre-reorganization) was and CarMax West and CBS (post-reorganization) are unitary businesses. CarMax West further asks this Court to remand this case to the ALC with the additional instruction that the ALC should consider (based on the record made at trial) how this finding

[10] As previously stated, SCDOR's witness testified that he thought that the entire CarMax group of companies was a unitary business (App. p. 298, lines 20-24 and p. 301, line 18 - p. 302, line 1); SCDOR's expert economist refused to answer whether or not the businesses at issue were unitary (App. p. 396, lines 15-22 and p. 416, line 19 - p. 417, line 7); and SCDOR presented no evidence that the CarMax West businesses at issue were unitary.

impacts the determination of the proper apportionment method in this case. More specifically, the ALC should consider the above-discussed case law on the impropriety of applying separate accounting to a unitary business when evaluating (based on the record at trial) whether the standard apportionment method fails to reasonably reflect unitary business activities of CarMax West (pre-reorganization) and CarMax West and CBS (post-reorganization) and whether SCDOR's alternative separate accounting method does. Such instructions (which the Court of Appeals did not give) will ensure that the ALC properly considers all relevant facts and law on remand, which will promote judicial economy and avoid duplicative proceedings and multiple appeals.

In the alternative, CarMax West would request that this Court remand this case to the ALC with instructions for the ALC to determine whether (based on the record made at trial) CarMax West (pre-reorganization) was and CarMax West and CBS (post-reorganization) are unitary businesses in light of the standard set forth in Exxon and the other cases discussed above with instructions that if the ALC determines that they are unitary, then the ALC should further consider how that finding impacts the determination of the proper apportionment method in this case as previously discussed.

II. The Court of Appeals Erred in Failing to Rule that the Financing Receipts at Issue Should Not Be Sourced to South Carolina.

The ALC erred in ruling that CarMax West's financing receipts should not be sourced to South Carolina when all services related to producing that income were performed out-of-state. CarMax West appealed this issue to the Court of Appeals on the basis that the ALC applied the wrong legal test to determine where the financing income should be sourced. However, the Court of Appeals failed to address or rule

upon this issue, and, therefore, CarMax West respectfully asks this Court to rule that the financing receipts should not be sourced to South Carolina.

S.C. Code Ann. §12-7-1190 provides that a multi-state business shall pay income tax "upon a proportion of its remaining net income computed on the basis of the ratio of *gross receipts from within this State* during the income year to the total gross receipts of such year within and without the State." S.C. Code Ann. § 12-7-1190 (emphasis added). In Lockwood Greene Engineers v. S.C. Tax Commission, 293 S.C. 447, 361 S.E.2d 346 (Ct. App. 1987), the Court of Appeals interpreted the phrase "gross receipts from within the State" in S.C. Code Ann. § 12-7-1190. There are two basic views or tests as to what would constitute gross receipts *from within* a State: (1) the "origin of payment" test, which sources income to the location of a taxpayer's customers; and (2) the "place of activity" test, which sources income to the location where the activity generating the income takes place. See Lockwood Greene, 293 S.C. at 448, 361 S.E.2d at 347.

The taxpayer in Lockwood Greene was an engineering firm with employees in South Carolina and customers in and out-of-state. Id. Lockwood Greene argued that the Court should apply the "origin of payment" test and source the receipts to the location of its customers, while SCDOR argued that the Court should apply the "place of activity" test and source the receipts to the location of the engineers who performed the services that generated the income. Id. The Court first noted that the purpose behind the allocation statutes is to impose a tax on multi-state taxpayers "upon a base which reasonably represents the proportion of the trade or business carried on within this State." Lockwood Greene, 293 S.C. at 449, 361 S.E.2d at 347 (quoting Hertz Corp.

v. S.C. Tax Comm'n, 246 S.C. 92, 142 S.E.2d 445 (1965)). It then reasoned that the out-of-state clients were paying the engineering firm for the expertise and time of the employees who were located in South Carolina. Id. at 449, 361 S.E.2d at 347. The activities or work performed by these employees provided value to the customers and produced the income upon which the tax was being assessed. Id.

Accordingly, the Court adopted the "place of activity" test (which the Court found more appropriately recognized the proportion of the engineering business actually conducted in South Carolina) and held that the receipts should be sourced to South Carolina where the engineering personnel who generated the income were located. Id. The Legislature has now codified the holding in Lockwood Greene in S.C. Code Ann. §12-6-2295(A)(5), which provides that if the income-producing activity of a multi-state taxpayer is performed partly within and partly without this State, gross receipts are attributable to this State to the extent the income-producing activity is performed within this State. S.C. Code Ann. §12-6-2295(A)(5) (2007).

Under the Lockwood Greene "place of activity" test, the CBS financing receipts in this case should be sourced outside of South Carolina. It was uncontested at trial that all of the activity or work performed by CarMax West employees in producing these receipts takes place in Georgia (App. p. 111, lines 12-15) and that such activity adds value. App. p. 210, line 24 - p. 212, line 2. This financing income is derived from the servicing and securitizing of the loans *after* the initial sale (App. p. 110, lines 15-22; p. 111, lines 12-15), and it does not include any income related to the initial vehicle sales, all of which is reported in South Carolina by CarMax East and taxed by South Carolina. App. p. 107, lines 6-11. Thus, sourcing the receipts outside of South Carolina does not

deprive South Carolina of its fair share of the tax revenue from the transactions that actually occur within the state, i.e. the income generated by the initial vehicle sales, upon which CarMax East pays taxes to South Carolina.

As CarMax West's expert economist testified, applying the "place of activity" test also produces the correct economic result under the "value added" and "matching" principles. The "value added" principle essentially holds that income should be sourced to the location where the value producing the income is added. App. p. 211, line 6 - p. 212, line 2. Because CBS associates are located in Georgia and add value during the servicing and securitizing stage, he believed these revenues should not be sourced to South Carolina. Id. (explaining that this concept is the same one used in computing national gross domestic product, which looks at the addition in value at each stage of production). The matching principle provides that income should be matched to the expenses that produce it. App. p. 212, lines 3-13. Because CBS incurs its servicing and securitizing expenses in Georgia, that is where the income they produce should be sourced. See App. p. 171, lines 11-22 (testimony of CarMax West's expert on state and local tax, tax accounting and tax policy explaining that matching income and expenses is good tax policy[11] and that most states would tax this type of income on a cost of performance or income-producing activity basis).

[11] SCDOR's point raised at trial that the financing receipts have already been matched against financing expenses in CBS is not a reason to trace the receipts away from the activities that produced them. The matching principal is just as viable in the sourcing of receipts as it is in the fact that the receipts are first off-set by the expenses that produced them in CBS; one should still match income with activities.

This result is also consistent with SCDOR's recently published position that receipts are to be sourced to the location where the activity generating the income takes place ("place of activity" test) and not to the location of where the payment originates ("origin of payment" test). See S.C. Private Letter Ruling #13-3, Apportionment of Engineering Service Income (Aug. 7, 2013).

The alternative "but for" test proposed by SCDOR (which appears to be similar to the "origin of payment" test rejected by the Court in Lockwood Greene) is unsupported and flawed, would produce irrational results and should be rejected. SCDOR's position is that all receipts from post-sale financing activities related to vehicles sold in South Carolina should be sourced to South Carolina because that is where the initial transaction takes place; as SCDOR's expert testified, "but for" the initial sale in South Carolina, there would be no financing receipts. App. p. 423, lines 14-21.

First, and most importantly, SCDOR's "but for" test is contrary to South Carolina law, including Lockwood Greene, S.C. Code Ann. §12-6-2295(A)(5), and SCDOR's own recently published position (i.e., S.C. Private Letter Ruling #13-3, Apportionment of Engineering Service Income (Aug. 7, 2013)). The ALC erred in applying the incorrect legal test. Had the ALC applied the proper test, the "place of activity" test, the receipts would have been sourced outside of South Carolina as all activity by CAF that generated the income at issue was performed in Georgia.

Moreover, neither SCDOR nor its expert supplied any basis for this "but for" test in the law or economic literature. SCDOR's expert failed to even address much less explain why the activities that directly generate the income at issue should be ignored.

Moreover, under SCDOR's "but for" test, income from financing contracts initially sold in South Carolina would always be traced to South Carolina no matter where the sale or assignment of those contracts takes place, no matter where the purchaser of those contracts is located and no matter how much work is performed in order to service or securitize those contracts. Indeed, it would make no difference whether the purchaser of the vehicle moves out of South Carolina and begins paying CBS in Georgia from, for example, North Carolina; under SCDOR's theory, those payments would not be made "but for" the initial transaction in South Carolina, and, therefore, the receipts should be taxed by South Carolina. This is diametrically opposed to South Carolina law, makes no sense and is contrary to sound economic policy, tax policy and accounting principles, including the place of activity concept and the matching principle.

As support for its ruling, the ALC references dicta in Lockwood Greene stating that the "place of activity" test might not apply to a finance company. That language obviously does not constitute binding precedent and should not guide resolution of this issue. First, S.C. Code Ann. § 12-6-2295(A)(5), the codification of Lockwood Greene, contains no such exemption for finance companies. Moreover, the principles supporting the sourcing of the engineering services revenue to the place of activity in Lockwood Greene apply equally to the CAF employees who service and securitize the loans in this case as discussed above. Additionally, CarMax West, CBS and CAF are not financing companies. Instead, CarMax West is a vehicle retailer that owns an interest in CBS, which has a division (CAF) that services the retail installment contracts of CarMax West customers and that securitizes these loans.

The ALC also cites Geoffrey, Inc. v. S.C. Tax Commission, 313 S.C. 15, 437 S.E.2d 13 (1993) in support of its decision on this issue, but that case simply has no bearing on where CarMax West's financing receipts should be sourced. In Geoffrey, the South Carolina Supreme Court held that the royalty income earned by an out-of-state holding company affiliate had a sufficient nexus to the state to support the assessment of income tax. CarMax West does not contest its economic nexus to South Carolina as evidenced by its years of income tax return filings and payments to the state. Geoffrey provides no guidance whatsoever as to where financing revenue generated out-of-state after an in-state sale should be sourced, and it does not displace the "place of activity" test adopted in Lockwood Greene and subsequently codified in S.C. Code Ann. § 12-6-2295(A)(5).[12]

Based on the above and under the "place of activity" test in Lockwood Greene (as codified in S.C. Code Ann. § 12-6-2295(A)(5)), the undisputed evidence at trial established that CarMax West's income from CAF's financing servicing activities that take place after the initial sale in South Carolina should not be sourced to South Carolina because all of the economic activity that produces these additional revenues takes place out-of-state. The ALC erred in finding otherwise. CarMax West therefore respectfully requests that this Court reverse the ALC's ruling in favor of SCDOR on this issue and dismiss the portion of the assessment related to the financing receipts.

---

[12] Additionally, Geoffrey provides further support to CarMax West's argument that separate accounting is inappropriate as the tax assessed in that case was based on Geoffrey's total unitary net income as measured by its sales activities (the exploitation of trademarks) that took place in this State and not by separate geographical accounting as SCDOR has imposed here.

III. The Court of Appeals Erred in Failing to Determine that SCDOR's Assessment Violates CarMax West's Constitutional Rights.

The ALC erred in determining that SCDOR's assessment did not violate CarMax West's constitutional rights. CarMax West appealed this issue to the Court of Appeals as it contends that SCDOR violated its constitutional rights by applying separate accounting to a unitary business and by sourcing the finance receipts at issue to South Carolina. However, the Court of Appeals failed to address or rule upon this issue, and, therefore, CarMax West respectfully asks this Court to rule that the assessment violated CarMax West's constitutional rights.

SCDOR has erroneously applied the South Carolina income tax laws to CarMax West in such a way as to reach an unconstitutional result. The method of taxation employed by SCDOR violates the Due Process Clause of the South Carolina and United States Constitutions and the Interstate Commerce Clause of the United States Constitution because, *inter alia*, it taxes income with no connection to South Carolina, taxes income out of all proportion to CarMax West's activities in South Carolina, is not fairly apportioned and is not fairly related to the services provided by the taxing state.

The four-part test for determining whether a state taxing statute violates the commerce clause is set forth in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). To be sustained, a tax must: (1) be applied to an activity with a substantial nexus to the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the taxing state. Id. at 279. In evaluating the fairness prong, one of the tests the courts apply is an external consistency test. See Container Corp., 463 U.S. at 169 (discussing fairness issue under both

Commerce Clause and Due Process Clause). External consistency requires that the factors used by the state in the apportionment formula "must actually reflect a reasonable sense of how income is generated." Id. A formula will not satisfy this test if it attributes income to the state that is "out of all appropriate proportions to the business transacted . . . in that State" (id. at 170 (citations omitted)) or has "led to a grossly distorted result."[13]

As applied to CarMax West in this case, the tax assessment at issue fails the Complete Auto test and runs afoul of the law as set forth in Container Corp., Exxon and similar cases because it taxes income with no connection to South Carolina (as to financing income only), is not fairly apportioned, and is not fairly related to the services provided by the taxing state. More specifically, as to the fairness prong, SCDOR's alternative formula in this case fails the external consistency test because it does not actually reflect a reasonable sense of how income is generated by CarMax West, a unitary business, in South Carolina. Finally, SCDOR's alternative formula is not fairly related to the services provided by South Carolina, which are *de minimus* in this case.

The irrationality and unfairness of the proposed assessment on CarMax West is further illustrated by the fact that SCDOR would be imposing a greater tax liability on CarMax West ($102,303), which has virtually no contact with South Carolina, than CarMax East ($94,452), which performs substantial business in South Carolina. See

[13] See also Amerada Hess Corporation v. Director, Division of Taxation, 490 U.S. 66 (1989) (applying Complete Auto test and due process analysis and holding that expenses and income associated with the taxpayer's crude oil production activities were part of the taxpayer's unitary business and accordingly were not assignable out-of-state but rather were properly subject to apportionment); Trinova Corp. v. Michigan Department of Treasury, 498 U.S. 358 (1991); Exxon Corp. v. S.C. Tax Comm'n, 273 S.C. 594, 607 258 S.E.2d 93, 99 (1979) (stating that due process clause requires there be some fiscal relation to the protections, opportunities and benefits provided by the state).

App. pp. 931–933, SCDOR Distortion Example for FY 2006. CarMax West established by a preponderance of the evidence that SCDOR's assessment results in liability that is distortive and taxes CarMax West out of all proportion to and does not fairly represent its business conducted in South Carolina (see Container Corp., 463 U.S. at 170; Hans Rees', 283 U.S. at 135), and the ALC's finding to the contrary is in error. Thus, CarMax West respectfully requests that this Court reverse the ALC's decision that CarMax West's constitutional rights were violated. In the alternative, CarMax West would ask that this Court remand this issue to the ALC with instructions that it must reconsider this issue in light of the fact that CarMax West is a unitary business (see infra pp. 10-15) and the fact that all activities that generate the sourcing income take place out-of-state. See infra pp. 15-18.

IV. 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 Court of Appeals' decision in the instant case is appealable because the order on review is a "final judgment" as defined by this Court's jurisprudence interpreting South Caorlina statutory authority. The cases cited in this Court's Order granting certiorari (see App. pp. 1398-99)-- Charlotte-Mecklenberg Hosp. Auth. v. S.C. Dep't of Heath & 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) -- are inapplicable. Charlotte-Mecklenberg and Bone apply only to cases wherein the initial reviewing court has remanded the case to an administrative agency for further fact finding proceedings thereby vacating the prior decision of the agency such that there is no final order to

appeal. That is not the procedural posture of this case, which involves a remand by the Court of Appeals to the ALC with instructions to apply the proper legal standard and not a remand to an administrative agency to conduct further fact finding proceedings. This Court is obviously empowered to review an opinion of the Court of Appeals on certiorari, and Bone and Charlotte-Mecklenberg do not apply here. Moreover, even if these decisions somehow could be read to apply, a review of a final decision by the ALC in this case would not provide an adequate remedy (or end the issues involved in this appeal), and, therefore, the instant case is appealable.

A. Charlotte-Mecklenberg and Bone are not Applicable to this Case.

Charlotte-Mecklenberg and Bone are not applicable to this case. These cases hold only that an order from a reviewing court remanding a case to an administrative agency for further fact finding proceedings is not a final decision and thus is not subject to immediate appellate review. The parties in the instant case did not seek certiorari on an order remanding the case to an administrative agency (SCDOR in this case) for further fact finding proceedings. Rather, the appeal here is of an order remanding the case to the ALC so that the ALC can apply the proper law to the case.

In Charlotte-Mecklenberg, this Court examined whether an ALC order reversing a decision of the Department of Health and Environmental Control ("DHEC") and remanding it to DHEC for further findings of fact was immediately appealable. Charlotte-Mecklenberg, 387 S.C. at 266, 692 S.E.2d at 894. The Court noted that pursuant to § 1-23-610(A)(1) only *final* decisions are appealable, and an order is not final where it requires the administrative agency to perform additional fact finding before the rights of the parties are determined. Charlotte-Mecklenberg, 387 S.C. at

267, 692 S.E.2d at 894, citing Hooper v. Rockwell, 334 S.C. 281, 513 S.E.2d 358 (1999). Because the ALC order remanded the case to DHEC and required DHEC to perform further fact finding in the form of determining whether certain applicants were entitled to a certificate of need, this Court held that the ALC order remanding the case to DHEC was not final and could not be immediately appealed. Charlotte-Mecklenberg, 387 S.C. at 267, 692 S.E.2d at 895. The ALC's order had the effect of vacating the agency's decision, thus there was no final ruling or decision from which to appeal.

In Bone, this Court adhered to its holding in Charlotte-Mecklenberg. Bone, 404 S.C. at 76, 744 S.E.2d at 557. The appellant in Bone first appealed to the Court of Appeals an order of the Circuit Court remanding the case back to the Worker's Compensation Commission to determine the amount of the claimant's benefits. Bone, 404 S.C. at 74, 744 S.E.2d at 556. The Appellant argued that the Circuit Court had failed to rule on other issues in the case such as the severity of claimant's injury and whether the claimant had reached maximum medical improvement. Id. The Court of Appeals dismissed the appeal on the basis that the decision was not immediately appealable because it involved a remand to an administrative agency for further proceedings (i.e. determination of the amount of claimant's benefits) and thus was not a final decision— the same reason relied upon by the Court in Charlotte-Mecklenberg. Bone, 404 S.C. at 73, 744 S.E.2d at 555. Appellant then sought certiorari from this Court, which, after granting the petition, affirmed the Court of Appeals on the same basis. Id. More specifically, this Court held that a remand by the intitial reviewing

court back to an administrative agency is an intermediate judgment and thus not immediately appealable. Bone, 404 S.C. at 82, 744 S.E.2d at 561.

In sum, Charlotte-Mecklenberg and Bone simply hold that orders remanding cases back to administrative agencies for additional fact finding proceedings, whether those remand orders are issued by the ALC or a circuit court, are not final decisions of administrative agencies and thus are not immediately reviewable on appeal by this Court or the Court of Appeals.[14] In this case, CarMax West and SCDOR are not seeking certiorari on an order remanding the case to an administrative agency (i.e. SCDOR) for further fact finding proceedings. Here, the ALC made a ruling on certain issues and simply failed to address other issues. This decision finally decided the rights of the parties in this action, and thus is a final order. CarMax West then appealed that decision to the Court of Appeals, which ruled on one issue and remanded the case to the ALC to apply the proper law but failed to rule on other legal issues raised. It is this decision upon which the parties seek certiorari. Thus, as the posture of the case shows, Bone and Charlotte-Mecklenberg do not apply to this case because the parties are seeking certiorari on a decision of the Court of Appeals on a matter of law and not seeking review of a decision that remands the case back to the administrative agency for further fact finding proceedings. Accordingly, the order of the Court of Appeals is ripe for review.

---

[14] The cases cited by this Court cites in Bone also involve appeals from orders remanding the case to an administrative agency for additional proceedings. See e.g. Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 52, 446 S.E.2d 618 (1994) (involving remand of case to Worker's Compensation Commission); Owens v. Canal Wood Corp., 281 S.C. 491, 316 S.E.2d 385 (1984) (same); Hunt v. Whitt, 279 S.C. 343, 306 S.E.2d 621 (1983) (same); Blakely v. State Board of Medical Examiners, 310 S.C. 29, 425 S.E.2d 37 (1993) (involving remand to the Board of Medical Examiners).

B. Even if Bone and Charlotte-Mecklenberg Could be Read to Apply to this Case, this Case is Immediately Appealable Because Review of a Final Decision by the ALC Would Not Provide an Adequate Remedy to CarMax West.

Further, even if Bone and Charlotte-Mecklenberg could somehow be read to apply to this case, the decision in this case is immediately appealable because review of the final decision (i.e. review of the ALC decision after remand) would not provide an adequate remedy. South Carolina Code Ann. § 1-23-380 provides that "[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." The legislative policy behind the final judgment rule is to avoid the undue delay and waste of judicial resources caused by interlocutory appeals. Bone, 404 S.C. at 81, 744 S.E.2d at 560. In this case, however, it is dismissal of this appeal that would result in undue delay and waste of judicial resources.

The remand decision of the Court of Appeals failed to rule on several key legal issues that are essential to an adequate ruling in this case on the remand to the ALC. For example, the ALC failed to rule that CarMax West is a unitary business. As explained in section I above, whether a business is unitary must be considered in determining the appropriate apportionment method. If this appeal is dismissed and the case remanded to the ALC per the Court of Appeals' order, the ALC will be reconsidering the issue of the proper apportionment method without considering whether CarMax West is a unitary business. If the ALC decides in favor of SCDOR, CarMax West will then be forced to file another appeal requesting that the law regarding unitary businesses be considered.

Additionally, the issues regarding financing receipts and whether CarMax West's constitutional rights have been violated will not be considered by the ALC on remand as the remand involves only applying the proper burden of proof to the SCDOR on the apportionment issue. The ALC applied the proper burden of proof on the financing receipts issue and the constitutional claim at trial; rather CarMax West contends the ALC made other errors of law. Regardless of how the ALC rules on the apportionment issue (i.e. whether in favor of SCDOR or in favor of CarMax West), CarMax West will be forced to file another appeal in order to have its constitutional claims and its claims related to the sourcing of financing receipts decided. This will result in undue delay, additional attorney's fees and costs to both parties and waste of judicial resources as multiple appeals are assured.[15] Thus, the order at issue is immediately appealable because review of the final decision (i.e. the ALC's ruling on remand) would not provide an adequate remedy and would result in undue delay, multiple appeals, burdensome attorney's fees and costs to both parties and waste of judicial resources.

CONCLUSION

For the above-stated reasons, CarMax West respectfully requests that this Court to find that this case is reviewable and rule on the issues raised by Appellants, upon which the Court of Appeals did not rule. More specifically, CarMax West asks that this Court rule as follows:

---

[15] Additionally, if CarMax West had not appealed the financing receipts and constitutional issues, SCDOR could possibly later argue that these issues had been waived as the ALC has issued a final decision and the remand does not relate in any way to those issues.

I. Rule that the Court of Appeals erred in failing to determine that the CarMax businesses at issue are unitary; and

A. Enter a finding that CarMax West (pre-reorganization) and CarMax West and CBS (post-reorganization) are unitary businesses based on the uncontested evidence at trial and instruct the ALC on remand to consider based on the record made at trial how this finding impacts the determination of the proper apportionment method in this case, including that it should consider Exxon and related cases on the impropriety of applying separate accounting to a unitary business when evaluating whether the standard apportionment method fails to reasonably reflect the unitary business activities of CarMax West (pre-reorganization) and CarMax West and CBS (post-reorganization) and whether SCDOR's alternative separate accounting method does; or

B. In the alternative to A, remand this case to the ALC with instructions to determine based on the records made at trial whether CarMax West (pre-reorganization) and CarMax West and CBS (post-reorganization) are unitary businesses in light of the standard set forth in Exxon and related cases with instructions that if the ALC determines they are unitary, then the ALC should further consider how that finding impacts the determination of the proper apportionment method in this case as set forth in A.

II. Rule that the Court of Appeals erred in failing to rule that the financing receipts at issue should not be sourced to South Carolina, reverse the ALC on this issue and dismiss the portion of the assessment related to the financing receipts.

III. Rule that the Court of Appeals erred in failing to rule that CarMax West's constitutional rights were violated; and

A. Find that CarMax West's constitutional rights were violated and dismiss the assessment in its entirety; or

B. In the alternative, remand this issue to the ALC with instructions that it must reconsider this issue based on the record made at trial in light of the fact that CarMax West (pre-reorganization) and CarMax West and CBS (post-reorganization) are unitary businesses and the fact that all activities that generate the financing income take place out-of-state.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Bryson Geer by AMB w/ permission

John C. von Lehe, Jr.
SC Bar No. 5719
E-Mail: john.vonlehe@nelsonmullins.com
Bryson M. Geer
SC Bar No. 13606
E-Mail: bryson.geer@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Attorneys for Respondent/Petitioner

Charleston, South Carolina
October 30, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Case No. 09-ALJ-17-0160-CC

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, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent/Petitioner, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: BRIEF OF RESPONDENT/PETITIONER CARMAX AUTO SUPERSTORES, WEST COAST, INC. and JOINT APPENDIX

Counsel Served:

Milton Kimpson, Esq.
Adam N. Marinelli, Esq.
Roxanna M. Tinsley, Esq.
South Carolina Department of Revenue
P.O. Box 12265
Columbia, SC 29211

Burnet R. Maybank, III, Esq.
Nexsen Pruet, LLC
PO Drawer 2426
Columbia, SC 29202

Robert L. Widener, Esq.
Erik P. Doerring, Esq.
McNair Law Firm, P.A.
PO Box 11390
Columbia, SC 29211

October 30, 2013

Lisa P. Matthews
Administrative Assistant