

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III, Chief Administrative Law Judge

**Case No. 09-ALJ-17-0204-CC
Appellant Case No. 2012-208608**

Rent-A-Center West, Inc.,Appellant,

v.

South Carolina Department of Revenue,Respondent.

PETITION FOR REHEARING

RECEIVED

NOV 28 2016

SC Court of Appeals

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Pursuant to Rules 221(a), 219, and 240 of the South Carolina Appellate Court Rules, Respondent, South Carolina Department of Revenue (“Department” or “Respondent”), hereby files this Petition for Rehearing in the above-referenced matter, which resulted in Opinion number 5447 filed on October 26, 2016 (the “Opinion”). The Department respectfully submits that rehearing and/or issuance of a new opinion denying the relief sought by the Appellant and affirming the decision of the Administrative Law Court (“ALC”) is warranted. This Petition for Rehearing is based on the grounds that the Court overlooked and/or misapprehended the substantial evidence in the record that the Department satisfied its burden and that Appellant’s retail and trademark businesses are not unitary businesses.

INTRODUCTION

As this Court is aware, the primary issue in this matter has been whether the Department satisfied its burden of proof to demonstrate that the statutory apportionment method used by the Appellant, Rent-A-Center West, Inc., did not fairly reflect the extent of Appellant’s business activity in South Carolina. Another issue is whether Appellant’s retail and trademark activities are non-unitary activities such that Appellant’s inclusion of both of the non-unitary activities in one gross-receipts formula was improper.

On January 6, 2012, the ALC issued its Final Order and Decision (“ALC Order”) in this matter and concluded that the Department satisfied its burden with sufficient evidence. (*See R. pp. 3-23.*)¹ The ALC, who is in trier of fact in this matter, found that “the evidence in this case

¹The ALC in this case appropriately placed the burden on the Department to show 1) that the standard apportionment method used by the taxpayer did not fairly represent the taxpayer’s business activity within SC and 2) that the Department’s alternative method was reasonable. As will be discussed, this is what distinguishes the instant case from the outcome in *CarMax Auto Superstores W. Coast, Inc. v. S.C. Dep’t of Revenue*, 411 S.C. 79, 767 S.E.2d 195 (2014), where the trial judge placed the burden on the taxpayer to disprove the appropriateness of the Department’s alternative apportionment formula.

demonstrates that the standard formulas for apportionment (and, in particular, use of Section 12-6-2290) did not reasonably represent the proportion of trade of business that RAC West carried on in South Carolina. Furthermore, the facts established that the Department’s [alternative] method of apportionment is reasonable.” (R. p. 14.)

The ALC also found that the facts demonstrated that Appellant’s retail operations were “unrelated” to its trademark business. (R. p. 13.) Accordingly, the ALC concluded that including Appellant’s gross receipts from its out-of-state retail operations in the denominator of the combined gross-receipts formula diluted and distorted Appellant’s actual economic activity in South Carolina. (R. p. 13.)

LAW

During the years at issue in this case, South Carolina law allowed two standard statutory formulary apportionment methods to apportion a taxpayer’s apportionable income from within and without South Carolina. The first standard method used a three-factor apportionment formula set forth in S.C. Code Ann. § 12-6-2250 (Supp. 2000). This three-factor formula applied to manufacturers and dealers in tangible personal property, so it was not applicable to Appellant. The second standard method used a gross-receipts apportionment formula set forth in S.C. Code Ann. § 12-6-2290 (2014). The gross-receipts formula applied to all other multi-state taxpayers other than manufacturers or dealers in tangible personal property.²

²Despite not being a manufacturer or a dealer in tangible personal property, Appellant initially filed its corporate income tax returns for the years at issue using the three-factor formula. After litigation commenced, Appellant filed amended income tax returns that used the gross-receipts apportionment formula. (R. p. 4 n.1.) The ALC found that the three-factor formula was not applicable to the Appellant and its business. (R. pp. 11-12.) Therefore, the dispute in this case is whether the gross-receipts formula fairly represents the extent of the Appellant’s business activity in South Carolina.

If the standard apportionment formula for a taxpayer does not fairly represent the extent of the taxpayer's business activity in South Carolina, the taxpayer may petition for or the Department may require the use of an alternative apportionment method, if that alternative apportionment method is reasonable. S.C. Code Ann. § 12-6-2320(A) (2014); *see CarMax Auto Superstores West Coast, Inc. v. S.C. Dep't of Revenue*, 411 S.C. 79, 86-87, 767 S.E.2d 195, 198-99 (2014). “[T]he proponent of the alternative formula bears the burden of proving by a preponderance of the evidence that: (1) the statutory formula does not fairly represent the taxpayer's business activity in South Carolina and (2) its alternative accounting method is reasonable.” *CarMax*, 411 S.C. at 89, 767 S.E.2d at 200.

Upon an appeal from the ALC, a South Carolina appellate court:

[M]ay not substitute its judgement for the judgement of the agency as to the weight of the evidence on questions of fact. The Court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2015).

In a contested case hearing such as the one in this case, “the ALC serves as the sole finder of fact in the de novo contested case proceeding.” (Opinion, p. 5 (citation omitted).) “When the evidence conflicts on an issue, the court’s substantial evidence standard of review defers to the findings of the fact-finder. (Opinion, p. 6 (citation omitted).) “The decision of the

[ALC] should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law.” (Opinion, p. 6 (citation omitted).) “Substantial evidence is ‘evidence which considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached.’” (Opinion, p. 6 (citation omitted).) “Substantial evidence . . . is more than a mere scintilla of evidence.” (Opinion, p. 6 (citation omitted).)

LEGAL ANALYSIS

The Court overlooked or misapprehended the substantial evidence that exists in the record to support the ALC’s finding that the Department satisfied its burden to prove that the statutory gross-receipts formula did not fairly reflect Appellant’s business activity in South Carolina. Further, this Court overlooked or misapprehended the substantial evidence that exists in the record demonstrating that Appellant’s out-of-state retail business and its trademark business are unrelated and not unitary. Given this substantial evidence, this Court should defer to the facts as found by the ALC and issue a new opinion affirming the ALC Order.

I. The Department Presented Substantial Evidence to Satisfy its Burden of Proof to Demonstrate that the Standard Gross-Receipts Apportionment Formula Did Not Fairly Reflect the Extent of Appellant’s Business Activity in South Carolina.

The record is replete with evidence that supports the ALC’s finding that the Department satisfied its burden to prove that the statutory gross-receipts apportionment formula used by Appellant did not fairly represent the extent of Appellant’s business activity in South Carolina. Accordingly, this Court should modify its Opinion to affirm the ALC Order or should rehear this matter.

The ALC, who was the trier of fact in this case, was in the best position to determine the facts in this case, (see Opinion, p. 6 (citing *Risher v. S.C. Dep’t of Health & Envtl. Control*, 393 S.C. 198, 201, 712 S.E.2d 428, 435 (2011)), and found that “the evidence in this case

demonstrates that the standard formulas for apportionment (and, in particular, use of Section 12-6-2290) did not reasonably represent the proportion of trade of business that RAC West carried on in South Carolina,” (R. p. 14). This evidence relied on by the ALC constituted sufficient evidence as it was specific and more than mere bald assertions; however, this Court relied upon only one statement by the Department’s auditor and two statements by the Department’s expert witness (Opinion, p. 13) and overlooked the additional and sufficient evidence in the record that supports the Department’s position. By failing to recognize the sufficient evidence that supports the Department’s position, the Court overlooked or misapprehended the evidence presented at the contested case hearing resulting in this Court erroneously finding that the Department presented the same insufficient evidence in this case that it presented in *CarMax Auto Superstores W. Coast, Inc. v. S.C. Dep’t of Revenue*, 411 S.C. 79, 767 S.E.2d 195 (2014).³

³The Department submits that the Court should rely on *CarMax* solely for the legal conclusion regarding the burden of proof under S.C. Code Ann. § 12-6-2320 and nothing more. The result in *CarMax* – finding that the Department had not met its burden of proof to show that the standard formula did not fairly represent the extent of CarMax’s business activity in South Carolina – should not be used to draw any conclusion on the sufficiency of the Department’s evidence here. Significantly, the trial court in *CarMax* imposed the burden of proof on the wrong party, requiring the taxpayer to show that the Department’s alternative formula was inappropriate instead of placing the affirmative burden on the Department. As observed by Chief Justice Pleicones in dissent, “The ALC placed the burden of proof on CarMax West, and accordingly its findings of fact and conclusions of law are premised on that error of law.” *CarMax*, 411 S.C. at 92, 767 S.E.2d at 201 (Pleicones, J., dissenting in part). The dissent further observed that “[i]t is therefore not surprising that as the majority states, ‘the Department relied on CarMax West to refute [the Department’s] use of an alternate formula,’ or that the Department, lacking any burden of proof, largely offered evidence of **what** it did rather than **why** it did it.” *Id.* While the Department acknowledges that the *CarMax* Court ultimately reviewed the record to determine that the Department’s evidence was insufficient, the *CarMax* Court did not have the same perspective on the evidence there as did the trial judge in the instant case. Here, the ALC imposed the proper burden of proof. (R. pp. 10, 12.) The trial judge here thus had the ability to weigh the testimony of witnesses and assess their credibility and evaluate all other evidence. Using the correct burden of proof, the ALC here arrived at the factual conclusion that the Department met its burden of proof. The Department respectfully submits that these conclusions – that the standard formula does not fairly represent the extent of the

This Court improperly found that substantial evidence does not support the ALC's finding that the Department met its burden. (Opinion, p. 13.) In its analysis, this Court stated that the Department's auditor "did not point to any specific evidence" to show that Appellant's use of the gross-receipts formula did not fairly represent the extent of its business activity in South Carolina. (Opinion, p. 13.) It further indicated that the Department's economic expert made mere "bald assertions" regarding Appellant's use of the gross-receipts formula. (Opinion, p. 13.)

The Department, however, satisfied its burden of proof by presenting sufficient evidence that the standard gross-receipts formula used by Appellant does not fairly represent the extent of Appellant's business activity in South Carolina. This evidence demonstrates that by including Appellant's out-of-state retail receipts in the denominator of the gross-receipts ratio, when Appellant conducted no retail activity in South Carolina, the gross-receipts ratio was diluted and distorted such that the resulting tax base did not fairly represent Appellant's business activity in South Carolina. The ALC found that "the facts clearly reflect the revenue from the operations of [Appellant's out-of-state] stores is unrelated to the trademark business [Appellant] operates in South Carolina" and that "the evidence does not show that [Appellant's] retail operations, which generates a very large portion of its gross receipts, contribute a comparable amount to {Appellant's} net income." (R. p. 13.)

A witness for the Appellant testified that Appellant did not operate any retail stores in South Carolina, but it operated retail stores only in the western part of the United States. (R. p. 125.) This witness also testified that Appellant had no management or employees in South Carolina. (R. p. 131.)

taxpayer's activity in the State and that the Department's alternative methodology is reasonable – were supported by substantial evidence.

The Department's auditor testified that Appellant had only two streams of income: (1) retail sales conducted entirely outside of South Carolina that made up 87% of Appellant's income and (2) royalty income from trademark licensing agreements earned partially from within South Carolina that made up 13% of Appellant's income. (R. p. 254.)

The Department's auditor also testified that Appellant's only income generated from within South Carolina was royalty income and that Appellant did not operate any retail stores in South Carolina. (R. pp. 253-54.) The auditor testified that Appellant's out-of-state retail operations had "nothing" to do with its trademark activities in South Carolina. (R. p. 253.) Through a trademark licensing agreement, Appellant licensed use of its trademarks to RAC East, Inc., a separate but affiliated company that operated retail stores in South Carolina. (R. 383-390.)

Further, the record indicates that Appellant engages in two business activities – retail and trademark – that have widely divergent profit margins and that the result of combining both activities into one gross-receipts formula is a dilution and distortion of Appellant's business activity in South Carolina. Appellant conducts a high profit margin trademark licensing business in South Carolina while it conducts a lower profit margin retail business in western states. (R. pp. 253-56.) The Department's auditor testified that Geoffrey-type companies (i.e., companies that own and license trademarks) do not incur many expenses and would therefore be a high profit margin business when compared to a retail business that has many expenses to offset its income. (R. p. 256.) Even though the Department asked for documentation of any trademark-related expenses incurred by Appellant (R. p. 254-55), the record is void of Appellant even naming any trademark-related expenses that it incurred, much less substantiating any such deductions. However, the record includes statements from an RAC Texas employee stating that

RAC Texas manages Appellant's trademark portfolio, indicating that Appellant incurs little or no expense related to its trademarks. (R. p. 154.) Therefore, Appellant operates only its high margin trademark business in South Carolina from which it generates more net income from every dollar of sales. Apportioning Appellant's total net income using a gross-receipts ratio that includes both the lower margin retail receipts that make up 87% of total receipts and the higher margin royalty receipts will result in less total net income being apportioned to South Carolina although Appellant operates only its high margin business in South Carolina. Separating these lines of businesses for apportionment purposes is supported by the decision in Microsoft Corporation v. Franchise Tax Board, 39 Cal.4th 750, 767-71, 139 P.3d 1169, 1180-83 (2006) (stating that a qualitative analysis is necessary because by applying the worldwide average margin to each state's gross receipts when the much lower margin treasury operations operate only in Washington State "would result in severely underestimating the amount of income attributable to every state except the state hosting the treasury department).

The ALC demonstrated the distortion and dilution of the gross-receipts ratio caused by including both retail and royalty receipts in the denominator while including only Appellant's South Carolina royalty receipts in the numerator. (R. pp. 6-7.) For example, the ALC noted that while Appellant's total net income for 2004 was \$19,840,800 the gross-receipts ratio used by Appellant apportioned only \$40,317 of that total net income to South Carolina. (R. p. 6.) This is despite the fact that Appellant generated \$861,437 from South Carolina in 2004 through its high margin trademark licensing business. (R. pp. 6, 254.) Due to the qualitative differences in Appellant's retail and trademark businesses, the gross-receipts formula dilutes and distorts the extent of Appellant's business in South Carolina because it results in a reduction of Appellant's South Carolina gross receipts from trademarks of \$861.437 by 95% to arrive at a South Carolina

taxable income amount of only \$40,317. (R. p. 6.) Such a significant reduction is absurd when the record is void of any expenses which Appellant incurred that should offset the South Carolina-based royalty income and the evidence in the record clearly indicates that another entity, RAC Texas, manages and maintains Appellant's portfolio or trademarks and tradenames (R. p. 154). The absurd result of using one gross-receipts formula that includes both the high margin and the lower margin activities is even starker in 2005 and 2006. (R. p. 7.)

Further, the Department's expert recognized and testified regarding the inherent problem of including the out-of-state retail sales in the denominator of the gross-receipts ratio while no retail sales are included in the numerator when Appellant conducts no retail operations in South Carolina. Dr. Harrison, an expert in law and economics, testified that using the standard gross-receipts ratio, which included retail sales in the denominator, "would not provide an accurate reflection of the economic connection of [Appellant] with South Carolina." (R. p. 274.) He called it mixing apples and oranges (R. p. 274), which is the same analogy used by the California Supreme Court in Microsoft Corp. when addressing the different profit margin activities within Microsoft's business, 39 Cal.4th at 768, 139 P.3d at 1180.

The above demonstrates that the Department, unlike in *CarMax*, presented much more than a scintilla of evidence to support its assertion that Appellant's use of the gross-receipts formula did not fairly represent the extent of Appellant's business activity in South Carolina. Therefore, the Department presented the necessary sufficient evidence for the ALC's decision to be affirmed. Additionally, the ALC as the trier of fact made the factual determinations based on such sufficient evidence and its factual determinations should not be overturned.

II. The Department Presented Substantial Evidence that Appellant’s Out-of-State Retail Business and its Trademark Businesses Are Unrelated and Not Unitary.

Although the above is sufficient for this Court to issue a new opinion affirming the ALC Order, the ALC Order should also be affirmed because the ALC found that Appellant’s retail and trademarks activities are “unrelated” and it is not proper, as Appellant did, to combine non-unitary activities into one standard apportionment method.⁴ (R. pp. 12-13, 15.)

“Under both the Due Process and the Commerce Clause of the [United States] Constitution, a state may not, when imposing an income-based tax, ‘tax value earned outside its borders.’” *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983). In addition to not taxing income earned outside of a taxing authority’s state, the standard formulary apportionment methods used in a particular state should be applied only to activities that are unitary, and unrelated activities should not be apportioned by using one combined formulary apportionment method. As the ALC found, the entire “unitary business” concept functions to determine whether certain activities of a taxpayer may be subject to income tax on a formulary apportionment basis. (R. p. 15 (citing 71 Am. Jur. 2d *State and Local Taxation* § 511 (updated Nov. 2011)).) The United States Supreme Court confirmed that formulary apportionment is applied only to unitary activities as follows:

The unitary business/formulary apportionment method is a very different approach to the problem of taxing businesses operating in more than one jurisdiction. It . . . calculates the local tax base by first defining the scope of the “unitary business” of which the taxed enterprise’s activities in the taxing jurisdiction form one part, and then apportioning the total income of that “unitary business” between the taxing jurisdiction and the rest of the world on the

⁴It is proper however to use separate accounting even if a taxpayer’s business activities are unitary because, for example, S.C. Code Ann. § 12-6-2320(A) allows separate accounting as an alternative apportionment method without any mention of unitary or non-unitary businesses. (See also R. p. 16.)

basis of a formula taking into account objective measurers of the corporation's activities within and without the jurisdiction.

Container Corp., 463 U.S. at 165. South Carolina law also has recognized that formulary apportionment applies to unitary activities but not to unrelated activities. See S.C. Code Ann. Regs. 117-710.1 (2012).

The ALC addressed the factors necessary in a unitary-business analysis and found that “the facts clearly reflect the revenue from the operation of those [out-of-state] stores is unrelated to the trademark business [Appellant] operates in South Carolina.” (R. p. 13.) The test to determine whether a business is unitary is to determine if the business has the characteristics of unity of ownership, unity of management, and unity of operations (i.e., the “unities” definition) and if the activities of the business in question contribute to or depend on the other activities of the business (i.e., the “contribution-dependence” definition). (R. p. 16 (citing *Eastman Kodak Co. v. South Carolina Tax Commission*, 308 S.C. 415, 418 S.E.2d 542 (1992)).)

As noted below, the record is again replete with substantial evidence supporting that Appellant's retail and trademark businesses are unrelated and non-unitary such that using a single gross-receipts formula combining these unrelated activities would not fairly represent the extent of Appellant's business activities in South Carolina. Appellant's trademark business, which is the only business that Appellant conducted in South Carolina, (R. pp. 152, 253, 342), is not unitary with Appellant's primary business, its retail business. For example, unity of management does not exist between Appellant's retail and trademark businesses. (R. p. 17.) Appellant manages its retail stores but not its trademarks and tradenames. Evidence demonstrates that Appellant has store managers who manage the day-to-day retail operations at each store, (R. pp. 127, 129, 152), but Appellant does not manage the day-to-day operations of its trademark business (R. pp. 152, 154). RAC Texas, a separate entity that does not pay income

taxes in South Carolina, provides the services for protecting, licensing, and monitoring use of Appellant's intellectual property in South Carolina and elsewhere. (R. pp. 152, 154.) Ms. Wolverton of RAC Texas is "responsible for maintaining the company's portfolio of trademarks and trades names" including determining whether a desired name would be available for federal registration, filing the registration and leading the registration process, filing continuing use statements, and monitoring use of the Intellectual Property by others. (R. p. 154.) Additionally, although RAC West owns the intellectual property, Appellant's own economic consultant in its transfer pricing study stated that RAC Texas is responsible for developing advertising and marketing strategies to create, maintain, and expand the RAC brand name. (R. p. 425.) Appellant asserts that a unity of management exists here because a related company, RAC Texas, manages Appellant's trademark business, (Appellant's Brief p. 32.); however, this fact actually proves the opposite. The fact that another entity manages and maintains Appellant's portfolio of trademarks and tradenames and the fact that Appellant's economic consultant could separate Appellant's trademark licensing activities in order to determine the royalty fee demonstrate that Appellant's retail and trademarks activities are not unitary because Appellant does not have centralized management over both activities and shows that Appellant's retail and trademark businesses can be separated.

In addition to not meeting the unity of management test, there are several reasons why Appellant does not meet the contribution-dependence test, meaning that its trademark business is not unitary with its retail business. First, Appellant's trademark business depends on retail sales made by its retail affiliates (i.e., RAC East and RAC Texas) and their customers, not from Appellant's own retail sales. (See, e.g., R. pp. 383-87.) Unlike the retail sales of RAC East (R. pp. 383-87), the retail sales of Appellant do not generate any royalty income for Appellant's

trademark business because Appellant does not charge itself a royalty fee. Second, as the ALC noted, Appellant did not prove that its retail and trademark operations have an inextricable link between the two businesses. (R. p. 8.) Appellant's own expert placed a value on the trademark activities by determining an appropriate royalty percentage. (R. p. 8.) Appellant made bald assertions that such an inextricable link existed but offered no documentary or other meaningful evidence to support this claim except for self-serving testimonial statements. Third, Appellant's assertion that as the customer service and performance of the retail stores increased the intellectual property become "more famous" (R. pp. 155), is irrelevant because notoriety does not necessarily cause an increase in value and Appellant certainly did not present any estimates of how much the value of the intellectual property increased or decreased in any year because of retail service or performance. Assuming, arguendo, that good retail service or performance increased the value of the intellectual property in any one of the tax years at issue, such an increase in the value of intellectual property is not a taxable event and has no relevance to Appellant's income tax returns for 2003, 2004, or 2005 as Appellant did not change the royalty fee charged to its affiliates due to a change in value, which would have affected Appellant's income, or did not sell its intellectual property in a taxable transaction. The taxable event for Appellant in South Carolina is the receipt of the royalty fees from RAC East. That taxable event is the centerpiece of the Department's alternative apportionment method. Appellant could affect the taxable event, if the value of the intellectual property increased or decreased, by increasing or decreasing the royalty percentage in the licensing agreements with RAC East. Fourth, Appellant did not strategically acquire the intellectual property to enhance the value of its retail business as it already owned the intellectual property when that company was acquired. (R. p. 132.) Fifth, whatever value Appellant's intellectual property has on its retail operations and vice versa is

applicable to all retail operations of RAC West, RAC Texas, and RAC East, not merely on the retail operations of RAC West. (R. p. 155.) Therefore, Appellant's intellectual property equally serves the retail operations of RAC West, RAC East, and RAC Texas and does not provide any unique value to RAC West's retail business. Finally, although the retail operations of RAC East and Appellant are the same (R. p. 152), only Appellant owns the intellectual property (R. pp. 152, 155). This indicates that operating the retail stores, whether by RAC East, RAC Texas, or Appellant, is not dependent on also owning the trademark business; otherwise RAC East's and RAC Texas' retail business would be failing because they do not own the trademarks.

Still another example of Appellant's trademark business not being unitary with its retail business is the fact that Appellant's royalty income is identifiable, quantifiable, and separable. Its royalty income comes from its retail affiliates, primarily RAC East and RAC Texas, and is established through licensing agreements. (See, e.g., R. pp. 383-90.) In the agreement with RAC East, Appellant receives a royalty fee of 3% of RAC East's net sales. (R. p. 389.) KMPG was able to look separately at Appellant's trademark business and determine an arm's length royalty fee. (R. pp. 409-77.) Since the royalty fee has been quantified and KPMG separately analyzed Appellant's trademark business, Appellant's trademark business can be separated from its retail business.

Appellant cites Exxon Corp. v. South Carolina Tax Commission, 273 S.C. 594, 258 S.E.2d 93 (1993) to assert that Appellant's trademark business is unitary with its retail business. (Appellant's Brief p. 28-33.) In Exxon, Humble Oil and Refining Company (Humble) operated a vertically integrated oil and gas company engaged in exploration and production of oil and gas, refining of crude oil, and the retail sales of petroleum products. Exxon, 273 S.C. at 596, 258 S.E.2d at 94. When filing income tax returns in South Carolina, Humble excluded from its tax

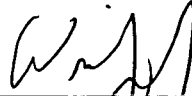
base the portion of its income related to the exploration and production operations. Id. The Supreme Court affirmed the lower court's decision that Humble operated a single unitary business that included the exploration and production operations and that South Carolina income tax should be calculated by applying the apportionment ratio to Humble's entire corporate net income. Id., 273 S.C. at 595, 596, 602, 258 S.E.2d at 94, 97. The Supreme Court used the unities and contribution-dependence definitions in its Exxon analysis, but, as discussed, above, the facts of the instant case, unlike Exxon, show that unity of management and the requisite contribution-dependency between Appellant's retail and trademark businesses did not exist. Additionally and critically, Exxon does not prohibit the use of separate accounting as an alternative apportionment method inasmuch as that opinion predated the 1995 enactment of Section 12-6-2320(A) which allows separate accounting. Prior to the enactment of Section 12-6-2320(A), South Carolina law did not have a statute that authorized the use of separate accounting as an alternative apportionment method.

Based on the above, the ALC found that Appellant's retail and trademark businesses are unrelated; hence, they are non-unitary. The record includes sufficient evidence to support the ALC's finding. Therefore, based on how formulary apportionment formulas are intended to be applied to only unitary activities, this Court should modify its opinion to affirm the ALC Order.

CONCLUSION

For the reasons specified herein, the Department respectfully requests that this Court grant its Petition for Rehearing and/or issue a new opinion denying the relief requested by Appellate and affirming the judgement of the ALC.

Respectfully submitted,



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APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III, Chief Administrative Law Judge

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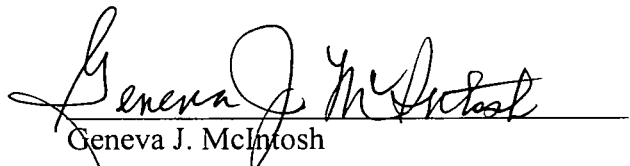
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South Carolina Department of Revenue,Respondent.

PETITION FOR REHEARING

I, Geneva J. McIntosh, do hereby certify that I have caused to be mailed, via United States Postal Service, postage prepaid, a copy of the South Carolina Department of Revenue's Petition for Rehearing in re: Rent-A-Center West, Inc., v. South Carolina Department of Revenue, Trial Court Case No. 09-ALJ-17-0204-CC, Appellate Case No. 2012-208608 to John C. Von Lehe, Jr. and Bryson M. Geer, Esquires, Nelson, Mullins, Riley & Scarborough, LLP, P. O. Box 1806, Charleston, SC 29402-1806 on this 28th day of November, 2016.


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Trial Court Case No. 2009ALJ170204CC

Dear Ms. Kitchings:

Respondent South Carolina Department of Revenue files the original and six (6) copies of its Petition for Rehearing in the above-referenced matter. The Court filed its Opinion on October 26, 2016, and extended the deadline to serve and file this Petition until November 28, 2016.

By a copy of this letter, Respondent is serving the Petition on Appellant's counsel.

Sincerely,

OFFICE OF GENERAL COUNSEL FOR LITIGATION

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