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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Appellate Case No. 2024-001558

CarMax Auto Superstores, Inc., ... Appellant,

v.

South Carolina Department of Revenue, ... Respondent.

APPELLANT'S FINAL REPLY BRIEF

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INTRODUCTION[1]

The ALC applied an overly broad and incorrect legal standard for Step One of the AA Statute (i.e., § 12-6-2320(A)).[2] The ALC's use of this incorrect Step One standard is the product of numerous errors, and if allowed to stand, will negatively impact the fairness, consistency, and predictability of our tax laws. Had the ALC simply followed precedent, it would have applied the correct Step One standard. Had the ALC applied basic principles of statutory interpretation to the AA Statute, it would have applied the correct Step One standard. But neither occurred. Moreover, by not interpreting the AA Statute, the ALC bypassed the critically important and long-standing rule that ambiguities in tax statutes be resolved in favor of the taxpayer.

Once the incorrect Step One standard was used, additional errors followed. Another taxpayer protection—the burden of proof being on the Department—was not provided because the Department proved essentially nothing yet was still found to have met its burden for both Step One and Step Two. The ALC also did not interpret the AA Statute for Step Two, thus again bypassing the rule that ambiguities be resolved in the taxpayer's favor.

The Department's Brief (the "Response") ignores East's core arguments. It largely seeks to avoid Step One by treating the AA Statute as one sweeping action rather than the required two-prong analysis. *CarMax Auto Superstores W. Coast, Inc. v. S.C. Dep't of Rev.*, 411 S.C. 79, 88-90, 767 S.E.2d 195, 199-200 (2014) (holding the AA Statute "clearly evinces a two-part analysis[,]" and the Department bears the burden of proving each prong).[3] Only two cases have addressed and

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[1] Abbreviations used herein are the same as those in East's opening brief ("East's Brief").
[2] The Legislature passed S. 298 (effective March 11, 2024), which amended subsection (A)(4) of the AA Statute and added a new subsection (B) related thereto. § 12-6-2320 (2024). As it does not apply to cases at the ALC or appellate courts, all cites to the AA Statute herein are to the prior version.
[3] Step One requires the Department prove the "statutory formula" (here, the sales factor) does not fairly represent East's business activity in South Carolina, and Step Two requires the Department prove its alternative method (here, CUR) is reasonable and equitable. *Id.*

applied Step One. *Id.* and *Rent-A-Ctr. W. Inc. v. S.C. Dep't of Rev.*, 418 S.C. 320, 332, 792 S.E.2d 260, 266 (Ct. App. 2016). The Department cites neither regarding Step One.[4] Critically, Step Two ***does not matter*** until the Department first proves Step One. *Id.*

The Department's failure to refute East's arguments or support the ALC's Order should compel reversal of the Order, which will preserve the predictability, consistency, and fairness of South Carolina's tax laws.

ARGUMENT

I. THE DEPARTMENT FAILS TO REFUTE AND INSTEAD STRENGTHENS EAST'S ARGUMENTS SHOWING THE ALC APPLIED THE WRONG LEGAL STANDARD FOR STEP ONE OF THE AA STATUTE.

East maintains the ALC applied the wrong standard for Step One. East Br. at 21-24. Only two things must be known to determine whether East is correct: (i) the standard applied by the ALC; and (ii) the correct standard. The parties appear to agree on the former but not the latter. The ALC's standard is incorrect because it is both contrary to the *CarMax* standard and inconsistent with the legislative intent of the AA Statute.

A. The Parties Agree on the Standard Applied by the ALC for Step One.

The parties appear to generally agree regarding the ALC's Step One standard. First, the parties are unaware of both (i) the ALC's reason(s) for not following *CarMax*; and (ii) the origins of the ALC's standard.[5] Second, the parties appear to agree on how the ALC's standard functions. East explained that the standard's exact parameters are unclear, but certain things are known,

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[4] On the other hand, the Department cites *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Rev.*, 388 S.C. 138, 146, 694 S.E.2d 525, 529 (2010), which addressed nothing in Step One, dozens of times. This Court need not grapple with *Media General* unless and until Step One is met, and even then, the Step Two issues here do not turn on the *Media General* holding.

[5] East asserted the ALC never explained why it deviated from *CarMax*, and it neglected to support its standard by, for example, interpreting the relevant statutory text. East Br. at 22-23 and n. 31. The Response voices no clear disagreements.

including (i) solely proving FTI is too low can satisfy the ALC's standard (East Br. at 22-24); and (ii) the accuracy of the sales factor in measuring South Carolina business activity appears to be irrelevant because the ALC's standard was met without examining whether East's sales factor fairly represents its South Carolina business activity. *Id.* at 22-23 and 25. The Response voices no disagreement with the above.

B. The Department Fails to Refute and Instead Strengthens East's Arguments that Step One Requires Proof that East's Sales Factor Fails to Fairly Represent East's South Carolina Business Activity.

East's position is clear: where the law requires East to use the sales factor, the correct Step One standard requires the Department prove East's sales factor does not fairly represent its South Carolina business activity. *Id.* at 21-22. This argument is supported by at least two independent reasons: (i) it is the standard established in *CarMax*;[6] and (ii) applying basic rules of statutory construction to the statutory text confirms East's position is correct. *Id.* The Department does not cite *CarMax* (or *Rent-A-Center*) for anything related to Step One nor explain why the *CarMax* standard should not apply here.[7] The Department also has no meaningful response to East's statutory construction argument. The only arguable response is the following:

> CarMax seeks to strike the language of "if the allocation and apportionment provisions of this chapter" and replace it with "sales factor." Under CarMax's edit, an unfair representation of a taxpayer's business activity is fine so long as that distortion is not caused by the sales factor.[] Indeed, CarMax East could shift all of

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[6] East contends that under *CarMax*, the Department must show the *statutory formula* does not fairly represent the taxpayer's business activity in South Carolina. *CarMax* at 89, 767 S.E.2d at 200. The "statutory formula" in *CarMax* was the gross receipts method (*see* § 12-6-2290), and here it is the sales factor (*see* § 12-6-2280(A)).

[7] *CarMax* is clear that the gross receipts method was intended to represent West's business activity and Step One required proof that method failed to do so. The Department's attempt to exclude West's retail sales from the denominator of that method because it had no stores here also makes that clear. *CarMax*, 411 S.C. at 83–84, 767 S.E.2d at 197 ("The Department rejected... the gross receipts method, claiming it did not fairly represent the extent of [West's] business dealings in South Carolina" and "proposed [an] alternative formula [that per the Department]... focused on [West's] actual business activity in South Carolina.").

> its income out of South Carolina through non-arm's length priced intercompany transactions irrespective of its business activity in South Carolina. Certainly, the Legislature did not intend such an absurd result.

Dep't Br. at 17. This response first mischaracterizes East's argument and then implies it leads to absurd results and thus cannot be correct. East's argument is simple—look at the relevant words in the AA Statute, read them in context, and here, where the sales factor is required, Step One requires the Department prove East's sales factor fails to fairly represent its South Carolina business activity.[8] East Br. at 21-22. Both this Court and the South Carolina Supreme Court have held this is the correct standard. *Id.* Further, this standard does not allow incorrect transfer prices to be used to shift income out of state as the Response suggests. The Legislature gave the Department §482 powers (along with penalty rules per § 12-54-155(C)(2)) to address that exact issue.

Finally, the Response makes a great point when it states that "[b]y considering revenue, the ALC could observe CarMax East's business activity unadulterated by intercompany transactions and appropriately judge that the business activity was not fairly represented." Dep't Br. at 28. In other words, *revenue is better for measuring East's business activity* because revenue is pure /"unadulterated" by things that occur *after* revenue. That is 100% true, but critically, East's *sales factor* is all based on *revenue*, and FTI is not. In FY2018 alone East had nearly $13 billion of revenue and ~$153 million of FTI. *See infra* § I(D). The sales factor measures business activity, and FTI does not. In sum, the Response fails to identify any flaws in East's arguments regarding the correct Step One standard and, if anything, strengthens them.

[8] Similarly, for a taxpayer required to use the gross receipts method, Step One requires proof the gross receipts method fails to fairly represent South Carolina business activity. And for a taxpayer required to use a method in § 12-6-2310, e.g., an airline using § 12-6-2310(5), then Step One requires proof that method fails to fairly represent the airline's South Carolina business activity.

C. The Department Neither Provides Support for the ALC's Step One Standard nor Refutes East's Arguments Showing that the ALC's Standard is Incorrect.

The Department fails to show the ALC's standard was correct. The ALC should have provided: (i) the reason it deviated from *CarMax*; (ii) a legal basis to support that reason as being correct;[9] and (iii) a legal basis to support the ALC's Step One standard, such as a legally sound interpretation of the statutory text. The ALC did none of these, and neither has the Department. The ALC essentially said East is a retailer, thus (clearly) its "income" comes from retail sales, and thus "income" is a "proxy" for East's South Carolina business activity (oddly citing to an Oregon case that the ALC acknowledged did not support its reasoning). Order, R. 139-140, n. 64. That appears to be the ALC's only basis for ignoring *CarMax* and applying its own Step One standard, but it is not adequate support, and the Department fails to provide any support for the same.

The Department also fails to address East's arguments that show the ALC's standard was not correct, including that it is: (i) not the same as *CarMax*; (ii) contrary to the legislative intent of the AA Statute; and (iii) one that leads to absurd results (e.g., any improper business expense deduction or even an accounting error that reduced FTI could satisfy the ALC's standard). East Br. at 22-24. The Department's only response is a footnote that relates to the accounting error example which, if anything, supports East's arguments. Dep't Br. at 17, n. 15.[10]

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[9] *See, e.g., State v. One Coin-Operated Video Game Machine*, 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996) (stating that the Court saw "no reason to revisit" an issue decided in a prior case and that "*stare decisis* exists to insure a quality of justice that results from certainty and stability.") (citations omitted).

[10] The Response seems to suggest an accounting error, which would reduce FTI, should not satisfy the ALC's Step One standard because the error "would not be a failure of 'the allocation and apportionment provisions of this chapter' to represent the taxpayer's business activity in South Carolina." *Id.* The same is true for a transfer pricing error that reduces FTI, and a standard that can be satisfied by showing FTI is too low is incorrect. East Br. at 23-24.

D. The *CarMax* Standard is Narrow, Predictable, and Capable of being Applied Fairly and Consistently, while the ALC's Standard is Broad, Unpredictable, and Incapable of being Applied Fairly and Consistently.

The South Carolina tax return is useful for illustrating how significantly different the ALC's standard is from the *CarMax* standard and further demonstrates why the ALC's standard is contrary to the legislative intent of the AA Statute. Here, *CarMax* requires the Step One standard to focus on the sales factor (Schedule H-1). This is East's FY2018 sales factor of ~3.65% based on ~$471 million of South Carolina sales divided by ~$13 billion of total sales:

SCHEDULE H-1 COMPUTATION OF SALES RATIO

	Amount	Ratio
1. Total Sales Within South Carolina (see instructions)	470,911,270	
2. Total Sales Everywhere (see instructions)	12,905,648,104	
3. Sales Ratio (line 1 ÷ line 2)		3.6489 %

See R. 3664. It is not clear where the ALC's standard is focused. It is *at least* focused on FTI because Step One was met based on East's FTI being supposedly too low. Below is also from East's FY2018 tax return, which shows ~$153M of FTI:

1. Federal Taxable Income per federal tax return. . . . . ▶	1.	153,445,451
2. Net Adjustment from line 12, Schedule A and B	2.	22,970,819
3. Total Net Income as Reconciled (line 1 plus or minus line 2) . . . . . ▶	3.	176,416,270
4. If Multi-state Corporation, enter amount from line 6, Schedule G; otherwise, enter amount from line 3. ▶	4.	6,437,253
5. LESS: South Carolina net operating loss carryover, if applicable . . . . . ▶	5.	
6. South Carolina Net Income subject to tax (line 4 less line 5) . . . . . ▶	6.	6,437,253
7. TAX: Multiply amount on line 6 by 5% (.05)	7.	321,863

Id. at 3661. East's sales factor fits between Lines 3 and 4 on its FY2018 tax return shown above—Line 3 is East's total business income and multiplying that by its sales factor results in the amount on Line 4. *Id.*

The *CarMax* standard is narrow, predictable, and capable of being applied fairly and consistently. Generally, it works like this: if Line 3 on the tax return shows $100 and Line 4 shows $5, then Step One requires the Department prove that more than 5% of the taxpayer's total business activity occurred in South Carolina.

The ALC's standard, on the other hand, is broad, unpredictable, and incapable of being applied fairly and consistently. East had ~$13 billion of sales in FY2018 (the sales factor denominator), which translated to ~$153 million of FTI that year. East's FY2018 FTI is only ~1.2% of its FY2018 revenue because of the countless things that occur to get from revenue to FTI.[11] Neither the ALC nor the Department explain how one can look at ~$153M of FTI and decide if it is accurately measuring business activity, nor is it clear how one could do so. East's FTI is based on federal tax laws, the purpose of FTI is not to measure *any* business activity, and certainly federal tax laws are not enacted with an eye towards measuring South Carolina business activity. As just one example of why using FTI to measure business activity is illogical, consider a taxpayer with substantial South Carolina business activity but which incurs large losses such that it has a negative FTI for the year. The taxpayer still measures its business activity because, for example, it must determine its South Carolina net operating loss (see Line 5 on East's FY2018 return shown above). The negative FTI would not reflect the substantial business activity or be useful in measuring the same; on the other hand, the sales factor would still accurately measure the taxpayer's South Carolina business activity.

The ALC's Step One standard is incredibly broad and unpredictable. It is at least focused on FTI, and if the ALC's standard is focused on more than just FTI (i.e., anything below Line 1 of East's return), that makes the standard even more broad.[12] The ALC's standard also appears to

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[11] And intercompany transactions cannot be blamed for this. It requires increasing East's FTI by ~$1.3 billion for the entire Audit Period to reach the result of CUR. East. Br. at 11. Increasing East's FY2018 FTI by one-third of that ~$1.3 billion is still under 5% of East's FY2018 revenue.

[12] The Department's belief that it has the unbridled power that the ALC's standard would allow resulted in the issuance of **53** assessments requiring CUR in less than 4 years. East Br. at 13 and 40. The Department and the ALC disregard the significance of this; however, it shows the havoc that has been wreaked on the business community by this incorrect and overly broad Step One standard, which the Department has used to invoke CUR on corporate taxpayers based on nothing

be unlimited as to the relevant time period; both the ALC and the Department believed evidence from more than a decade before the Audit Period is relevant and important with no indication they would not go back farther had the 2004 Restructuring occurred earlier.

In sum, the legislative intent of Step One is for the Department to prove exactly as *CarMax* provided, not to determine whether FTI measures business activity. Here, Step One requires the Department prove East's sales factor fails to fairly represent its South Carolina business activity. The ALC applied the wrong standard for Step One and therefore must be reversed.

II. THE DEPARTMENT FOLLOWS THE ALC BY NEVER INTERPRETING THE AA STATUTE FOR STEP ONE THUS AVOIDING THE CRUCIAL RULE THAT AMBIGUITIES BE CONSTRUED IN FAVOR OF THE TAXPAYER.

East contends the AA Statute clearly and unambiguously requires the Department prove that East's sales factor fails to fairly represent its South Carolina business activity. *Supra* § I. Neither the ALC nor the Department has set forth any competing statutory interpretation for the correct Step One standard, much less one that is plainly right. *Id.* East's interpretation is not only consistent with *CarMax* but also legally sound and reasonable, and most certainly sufficient to at least show an ambiguity exists as to the correct Step One standard. *Id.* Accordingly, if the Court does not find East's interpretation is clearly correct, the issue still should be resolved in East's favor under the rule requiring ambiguities in tax statutes be resolved in favor of the taxpayer. East Br. at 24-25.

The ALC bypassed this rule of construction by never interpreting the statutory text, and the Department does the same but adds a footnoted response discussing *Alltel*[13] (which East cited to support this settled rule). Dep't Br. at 36, n. 24. The Department says East "misplaces its reliance on the holding," and suggests the case is distinguishable such that the rule would not apply here.

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more than a unitary business group with intercompany transactions (which all will have). That is what the Department did here. *See* Dep't Br. at 12-13 (explaining its reasons for requiring CUR).

[13] *Alltel Commc'ns, Inc. v. S.C. Dep't of Rev.*, 399 S.C. 313, 731 S.E.2d 869 (2012).

Id. This is not simply the "*Alltel* rule." This critically important pro-taxpayer rule has been the "established rule" in this state since at least 1924. *Columbia Ry., Gas & Elec. Co. v. Carter*, 127 S.C. 473, 121 S.E. 377, 380 (1924); *see also Cooper River Bridge v. S.C. Tax Comm'n*, 182 S.C. 72, 188 S.E. 508, 509–10 (1936) ("*In construing the statutes under which the tax has been assessed*, our Supreme Court has pointed out in numerous cases that *the taxpayer must receive the benefits in cases of doubt in the enforcement of tax statutes*." (emphasis added) (citations omitted). Numerous cases recognize this rule, which would clearly apply here if needed.[14]

Further, the rule broadly applies to the construction of tax statutes except those considered a matter of legislative grace (e.g., tax credits and exemptions). *See, e.g.*, *Mead*, 419 S.C. at 139–40, 796 S.E.2d at 173 ("In sum, *Alltel* . . . provides the enforcement of tax statutes should be construed in favor of the taxpayer if the statutes are ambiguous. However, . . . statutes regarding tax *credits or exemptions* should be construed against the taxpayer if the statutes are ambiguous.") (Court's emphasis). East is not seeking a tax credit or exemption. Rather, it filed its returns as

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[14] Additional examples of the many times our courts have recognized this rule: *Amazon Servs., LLC v. S.C. Dep't of Rev.*, 442 S.C. 313, 328–29, 898 S.E.2d 194, 201–02 (Ct. App. 2024), *reh'g denied* (Mar. 18, 2024), *cert. granted* (Oct. 3, 2024); *Rent-A-Ctr. E., Inc. v. S.C. Dep't of Rev.*, 425 S.C. 582, 587, 824 S.E.2d 217, 219–20 (Ct. App. 2019); *Mead v. Beaufort Cnty. Assessor*, 419 S.C. 125, 140, 796 S.E.2d 165, 173 (Ct. App. 2016) ("In sum, *Alltel*... provides the enforcement of tax statutes should be construed in favor of the taxpayer if the statutes are ambiguous."); *SCANA Corp. v. S.C. Dep't of Rev.*, 384 S.C. 388, 394 n.3, 683 S.E.2d 468, 471 n.3 (2009) (Beatty, J., dissenting) (noting general rule that doubts/ambiguities in tax statutes must be resolved against the government); *S.C. Nat. Bank v. S.C. Tax Comm'n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989) ("In the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt." (citation omitted.)); *Clark v. S.C. Tax Comm'n*, 259 S.C. 161, 169–70, 191 S.E.2d 23, 26 (1972) ("Revenue laws are generally construed in favor of the taxpayer and against the taxing authority.") (citation omitted); *Pacolet Mfg. Co. v. Query*, 174 S.C. 359, 177 S.E. 653, 655 (1934) ("There is no question that all tax laws must be construed against the taxing power and in favor of the taxpayer where there is any doubt in the mind of the court[, and this rule] is for the protection of the taxpayer against the arm of the taxing body.").

required by law, but the AA Statute is being used to (i) force East to do otherwise to enforce the Department's view that CUR is best for unitary businesses, and (ii) impose more tax.

Thus, the rule that ambiguities in tax statutes be resolved in favor of the taxpayer would apply in this case if the Court finds the AA Statute ambiguous or unclear. Accordingly, if the Court does not find East's interpretation is plainly correct, it should still rule in East's favor.

III. THE DEPARTMENT'S 2004 RESTRUCTURING AND RELATED ARGUMENTS ARE CONTRARY TO THE ALC'S FACT FINDINGS, INCORRECTLY APPLY §482, FAIL TO SUPPORT THE ALC'S SUA SPONTE RULINGS, ARE NOT RELEVANT, AND PROVIDE NO SUPPORT THAT STEP ONE WAS MET.

The Response criticizes a corporate restructuring from over 20 years ago because it contained a permissible tax planning component.[15] It does this using many incorrect facts, coupled with flawed arguments about §482. The Department never used its §482 powers for anything, much less to unravel or recast the 2004 Restructuring, which §482 powers could not do even had they been used. The Court should ignore these incorrect and irrelevant arguments.

A. The Department Ignores the ALC's Fact Findings and Instead Attacks the 2004 Restructuring Using Incorrect Facts to Support its Flawed Arguments.

The Department regularly attacks events related to the 2004 Restructuring. *See, e.g.*, Dep't Br. 2, 6, 10, 25-27, 30-34, 39. However, the Department oddly ignores the ALC's fact findings while doing so.[16] Most (perhaps all) of the Department's arguments, which themselves are flawed, are premised on "facts" that are wrong and plainly contrary the ALC's clear fact findings.

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[15] The Department's arguments that the 2004 Restructuring "was a tax restructuring" and had no business purpose are puzzling. *See, e.g.*, Dep't Br. at 25-26. There were many business reasons for the restructuring. *See, e.g.*, Order, R. 87-88 and n. 11; East Br. at 14. The ALC also correctly recognized that tax planning is not only lawful but prudent. Order, R. 101, n. 32 ("This is not to say that tax minimization strategies are either improper or not a part of good business and tax advice.").

[16] The Department says nothing indicating it is contesting the ALC's fact findings, nor does it acknowledge that its "facts" contradict the ALC's fact findings.

The basic, material facts related to the 2004 Restructuring determined by the ALC include:

(i) East has *never* owned trademarks/tradenames; they have always been owned by West. Order, R. 87, n.9 and 87.

(ii) CarMax, Inc., contributed 100% of West to East. *Id.* at 88.

(iii) East contributed business process intangibles (the "2004 BPI") to West (which was 100% owned by East). *Id.*

(iv) The only assets East contributed to CBS were CAF, basic back-office / headquarter functions, and cash. *Id.* at 6, 16. In exchange, East received 6.5% ownership of CBS. *Id.* at 89 and 100.

(v) The assets West contributed to CBS were (1) the trademarks/tradenames (the "2004 IP"); *and* (2) the 2004 BPI. *Id.* 88 and 99. In exchange, West received 93.5% ownership of CBS. *Id.*

(vi) The 2004 Study determined the 2004 IP *and* 2004 BPI (collectively, the "Car-Related IP") was collectively worth ~$2 billion. *Id.* at 100 and 105.

The Response ignores the above facts. For example, the Introduction states:

> The [CBS] ownership interests did not account for the valuable business process intangibles and financing function that CarMax East contributed to CBS. The ownership interests also did not account for the fact that CarMax East assigned trademarks to CarMax West for no consideration immediately prior to CarMax West contributing the trademarks for almost a $2 billion value.

Dep't Br. at 2. The ALC's fact findings listed above show these two sentences contain at least five factually inaccurate statements/suggestions because: (1) East did not contribute business process intangibles to CBS; (2) the CBS ownership interests did account for the financing function East contributed; (3) West has always owned the trademarks, thus, East did not assign them to West; (4) West's trademarks were not valued at $2 billion; and (5) East did not assign, transfer, or otherwise contribute to West all the assets West contributed to CBS as the Department suggests. The Response has many arguments premised on incorrect facts like these.[17] East has addressed

[17] For more examples of incorrect statements/suggestions: Dep't Br. at 6 ("The restructure moved business process intangibles and other assets from [East] to CBS, and intellectual property from

numerous factual misstatements and related arguments herein; however, due to space constraints and the desire to focus on relevant issues, it has not addressed them all.[18]

B. The Department Misapplies §482 to the Entire 2004 Restructuring.

The Response combines its incorrect facts with a clearly flawed application of §482. The first step in a §482 analysis is identifying the *transaction* that is being evaluated. Order, R. 101 (citing the ALS (26 C.F.R. § 1.482-1(b)) which describes when a "controlled transaction" (i.e., a related-party transaction) satisfies it). Numerous transactions collectively make up the 2004 Restructuring, yet the Response broadly and incorrectly suggests the entire 2004 Restructuring (or multiple 2004 transactions collectively) violated the ALS, which it then surrounds with inaccurate

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[West] to CBS... but immediately prior to the restructure, [East] assigned the trademark rights to [West]."); 10 ("Critically, the [2004 Study] gave no consideration to the fact that... East had transferred its intellectual property to [West] for zero dollars ($0.00). When [West] contributed that same intellectual property to CBS, the study valued it at nearly $2 billion.") and ("[East] received no remuneration for... contributing the financing functions to CBS."); 25 (saying East in the 2004 Restructuring "transfer[red] a valuable asset (its business process intangibles and financing function) to CBS[.]"); 26 ("Further, the restructure itself violated the arm's length principle because [East] transferred the business process intangibles and financing function to CBS for no compensation.") and (stating when West contributed the trademarks and East the business process intangibles, West received 93.5% ownership interest and East a 6.5% ownership interest); 26-27 ("This is in addition to [East] giving the trademarks that it developed to [West] immediately prior to the restructure for free."); 30 ("[East] transferred trademark and business process intangibles for free to [West] who then contributed them to CBS during the 2004 restructuring in exchange for a 93.5% ownership share.") and ("[East] also contributed its financing function to CBS for no compensation."); 31-32 ("As part of the restructuring, [East] contributed its business process intangibles and financing function for no compensation to CBS."); 33 ("[West] was only the nominal owner of CarMax's trademarks and trade names . . . and bare legal ownership could not generate the $2 billion dollar valuation."); 34 (stating that East "was responsible for what it argues are high-value analytic functions [referring to business process intangibles] prior to transferring this to CBS.").

[18] The Department also says East contributed "financing intangibles" to CBS in 2004. Dep't Br. at 10 (saying the 2004 Study "failed to value the financing intangibles" East contributed to CBS); 34 (similar). It is unclear what the Department is referring to because there is no evidence "financing intangibles" existed, and the cited testimony does not support this. It likewise is unclear why the Department states that East paid CBS during the Audit Period for performing the "financing function." *Id.* at 10 (saying East "contribut[ed] the financing functions to CBS [then] East paid CBS for providing... the financing function during the Audit Period."); 26 (similar). That is not true.

facts like those described above. *See, e.g.*, Dep't Br. at 33 ("However, these intercompany transactions that resulted in [the CBS ownership] fail the arm's length standard due to three fatal flaws."); 32 ("[T]he ALC appropriately considered the 2004 restructuring under a § 482 analysis."); 26 ("[T]he restructure itself violated the arm's length principle[.]"). A §482 analysis requires specificity, starting with a clear identification of the "controlled transaction" being evaluated, which the Response ignores.

C. The Department Does Not Support the ALC's Improper Sua Sponte Findings Related to the 2004 Restructuring but May use Similar Flawed Arguments to Support its Own Attacks on the 2004 Restructuring.

East contends the ALC sua sponte raised and ruled upon issues related to the 2004 Restructuring in violation of East's and West's due process rights. East Br. at 47-50; Order, R. 108 (finding East should get "credit" for West's contribution of the 2004 BPI to CBS). Briefly, East argued that the ALC erred (*inter alia*)[19] in (i) concluding that East's contribution of the 2004 BPI to West violated the ALS because East received "zero compensation" (East Br. at 50; Order, R. 108); and relatedly, (ii) suggesting that because this contribution violated the ALS (which it did not) then §482 powers (had they been used) would empower the Department or ALC to give East "credit" for West's subsequent contribution of the 2004 BPI to CBS. *Id.* These errors start with the incorrect belief that East transferred the 2004 BPI to West for "no compensation." East owned 100% of West, so East's contribution of the 2004 BPI to West is an exchange of equal value in the form of an increased value to East's ownership (i.e., its shares) of West. East Br. at 50; R. 1714:21- 1716:9 (testimony of expert Cody). That also does not violate the ALS nor would §482 empower the ALC to disregard transactions or take CBS ownership from West and give it to East. East Br. at 50.[20]

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[19] *See* East Br. at 47-50 (regarding other errors by the ALC on this issue).

[20] Were the ALC's logic correct, then corporate reorganizations would largely cease to exist. Taxing authorities could arbitrarily use §482 powers to unwind them and selectively disregard

East's Brief also explained that the Department never asserted or argued that East should get credit for West's contribution of any assets to CBS. *Id.* at 48. That is still true—the Response does not appear to support any of the ALC's actions related to this issue, nor does it disagree with East's characterizations of, and arguments related to, the ALC's sua sponte rulings. East Br. at 47-50.[21] The Response does, however, seem to use some of the ALC's flawed logic by making statements that East transferred assets, either to West or to CBS, but received nothing in return, coupled with arguments that such transfers ran afoul of §482. *See supra* §III(A)-(B). But East's contributions of assets to West, which is 100% owned by East, is an exchange of equal value in the form of increased value to East shares. East contributed assets to CBS in exchange for its 6.5% ownership of CBS. Order, R. 89 and 99-100. There is no evidence the assets East contributed to CBS were worth more than 6.5% of the total value of all assets contributed to CBS in the 2004 Restructuring.

D. Events from 2004 are not Relevant to Anything in this Case.

The Response's focus on attacking the 2004 Restructuring and events related thereto (e.g.,

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transactions at will. In fact, the ALC shows that here. CarMax Inc., while owning 100% of East, contributed West to East prior to East contributing the 2004 BPI to West. *See supra* § III(A). CarMax Inc.'s contribution of West to East is indistinguishable from East contributing the 2004 BPI to West. Neither transaction is for "no compensation," impermissible, or a violation of the ALS, yet the ALC *chose* East's contribution of the 2004 BPI to West, incorrectly said it is for "no compensation" and violates the ALS, and then selected *another* transaction (West's contribution of the 2004 BPI to CBS) and suggested East should get "credit" for *West's* contribution of assets to CBS. Section 482 does not grant such unbridled power, particularly in a case where §482 powers were never used. *See also* East Br. at 50, n. 70 (stating that ALC's conclusion that contribution of BPI to West violates the ALS is at odds with ubiquitously used provisions like I.R.C. § 351, which South Carolina follows, which not only allows but encourages this transfer of BPI from a parent (East) to its subsidiary (West) by treating it as a tax-free nonrecognition event).

[21] East has seen nothing that it can reasonably view as the Department intending to support the ALC on this issue, and the Response does not appear to argue East should get "credit" for West's contribution of any assets (including the 2004 BPI) to CBS. While not clear, the Department appears to be making its own arguments rather than supporting the ALC's actions and sua sponte rulings.

the 2004 Study) serves no purpose. Regardless of which Step One standard is correct, the issue is whether East's South Carolina business activity conducted *during the Audit Period* is fairly represented by information included somewhere in East's tax returns for the Audit Period. East's business activity during the Audit Period should be the focus, not events from more than a decade before the Audit Period.

Additionally, as East explained and the Response ignores, the Department asserted no legal claim that could empower the ALC to take CBS ownership from West, even if West were a party. and give it to East. East Br. at 46. Similarly, the Department provides no clear response to East's explanation that the accuracy of the 2004 Study is not relevant to anything in this case. *Id.* The ALC likewise never clearly explains why it believed events from 2004 are relevant despite criticizing East for saying they are not. Order, R. 145. The ALC suggests they matter because of "the effect" of the partnership distributions (established in 2004) on East's tax returns in the Audit Period. *See, e.g.*, *id.* at 91, 109, 144; *see also id.* at 145 (saying "the operation of the partnership percentages is extremely relevant to this case"). But one need not look at 2004 for this; simply look at the Audit Period to see "the effect." The ALC erred by focusing on things from 2004, and the Department errs by attacking the 2004 Restructuring. This Court should not be distracted by these confusing, factually incorrect, and irrelevant attacks on 2004 events.

IV. THE DEPARTMENT FAILS TO SUPPORT FINDING THAT IT PROVED STEP ONE UNDER THE CORRECT STANDARD OR THE ALC'S STANDARD.

The Department bore the burden of proof, which cannot be satisfied absent providing specific evidence and a sound evidentiary basis for its positions. *CarMax*, 411 S.C. at 89-90, 767 S.E.2d at 200; *Rent-A-Ctr.*, 418 S.C. at 332-33, 792 S.E.2d at 267. The Department emphasizes the ALC's "finding is supported by substantial evidence in the record." Dep't Br. at 21. But "substantial evidence" is not satisfied by merely identifying "evidence" *claimed* to support the

ALC's finding. *See, e.g.*, *Risher v. S.C. Dep't of Health & Env't Control*, 393 S.C. 198, 210, 712 S.E.2d 428, 434 (2011) ("Substantial evidence is evidence which, considering the record as a whole, *would allow reasonable minds to reach the conclusion*[.]"). The Response fails to show the ALC's finding that Step One was met is supported by specific and substantial evidence.

A. The Department did Not Prove Step One under the Correct Legal Standard.

The Department ignores East's contentions that the Department never argued nor presented evidence that East's sales factor does not fairly represent East's business activity in South Carolina and that the ALC's issue was with East's FTI and not its sales factor. *See* East Br. at 25 and n. 32; Order, R. 145-146 and n. 70. Thus, the Department failed to prove Step One under the correct standard.

B. The Department Ignores and Fails to Refute East's Arguments Showing it Did Not Meet its Burden of Proof under the ALC's Wrong Legal Standard.

1. There is Still No Evidence that East's FTI is Incorrect.

The Department still has no support for the ALC's finding that East's FTI was too low. Only two arguments remain that conceivably (if proven) could be viewed as such evidence: (1) the management fee price was too high; and (2) the 2004 Study was wrong. East Br. at 26-27.[22]

Regarding the former, the Department ignores what matters, which is that it bore the burden of proof and failed to show the management fee price is incorrect. *See, e.g.*, Dep't Br. at 31-35. The Department fails to acknowledge, much less address, that the ALC could not determine whether the management fee price failed to satisfy the ALS. *See* Order, R. 126 and 143; East Br. at 26. The Department likewise says nothing about the ALC rejecting the Department's expert's suggested transfer price. *Id.* It merely says its expert, despite failing to prove each theory set forth

[22] The ALC properly rejected the last minute, unsupported argument that CBS should have paid loan origination fees to East (*see* East Br. at 26), and the Response does not seek to revive that theory.

at trial, was "more persuasive" and relies on the ALC's finding that the management fee price was "not reliable" based on the ALC's findings that transactions 1, 3, and 5 were "not reliable." *See, e.g.*, Dep't Br. at 34-35. East's Brief explained that these findings are neither valid nor meaningful even if they had been valid (East Br. at 33, n. 46), and the Department says nothing in response. Further, 100% of transaction 1 is already taxed here on the collective returns of East and West, and the Department ignores the ALC twice saying the Department's expert *did not understand* the functions related to transaction 5. Order, R. 125 ("I thus did not find the entirety of Dr. DeRamus's functional analysis to be reliable or credible based upon his lack of understanding of CBS's data analytics functions."); 126, n. 55 (similar). No evidence supports that East's FTI is too low due to the management fee.

On the latter (i.e., 2004 Study), the Department likewise ignores what matters. *See* Dep't Br. at 32-35. First, the Department never showed the 2004 Study was relevant to anything. *Supra* § III(D). Second, the Department failed to prove it was wrong. The ALC concludes:

> [*T*]*he Department's evidence was insufficient to establish whether the [2004] Study was accurate*. . . . [S]imply because a methodology is less reliable does not mean that its result is incorrect. Therefore, I *cannot find the [2004] Study was incorrect*.

Order, R. 107-108 (emphasis added). The Department fails to even acknowledge this finding; instead, it says the ALC "looked skeptically" at the 2004 Study followed by a barrage of flawed arguments related thereto. Dep't Br. at 32-35. The Department failed to prove the 2004 Study was incorrect and thus failed to show that East's FTI is too low on that basis.

2. <u>The Department Fails to Explain how an East-West Structure is Permissible but an Inefficient One is Proof of Step One</u>.

The Department ignores East's arguments showing the clear flaws in the ALC's core finding that the management fees and partnership distributions "working together" in an east-west structure causes East's FTI to be "artificially reduced" and/or too low. East Br. at 27-29; Order, R.

143-145. These items "working together" makes the CarMax Group a slightly inefficient / imperfect east-west structure because 6.5% of CBS's profits stay with East. East Br. at 27-29. Given an east-west structure is permissible, a slightly inefficient one is not sufficient to prove Step One. *Id.* And the Department did not prove the management fee price or the 2004 Study was incorrect. Three individual *non*-issues do not become an issue by simply saying they "work together." The Department ignores East's arguments on this issue and provides no further support for the ALC's flawed conclusion.

3. The Department Fails to Refute East's Arguments Showing the Remaining Evidence Relied on by the ALC is Insufficient to Support Ruling the Department Proved Step One.

East explained how the remaining support for the ALC's conclusion that the Department proved Step One is inadequate. East Br. at 29-32. **First**, the Response does not challenge East's contention that the ALC is mistakenly looking at West's South Carolina business activity as the "proof" of Step One against East, nor does it explain how that is appropriate. *Id.* at 29. **Second**, East explained that the ALC was relying on the materially incorrect statement that East's management fee payments reduced East's FTI by $1.6 billion and increased West's FTI by $1.4 billion. *Id.* at 29-30; Order, R. 98 and 143. The Response ignores this but presumably agrees because it does not mention it as a reason to affirm the ALC's ruling. **Third**, East also explained that the ALC was relying on another materially incorrect statement; it incorrectly believed that East's South Carolina stores had ~$90,000,000 of operating profit but only ~$21,000,000 apportioned to South Carolina for taxation. East Br. at 30-31; Order, R. 91, 144-146.[23] The

[23] East explained why this is (i) factually incorrect because the stores had nowhere close to $90 million of operating profit; and (ii) not probative evidence under the correct facts or even the incorrect "facts" the ALC relied upon. East Br. at 30-31 and n. 42 (approximating the stores operating profits to be between ~$13.5 and ~$20.2 million).

Department ignores East's arguments and instead repeats the ALC's flawed statements without providing any support for them. Dep't Br. at 3, 40. **Fourth**, East explained why the ALC's reliance on a comparison of East's revenues (~75%), management fee payments (~75%), and FTI (~20%) to West's revenues (~25%), management fee payments (~25%), and FTI (~80%), have no relevance and prove nothing. East Br. at 31; Order, R. 143-144. The Department keeps using the same arbitrary comparison as support without explaining how it shows anything of relevance. *See, e.g.*, Dep't Br. at 3, 28. **Fifth and finally**, East explained that the only remaining evidence the ALC relied on was a "distortion ratio" created by a Department employee that is an arbitrary comparison of values coupled with an implausible expectation that East and West should have the same ratio or else there is "distortion." East Br. at 31-32; *id.* at 32, n. 44.[24] The Department provides no response.[25]

C. The Department's Additional Arguments Fail to Support the ALC's Ruling.

In addition to ignoring most (if not all) of East's Brief on the above issues and the ALC's fact findings related to the 2004 Restructuring (*supra* § III(A)), the Department also largely ignores the Order when making its remaining arguments to support the ALC's Step One ruling. Section II of the Response states the ALC's Step One ruling is supported by substantial evidence. Dep't Br. at 21. However, for the next ~15 pages the Response cites evidence[26] in the record but essentially nothing the ALC relied on. *Id.* at 22-36.[27] Sections II(A)-(C) cite the Order for the following: (i)

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[24] East addressed this in detail in its brief because it is one of the few items the ALC relied on, but East will not repeat itself here for this immaterial issue. East Br. at 31-32 and n. 44.

[25] The Response also relies on this distortion ratio (without calling it such). Dep't Br. at 27 ("East ends up with $10.54 of taxable income for every $100 it produces [but] West ends up with $57 of taxable income for every $100 it produces."). This is not probative evidence, and its meaning is unclear; a lot of "income" is missing between what is "produced" and what East/West "end up with."

[26] The Response also cites demonstrative exhibits that were not admitted into evidence.

[27] It is unclear why the Response cites so much evidence the ALC does not rely on. East has attempted to respond to everything remotely meaningful in this or other sections herein.

the uncontested points that the CarMax Group is a unitary business and East is a retailer (*id.* 24); (ii) that the ALC recognized retail sales are different than taxable income (*id.* at 28); (iii) that the ALC found Revenue Ruling 15-5 factors helpful as guidance and substantial evidence "supports the ALC's findings regarding these factors" despite the Order not making that finding or applying those factors (*id.* at 29);[28] and (iv) that the ALC found transactions 1, 3, and 5 of the management fee price were "unreliable" (*id.* at 32) (*see supra* § IV(B)(1) for East's response). The rest of Sections II(A)-(C) discusses uncontested issues (e.g., unitary business) and items the ALC did not rely on (some expressly stated),[29] which do not support the ALC's ruling.[30]

D. The Department Fails to Show the Burden of Proof was Correctly Applied.

East argued that the ALC misapplied the burden of proof. East Br. at 32-33. First, if the Department fails to prove every theory it has, as was the case here, it should not meet its burden of proof. *Id.* Second, if the Department can merely allege "income shifting" to make the ALC look at East and require it "justify" the "income shifting," as was the case here, that is no different than placing the burden of proof on East from the start. *Id.* The Department ignores both arguments.

V. THE DEPARTMENT FAILS TO SUPPORT THE ALC'S RULING THAT IT PROVED STEP TWO.

The Department fails to refute East's arguments showing the ALC incorrectly ruled the Department proved Step Two. East Br. at 34-43. Reasonable minds would not view the evidence relied on by the ALC, particularly considering the clear evidence showing CUR is unreasonable, as proof of Step Two. *Risher*, 393 S.C. at 210, 712 S.E.2d at 434.

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[28] The factors are mentioned, but nothing more. Order, R. 141-142.
[29] For example, the Response says the matching principle supports the ALC. Dep't Br. at 27. That is incorrect (*see* East Prop. Order at 65-66), and the ALC did not rely on it. Order, R. 144, n. 67.
[30] East has already responded in this Brief to everything meaningful in § II(D) of the Response.

A. Describing How CUR Calculates Tax and Calling it "Apples to Apples" is Not Sufficient Evidence to Serve as Proof of Step Two.

The parties and ALC agree that Step Two at least requires the Department to prove CUR passes the first and third components of the *20th Century Fox* test (a/k/a the Reasonableness Test).[31] The ALC described how CUR calculates tax and found that such met the Reasonableness Test. East Br. at 34; Order, R. 148. However, more is required to support such a conclusion. The Response only provides the following additional support as to the first component of the Reasonableness Test:

> Simply put, the books balance. Income allocated to one state is subtracted from the other states. The apportionable income is apportioned by the sales factor based on CarMax East's sales in the respective states. Adding the sales factors of every state equals one—i.e. 100%. Therefore, combined reporting taxes no more or no less than 100% of CarMax East's income.

Dep't Br. at 39. It is unclear what this means or how it supports the conclusion, but it is not *evidence*.

Further, saying CUR is "apples to apples" does not remedy the absence of evidence. Order, R. 148; Dep't Br. at 38 ("The ALC correctly explained that [CUR] uses an apples-to-apples approach that increases the starting point of taxable income but reduces the sales by the proper proportion."). Such is not evidence, nor is it logical. Using FY2016 as an example (*see* Order, R. 99, chart comparing reporting methods), the "apples to apples" is that East's FTI increases from ~$160M to ~$835M, but the sales factor is reduced from 3.36% to 2.51%, ergo (per the Department and ALC) everything is "proportional" and fair. Order, R. 148; Dep't Br. at 38. That is a ~**420%** increase to FTI and ~**25%** decrease to the sales factor, which is neither proportional nor fair. And

[31] *See* East Br. at 34-35; Dep't Br. at 38; Order, R. 147. The first component requires CUR both (i) fairly represent East's South Carolina business activity, and (ii) if applied uniformly in all states, result in taxation of no more or less than 100% of East's income. East Br. at 34, 36-37. The third component requires CUR reflect the economic reality of East's South Carolina business activity. *Id.*

it is not evidence that CUR passes any part of the Reasonableness Test.[32]

The Response also fails to provide any support for the ALC's ruling that CUR passes the third component of the Reasonableness Test. Dep't Br. at 39-40. The Department mostly repeats items used as alleged proof of Step One—facts indicating the CarMax Group is a unitary business, more about the 2004 Restructuring, incorrect suggestion that East's South Carolina stores had $90 million of operating profit, and conclusory statements. *Id.* at 39-40.

The Department's only other argument that it proved Step Two is that CUR "reasonably approximates arm's length transfer pricing." *Id.* at 40. Yet, no evidence supports this.[33] East also showed this is not true, and the Response made no attempt to refute East's arguments. East. Br. at 38-39; *infra* § V(B)(2). In sum, no evidence, and certainly not "substantial evidence," supports the ALC's ruling that the Department proved CUR passes the Reasonableness Test or otherwise met its burden of proof for Step Two. The Department must prove CUR *is* reasonable and equitable, it failed to do so, and the ALC erred in finding otherwise.[34]

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[32] If an "apples to apples" comparison is relevant evidence as to Step Two, the ALC should have considered that East's returns as filed is East's FTI ("Apple 1") and East's sales factor ("Apple 2")—that is actually "apples to apples." CUR, on the other hand, combines Apple 1 with a watermelon (West's FTI) and combines Apple 2 with a grape (West's business activity here).

[33] The ALC agrees no evidence supports this. Order, R. 151 ("[T]his Court has no sound evidence upon which to correct these issues using separate reporting and the Department's Section 482 powers.").

[34] The Response also ignores East's argument that the ALC misapplied the burden of proof by prematurely focusing on East's arguments showing that CUR is *not* reasonable or equitable. East Br. at 35-36; Order, R. 149-151. The Department presented no evidence that CUR *is* reasonable or equitable that could justify shifting the burden to East to prove otherwise. *Id.* That remains true.

B. The Department Provides No Substantive Response to the Evidence Showing that CUR is not Reasonable or Equitable and the Clear Proof that CUR is Grossly Over-Taxing East Compared to its South Carolina Business Activity.

1. The Department Provides no Meaningful Response to East Showing CUR Fails the Reasonableness Test.

East explained why the use of CUR does not pass the Reasonableness Test, and, in fact, fails both components. East Br. at 36-37. CUR fails the first component for two independent reasons, and it also fails the third component. *Id.* The Response merely adopts the ALC's flawed logic that East is comparing "apples and oranges." Dep't Br. at 38; Order, R. 149.

2. The Department Has No Response to the Clear Proof that CUR is Grossly Over-Taxing East Compared to its South Carolina Business Activity.

The Response completely ignores East's arguments demonstrating that CUR grossly overtaxes East. East Br. at 37-39. East's FTI must be increased by ~$1.3 billion for the Audit Period to reach the tax owed by East under CUR, and the result of CUR cannot possibly be achieved using arm's length prices. *Id.* at 38-39. It requires abusive transfer pricing practices to move the ~$1.3 billion of FTI to East needed to reach the result of CUR. *Id.* The Department saw this argument (Dep't Br. at 37, n. 25)[35] but does not explain why it is incorrect.

The Response also ignores East's argument that shows the ALC's reasons, even if proven true, for finding Step One met cannot possibly justify the result of CUR. East Br. at 38. The ALC found FTI was supposedly "shifted" from East to West via East's management fee payments to CBS coupled with 93.5% of CBS's net income earned from those fees being in West's FTI. *Id.* East's management fees generated only ~$730M of FTI for West. *Id.* That is a long way from the

[35] The Response discusses the recent amendment to the AA Statute (which is inapplicable to this case) and suggests CUR would be allowed thereunder because East "concedes the result of [CUR] cannot be achieved using appropriate transfer prices," citing East's argument showing CUR grossly overtaxes East and is improper here. Dep't Br. at 37, n. 25 (citing East Br. at 38). East disagrees.

~$1.3 billion increase to East's FTI that is needed to reach the result of CUR. *Id.*[36]

VI. CONTRARY TO THE DEPARTMENT'S ARGUMENT, THE AA STATUTE DOES NOT AUTHORIZE CUR HERE.

A. The Department, Like the ALC, Again Refuses to Interpret the AA Statute and Again Avoids the Rule that Ambiguities Are Construed in East's Favor.

The application of basic rules of statutory construction to the statutory text makes clear that subsection (A)(4) does not authorize CUR in this case. East Br. at 41-43; § 12-6-2320(A)(4). Nowhere does the Response examine the relevant statutory text and provide a sound, legal analysis using statutory construction rules to explain why East's argument is incorrect or the Department's position is correct. *See* Dep't Br. at 1-45.

Instead, the Response defers to others, but they do not provide support. It incorrectly suggests other states have already found the Department can use CUR in *this* case. *Id.* at 18, n. and.[37] It also defers to the ALC as having correctly found that CUR is authorized here (*id.* at 18) and even suggests the ALC interpreted the AA Statute. *Id.* at 19 (saying "[East] contends the ALC incorrectly interpreted section 12-6-2320(A)(4)" as authorizing CUR in this case). But the ALC expressly stated it did not interpret the AA Statute. Order, R. 135-136, n. 61.[38]

East contends it should prevail under the statutory text as written, but alternatively, East

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[36] Similarly, the Department provides no response to East's point that the Department is again targeting West but calling it East. East Br. at 39. *West's* business activity was the "proof" of Step One so that CUR could be used to impose tax on *West's* FTI to be paid by East. *Id.*

[37] While South Carolina did not adopt UDITPA, the AA Statute is modeled after Section 18 therein. Order, R. 130. General cites to cases in other states as supposedly holding x, y, or z is not helpful—one must know the state's statutory scheme and the facts and ruling in the case to determine if such case is instructive here. The bulk, if not all, of the cases cited as purportedly finding CUR is allowed by a Section 18-type statute do not actually do so, and East is not arguing CUR can never be allowed under other states' statutory schemes.

[38] The ALC instead misunderstood East's argument as whether the Department may "require CUR under certain circumstances" (rather than under the circumstances of *this* case) and then viewed *Media General* as binding precedent for Step Two. *Id.* at 135-136, n. 61, and 138. East disagrees with the ALC's reliance on *Media General* as having resolved this issue. *See infra* § VI(B).

asserts at a minimum that its interpretation is reasonable and sufficient to demonstrate an ambiguity exists, and, therefore, the AA Statute must be construed in its favor.[39] *See supra* § II. As with Step One, the ALC bypassed this critical rule protecting all taxpayers by not interpreting the statute. *Id.*

B. The Department Mischaracterizes East's Arguments and Like the ALC Places Unjustified Reliance on *Media General.*

As for East's arguments about the significance (or lack thereof) of *Media General* in this case, see East's Brief at 42. In *CarMax*, where the facts were similar in that West was *contesting* the Department's use of the AA Statute and the Court established the standard for Step One, *that* is when it is appropriate to say the issue has been decided as justification for ignoring the statutory text (provided the ALC then followed that precedent, which here, did not occur). *Media General* had entirely different facts and posture than this case. It did not involve a retailer using the sales factor being forced to use CUR. It did involve taxpayers requesting the alternative method, both parties *agreeing* Step One and Step Two were met, and the Court rejecting the *Department's* arguments that (A)(4) did not allow the requested method. Thus, East's arguments here should have been considered because they were not made, considered, or rejected in *Media General.*[40]

CONCLUSION

Based on the foregoing as well as East's Brief, the ALC's decision should be reversed.

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[39] Further, the Department's view of the AA Statute is not clearly correct.

[40] East disagrees with the ALC's and Department's view of the method approved in *Media General*. *See* East Br. at 42. However, this does not matter because East has no arguments that turn or depend on what *Media General* actually approved. *Id.* at 41-43.

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