THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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

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

v.

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

REPLY BRIEF OF PETITIONER/RESPONDENT SOUTH CAROLINA DEPARTMENT OF REVENUE IN RESPONSE TO BRIEF OF RESPONDENT/PETITIONER CARMAX AUTO SUPERSTORES WEST COAST, INC.

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Pursuant to Rule 242(i), SCACR, the Petitioner/Respondent South Carolina Department of Revenue (Department) files its Reply to the Brief of Respondent/Petitioner.

ARGUMENTS

I. The Taxpayer's Attempts to Conflate the Two-prong Burden of Proof under S.C. Code Ann. § 12-6-2320 are Without Merit.

The taxpayer's recognition that the Department accepts the burden of proof as it relates to showing the proffered alternative method is reasonable is correct.[1] However, in challenging the Department's use of the proffered alternative apportionment methodology, the taxpayer has endeavored to improperly blend the two stages of analysis mandated by Section 12-6-2320, and in doing so attempts to proffer the standard method as a "competing method" pursuant to Media General Commc'ns, Inc. and Media General Holdings, Inc. v. South Carolina Department of Revenue, 388 S.C. 138, 694 S.E.2d 525 (2010).

Section 12-6-2320 clearly demarcates the first burden placed upon the Department as a showing that the standard statutory methods do not reasonably reflect the taxpayer's business activity in this State. Once such a showing has been made, no further analysis of the standard methodology is required, and burden then shifts to the second prong of Section 12-6-2320. This second stage of analysis is limited to the Department's statutory grant of discretion to require "any other method", so long as it is reasonable. This Court's review of that discretionary imposition of an alternative method

[1] See Respondent/Petitioners Brief in Response to Brief of Petitioner/Respondent at p. 7.

should be limited to a determination of that reasonableness based upon the substantial evidence presented to the ALC. Furthermore, the alternative apportionment statute only allows the Department to exercise that discretion ***after*** the standard methods have been determined to be distortive. The taxpayer recognized this two-step process in its Response to the Department's Brief, and yet continues to present the standard method as a competing methodology.[2]

The mistake made by the taxpayer is an attempt to reintroduce the statutory method as part of the second prong of the burden of proof imposed by Section 12-6-2320.[3] It is essential to note here, that unlike the taxpayer in Media General, the taxpayer did not proffer an alternative methodology in this case. Such a failure was fatal to the Department's case in Media General, as this Court held:

> In this case, however, the Department never recalculated Taxpayers' incomes using any other alternative method, and the Department stipulated that use of the combined entity apportionment method proposed by Taxpayers does result in a fair computing of Taxpayers' business activities in South Carolina. Accordingly, we uphold the ALC's determination that the combined entity apportionment method should be utilized by the Department for the tax period in question.
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> * * *
>
> We agree with the ALC that the legislature has placed no explicit limitation on the alternative methods that may be used under section 12–6–2320(A)(4), and consequently we affirm the ALC's ruling that the Department is authorized to use the combined entity apportionment method.

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[2] See Respondent/Petitioner's Brief in Response to Petitioner/Respondent's Brief at pp. 8-9.

[3] See Respondent/ Petitioner's Brief in Response to Petitioner/Respondent's Brief at p. 8 ("The only competing method to SCDOR's alternative method in this case is the standard statutory apportionment method.").

> Although the Department has the discretion to select an alternative method, the ALC has ordered in this case that the method be applied and we affirm this determination as the Department has not established that another method would be more appropriate.

Media Gen. Commc'ns, Inc. v. South Carolina Dep't of Revenue, 388 S.C. 138, 152, 694 S.E.2d 525, 532 (2010). The taxpayer's failure to present a competing alternative in the case at bar should limit its argument to the reasonableness of the Department's proffered method alone.

It is important to note here, that the taxpayer also did not present any evidence to counter the Department's showing of distortion with the standard methods. In fact, the issues on appeal before this Court do not involve any questions related to the failure of the statutory methods to properly reflect the taxpayer's activities. The Department would argue then that the ALC's findings of distortion should remain undisturbed without a determination that such a finding was clearly erroneous. Furthermore, from a procedural standpoint, once the Department succeeded in presenting by a preponderance of evidence that the statutory method **did not** reasonably reflect the taxpayer's business in this State, the statutory method must be excised from the possible methods available for the taxpayer to employ in determining its taxable income. In that regard, it would be improper to consider the statutory method as a "competing method" against which the proffered alternative should be compared, as the taxpayer attempts to argue.[4]

The taxpayer's misunderstanding concerning the two-prong burden laid out by Section 12-6-2320 is further revealed by its unfounded belief that the Department's

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[4] Id.

position is that the taxpayer was under a duty to propose its own alternative method.[5] Its interpretation of the arguments presented is without merit. While the taxpayer certainly had the opportunity to present a competing method once the Department deemed the statutory methods improper and propounded an alternate method, there exists no legal duty to do so. It could be reasoned that it would have been prudent to present an alternative, assuming *in arguendo* that the ALC would agree with the State's evaluation of the standard methods, but that strategic decision is immaterial to the analysis of reasonableness for the Department's proffered method. To reiterate, the appropriate burden of proof (based upon a preponderance of evidence standard) is a two-step process, whereby the standard method is first evaluated as a reasonable reflection of business activity in this State; and, should that first prong's analysis result in a finding of distortion of business activity, the second step is to move on to the proffered alternative method(s). Here, in the absence of a competing method proffered by the taxpayer, pursuant to Media General, this Court's review should be limited to a determination of reasonableness related to the Department's proposed alternative method. In the event that this Court disagrees with the ALC's findings of reasonableness, the only option would be a remand to the ALC to allow the parties to propose new alternative methods. However, it bears repeating that the Department presented substantial evidence to the ALC on both prongs of the burden of proof, and the ALC properly determined the State's method was reasonable.

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[5] Id. at 9.

This Court has recently distinguished the Bone v. U.S. Food Serv., 404 S.C. 67, 744 S.E.2d 552 (2013) decision in an appeal from the Worker's Compensation Commission. In a footnote within Shatto v. McLeod Regional Medical Center, et. al., No. 2011-201186, 2013 WL 6654374 (S.C. 2013), which involved the grant of a petition for writ of certiorari to review a decision by the Court of Appeals remanding the case to the Commission, this Court clarified the impact of the Administrative Procedures Act (APA) on the appealability of a final decision of the Court of Appeals. While the APA limits appeals from administrative agencies to "final judgments", S.C. Code Ann. § 1-23-390 includes Supreme Court review of decisions from the Court of Appeals, which is governed by Rule 242(a), SCACR. That rule grants jurisdiction to the Supreme Court "to review a *final decision* of the Court of Appeals." This Court properly recognized in Shatto that the purview of that jurisdiction is broader than the limitation of the APA to final *judgments*, and thus granted the petition for certiorari. In this case, the Court of Appeals' decision should be considered final and thus immediately appealable to this Court so that the proper burden of proof can be ascertained. In doing so, that standard can then be applied to the substantial evidence presented before the ALC which supports a finding of reasonableness related to the Department's proffered method.

Conclusion

The taxpayer's attempts to conflate the two-step burden of proof are without merit. Moreover, the appealable nature of this case rests upon the power of this Court to review final decisions of the Court of Appeals.

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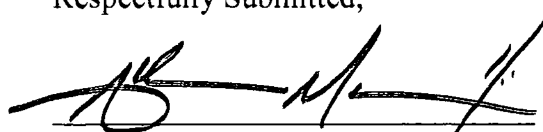
Respectfully Submitted,



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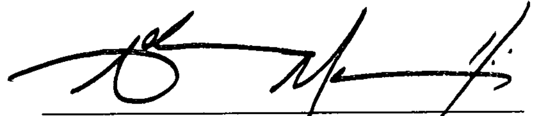
Appellate Case No. 2012-212203

CERTIFICATE OF COUNSEL

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



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PROOF OF SERVICE

I, Jean M. O'Connor, do hereby certify that I have caused to be mailed, postage pre-paid, a copy of Final Reply Brief of Petitioner/Respondent South Carolina Department of Revenue in Response to Brief of Respondent/Petitioner Carmax Auto Superstores West Coast, Inc. in the above referenced matter to John C. von Lehe, Jr., Esquire and Bryson M. Geer, Esquire, 151 Meeting Street, 6th Floor, Charleston, SC 29401-2239 this 23rd day of December 2013.

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