THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No. 09-ALJ-17-0204-CC

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

v.

South Carolina Department of Revenue ..... Respondent.

APPELLANT'S RETURN TO RESPONDENT'S PETITION FOR REHEARING

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Charleston, South Carolina
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Pursuant to Rule 240(e) of the South Carolina Appellate Court Rules ("SCACR"), Appellant Rent-A-Center West, Inc. ("RAC West") files this Return to Respondent South Carolina Department of Revenue's ("SCDOR") Petition for Rehearing (the "Petition") in this matter involving Op. No. 5447, which was filed on October 26, 2016 (the "Opinion"). As explained more fully below, the Petition should be denied. SCDOR's Petition fails to identify any substantive points of fact or law in the Opinion that the Court overlooked or misapprehended as required by SCACR Rule 221(a) and South Carolina case law and instead rehashes arguments previously presented to this Court, which were properly rejected in the Opinion, or makes new arguments that should not be considered. This Court correctly reversed the ALC's decision, and, thus, SCDOR's Petition should be denied.

PROCEDURAL AND FACTUAL BACKGROUND

As this Court will recall, the primary issue in this case is whether SCDOR met its burden of proof to show that the standard statutory apportionment formula did not fairly reflect RAC West's business activities in South Carolina. The ALC concluded that it did meet that burden; however, this Court correctly determined that this was in error because SCDOR failed to present sufficient evidence to meet the burden of proof and thus reversed the ALC. Opinion at p. 13.

A. Brief Summary of Relevant Facts

RAC West has retail stores in western states. R. p. 125 at 84:18-25. It also owns certain intellectual property (trade names and trademarks) ("IP") that it licenses to two related entities, Rent-A-Center Texas, LP ("RAC Texas") and Rent-A-Center East ("RAC East"), which, in return, pay RAC West a royalty fee. R. p. 125 at 84:20-21 and p. 126 at 85:6-8. Beyond receiving these royalty fees for the use of the IP by the South Carolina stores, RAC

West has no activities in this State. R. p. 131 at 106:3-6. It has no physical presence in South Carolina as it has no employees, facilities or tangible property in this State. R. p. 131 at 105:17-22. It also makes no sales in South Carolina and receives *de minimus*, if any, services or benefits from the State. R. p. 131 at 105:23-106:2.

RAC West reported its taxable net to this State using the standard statutory apportionment method. See R. p. 134 at 117:17-118:7; S.C. Code Ann. §12-6-2290 (2014); Sample SCDOR Corporate Income Tax Instruction, R. pp. 479-499; RAC West Amended Tax Returns 2003-2005, R. pp. 361-382. The standard method begins with a corporation's total net income and then apportions it to determine the portion due here based on its business in this State. S.C. Code Ann. §12-6-2290 (2014); Sample SCDOR Corporate Income Tax Instruction, R. pp. 479-499. The reported portion in this case was based on the gross receipts apportionment statute, which uses an apportionment fraction in which the numerator is comprised of gross receipts from South Carolina and the denominator is total gross receipts of the corporation. Id. RAC West's gross receipts from South Carolina consisted of royalties paid by RAC East (on its rentals of household goods to South Carolina customers), and the total gross receipts were all of RAC West's receipts, i.e. the total of its royalties, retail rentals and other income. R. p. 134 at 117:17-118:7; RAC West Amended Tax Returns 2003-2005, R. pp. 361-382. In other words, RAC West followed the literal wording of the gross receipts apportionment statute.

SCDOR objected to the standard method and computed a tax based solely on the gross royalties paid by RAC East to RAC West. This method completely ignores corporate net income as is graphically illustrated by SCDOR assessing a tax liability against RAC West in

2005 when the corporate net income was a loss. See Order, R. p. 7; RAC West Audit Report, R. p. 342.

B. Brief Summary of Procedural History

The ALC's Final Order (the "Order") found in favor of SCDOR on all issues except the penalty, which the ALC dismissed, on January 6, 2012. See Order, R. pp. 3-24. The ALC erroneously concluded that SCDOR met its burden to show that the standard apportionment method did not represent RAC West's business activity in South Carolina and that SCDOR's alternative method did. Id. RAC West then timely filed a Notice of Appeal. Thereafter, because the parties believed that some or all of the issues in this case might be decided by the Court of Appeals' decision in CarMax Auto Superstores West Coast, Inc. v. South Carolina Department of Revenue (Appeal from ALC Case No. 09-ALJ-17-0160-CC) (the "CarMax Appeal"), they requested a stay of this matter until the opinion in the CarMax Appeal was issued. The Supreme Court issued a decision in the CarMax Appeal on December 23, 2014, and the stay was lifted. CarMax Auto Superstores West Coast, Inc. v. S.C. Dept. of Rev., 411 S.C. 79, 767 S.E.2d 195 (2014).

After full briefing by the parties and oral arguments in this matter, this Court issued its Opinion reversing the ALC on or about October 26, 2016. This Court correctly held that based on the evidence in the record, SCDOR had failed to meet its burden to show that the standard apportionment method did not fairly reflect RAC West's business activities in South Carolina. Opinion at p. 13. More specifically, this Court found that SCDOR presented the same level of evidence as it did in the CarMax case, including unsupported allegations by SCDOR witnesses that the management services fee was too high and bald assertions by its expert witness that using the standard method was like "having apples in the numerator, while

having apples and oranges in the denominator" and that "excluding the retail operations from the calculations was essential to 'come up with a tax burden that fairly represented the economic nexus[1] of the entity with South Carolina.'" Id. Because SCDOR failed to meet its burden to prove this threshold issue, this Court declined to decide whether the ALC erred in (a) finding that SCDOR's alternative method was reasonable, (b) failing to find that RAC West operated a unitary business, (c) allowing SCDOR to apply separate accounting to a unitary business, and (d) concluding that SCDOR did not violate RAC West's constitutional rights. Id. at pp. 13-14 and n. 4. SCDOR now petitions this Court for a rehearing on the basis that this Court overlooked or misapprehended certain evidence or arguments.

ARGUMENT

As will be discussed below, SCDOR's Petition for Rehearing should be denied. Rule 221(a) of the South Carolina Rules of Appellate Procedure requires that a party submitting a Petition for Rehearing "state with particularity the points supposed to have been overlooked or misapprehended by the court." See also Kennedy v. South Carolina Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (stating that appellants "must demonstrate the Court overlooked or misapprehended their argument."). Additionally, the purpose of a petition for rehearing is not "to have the case tried in the appellate court a second time" or to "present points which lawyers for the losing parties have overlooked or misapprehended." Id. at 349 S.C. at 532, 564 S.E.2d at 322 (citations omitted).

In its Petition, SCDOR claims that this Court "overlooked and/or misapprehended the substantial evidence in the record that . . . " (1) SCDOR satisfied its burden to show that the

[1] Not only is this statement a bald assertion by the Department's expert witness, "economic nexus" has nothing to do with "business activity."

standard statutory apportionment formula did not fairly reflect RAC West's business activities in South Carolina; and (2) Appellant's retail and trademark business are not unitary businesses. Petition at p. 4. The first argument was squarely addressed and rejected by this Court in its Opinion. While SCDOR points to various facts, purported facts or other assertions that it claims this Court did not consider in relation to this argument, these alleged facts either are not supported by the evidence, do not support SCDOR's position, are not relevant, or were not previously raised by SCDOR, and most, if not all, relate to an argument that was clearly and thoroughly examined by the Court. The second argument, i.e. that RAC West's retail and trademark businesses were not unitary, did not need to be reached by the Court as SCDOR failed to meet its threshold burden to show that the standard formula did not apply. Opinion at pp. 13-14. Thus, because SCDOR failed to identify any substantive issues that have been "overlooked or misapprehended by the court" and, in any event, its arguments have no merit, this Court should deny the Petition.

I. SOUTH CAROLINA LAW ON CORPORATE INCOME TAX FOR MULTI-STATE TAXPAYERS

As this Court is aware, under South Carolina law, a multi-state taxpayer that does business both within and without this State is subject to a 5% corporate income tax "upon a base which reasonably represents the proportion of the trade or business carried on within this State." S.C. Code Ann. § 12-6-2210(B) (2014). The allocation statutes provide apportionment formulas that determine the proportion that represents a multi-state taxpayer's business that is carried on in South Carolina. See Lockwood Greene Eng. v. S.C. Tax Comm'n, 293 S.C. 447, 449, 361 S.E.2d 346, 347 (Ct. App. 1987). For the type of income that is at issue here, the parties agree that the single-factor "gross receipts" statute is the standard statutory method

to be applied. S.C. Code Ann. § 12-6-2290 (2014); R. p. 268 at 172:12-18 (testimony of auditor that single-factor formula would be the correct method). Under this statute, the taxpayer's "gross receipts from within this State" are divided by the taxpayer's "total gross receipts from everywhere." S.C. Code Ann. § 12-6-2290 (2014).

As both parties agree, an alternative method of apportionment is only authorized in certain circumstances, which are set forth in S.C. Code Ann. §12-6-2320(A):

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

Thus, an alternative method may only be used where (a) the standard method does not fairly represent the taxpayer's in-state business activities, and (b) the alternative method (in this case a flat tax on gross receipts) is reasonable. See S.C. Code Ann. §12-6-2320(A) (2014). Additionally, the party seeking to deviate from the standard statutory formula bears the burden of proving both of these elements by a preponderance of the evidence. CarMax Auto Superstores West Coast, Inc. v. S.C. Dept. of Rev., 411 S.C. 79, 89, 767 S.E.2d 195, 200 (2014). Thus, SCDOR, as the proponent of an alternative method, had the burden of proof on those two elements, which must be proven in sequence.

The South Carolina Supreme Court recently examined the first prong of this test in the CarMax case, wherein it held that SCDOR had not met its burden to show that the standard formula did not fairly represent CarMax West's business activities in this State. Id., 411 S.C. at 90, 767 S.E.2d at 200. The ALC in that case had relied on testimony from an auditor that the business structure of the taxpayer is often "linked with tax minimization strategies" and the fact that the taxpayer's method yielded a significantly lower tax than that of a related company to support its determination that the taxpayer's income was diluted by the standard statutory apportionment method. Id., 411 S.C. at 90, 767 S.E.2d at 201. The ALC had also considered the same "apples and oranges" allegation made in this case by the same expert witness. CarMax v. S.C. Dept. of Rev., Docket no. 09-ALJ-17-0160-CC, at p. 9, n. 7 (Admin. Law Ct. April 22, 2010). In affirming as modified the Court of Appeals decision reversing the ALC, the Supreme Court noted that "the Department merely 'describe[d] what it did rather than cite any evidence justifying what it did.'" CarMax, 411 S.C. at 90, 767 S.E.2d at 200. It also found that "[t]his was the extent of the evidence offered by the Department to prove the contention that the statutory formula did not fairly represent CarMax West's business activity in South Carolina, other than bald assertions by its witnesses that it satisfied this threshold question." Id., 411 S.C. at 90-91, 767 S.E.2d at 201. The Court then held that such findings, even if true, "do not provide a sound evidentiary basis to support the conclusion that the statutory formula did not fairly represent CarMax West's business activity in South Carolina." Id., 411 S.C. at 91, 767 S.E.2d at 201 (citing *St. Johnsbury Trucking Co.*, 385 A.2d at 217 ("Merely because the use of an alternative form of computation produces a higher business activity attributable to New Hampshire, is not in and of itself a sufficient reason for deviating from the legislatively mandated formula")). In other words, simply because SCDOR's chosen

method produces a higher income figure than the standard method is not a reason to reject the standard method.

As this Court noted, the South Carolina Supreme Court examined a similar issue in Eastman Kodak wherein SCDOR did not want Eastman Kodak to include the income from its safe harbor lease transactions in the denominator of the apportionment formula because only a very small percentage of the leased assets were located in South Carolina. 308 S.C. at 419, 418 S.E.2d at 544. However, as recognized by this Court in its Opinion, the Supreme Court disagreed and found that the apportionment formula properly reflected the taxpayer's business activities in South Carolina when it only had the minor South Carolina leasing operations in the numerator of the formula. Id.; see also Opinion at p. 13. As RAC West's tax policy expert testified, this is exactly how apportionment is supposed to work. Using a pizza pie analogy, he explained that formulary apportionment takes the total pizza (i.e. the total corporate income of a business in all states) and determines the slice of the pizza that the taxing state should get. R.p. 238 at 49:3-7 and 52:8-18; RAC West Final Brief at pp. 18-19.

II. THIS COURT PROPERLY RULED THAT SCDOR FAILED TO PRESENT SUBSTANTIAL EVIDENCE THAT THE STANDARD APPORTIONMENT METHOD DID NOT FAIRLY REPRESENT RAC WEST'S BUSINESS ACTIVITIES IN THIS STATE.

As this Court will recall, the basic issue in this appeal is whether SCDOR met its two-prong burden to establish, first, that the standard apportionment method (which seeks to determine the portion of RAC West's total net income that should be apportioned to South Carolina) did not fairly represent RAC West's business activities in this State; and, second, if the first prong is met, then to establish that its alternative method (i.e. a flat tax on only RAC West's gross royalty revenue in South Carolina) did. In its Opinion, this Court concluded that

SCDOR failed to meet its burden to show under the first prong that the standard formula does not fairly represent RAC West's in-state business activities because it produced the same level of evidence as was submitted in CarMax. Opinion at p. 13.[2] It specifically noted the auditor's testimony regarding multiple business entities and a management services fee that he stated was "too high" as well as SCDOR's experts "apples and oranges" testimony and his assertion that exclusion of the retail sales was necessary to fairly reflect RAC West's business activities in this State and concluded that these were bald assertions and constituted insufficient evidence to satisfy SCDOR's burden. Id.

SCDOR's Petition for Rehearing claims that this Court overlooked the following purported evidence and assertions in the record, which it claims support its contention that it presented substantial evidence to show that the standard apportionment method did not fairly represent RAC West's business activities in this State:

- Dr. Harrison's testimony that using the standard apportionment method would not provide an accurate reflection of RAC West's business activities in South Carolina because it was mixing apples and oranges (Petition at p. 9)

- testimony that RAC West did not operate any retail stores or have any management or employees in South Carolina (Id. at p. 6)

- testimony of the auditor that RAC West's "out-of-state retail operations had 'nothing' to do with its trademark activities in South Carolina" (Id. at p. 7)

[2] SCDOR asserts that CarMax should only be relied upon by this Court for its holding that the burden of proof is on the party asserting an alternative method. Petition at p. 5, n. 3. It claims that this Court should ignore the Supreme Court's analysis of the sufficiency of the evidence in CarMax based on a lone dissent stating that the ALC had placed the burden of proof on the taxpayer and thus it was not surprising that SCDOR did not attempt to offer evidence in support of its position but rather relied on CarMax to refute it. Id. SCDOR cites no authority that would support this Court ignoring binding precedent based on a lone dissent. Moreover, SCDOR did not actually present that case at trial as if the burden was on the taxpayer. Following CarMax counsel's closing arguments in which he argued that the burden of proof should be on SCDOR, counsel for SCDOR stated as follows: "Your Honor, we do not disagree with Mr. von Lehe's discussion of our burden in this case. We welcome that burden. If we cannot show that they have not fairly represented their business in South Carolina, we should not be allowed to apply this statute." CarMax Trial Transcript at p. 443:3-9. Accordingly, this Court properly recognized CarMax as binding precedent and applied the analysis therein to the facts in this case, which are similar if not identical to those in CarMax.

- evidence that another entity (RAC Texas) manages and maintains RAC West's trademarks and trade names (Id. at pp. 7-8)

- the fact that while RAC West's total net income for 2004 was $19,840,800, the standard method only apportioned $40,317 of that net income to South Carolina despite the fact that RAC West generated $861,437 in gross receipts (Id. at p. 8)

- the fact that retail sales in other states comprised 87% of RAC West's income while royalty income in South Carolina totaled 13% of RAC West's income (Id. at p. 7)

- purported evidence that the retail sales and trademark activities 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" (Id.)

As will be discussed below, the above are either unsupported assertions, do not support SCDOR's position or have not been previously argued.

A. SCDOR's Apples and Oranges Argument Was Fully Considered and Properly Rejected by This Court.

Almost all of the evidence and arguments that SCDOR claims this Court overlooked relate to its apples and oranges argument, which was fully considered and properly rejected by this Court. This Court thoroughly examined the apples and oranges argument (which was made by the very same expert in the CarMax case) and expressly mentioned the submissions from the auditor that Rent-A-Center was comprised of multiple entities and that the auditor believed the management fee was too high and found them not to be "substantial evidence" based on CarMax. Opinion at p. 13. SCDOR's allegations in this case and the CarMax case are identical: that the out-of-state sales should not have been included in the denominator of the apportionment fraction. Or as the Supreme Court put it in the CarMax case: "The Department sought to prevent CarMax West from diluting its income by inflating the denominator of its apportionment ratio with sales from its Western retail operations." CarMax, 411 S.C. at 84,

767 S.E.2d at 197. CarMax argued (as Rent-A-Center does here) that including the out-of-state sales does not cause the apportionment formula to be diluted and therefore to unfairly represent the extent of its business in South Carolina. To the contrary, the formula correctly responds to the fact that there are no retail sales in South Carolina and that fact is correctly recognized by including the sales in the denominator with none in the numerator. As this Court recognized, this result is also directly supported by the Eastman Kodak case. Eastman Kodak, 308 S.C. at 419, 418 S.E.2d at 544 (stating that "the fact that a very small percentage of the leased assets are located in South Carolina is accounted for in the numerator of the apportionment formula . . . [and t]herefore the apportionment formula reflects a 'reasonable representation' of Kodak's business in this State"). See also Opinion at p. 12.

This Court also noted that SCDOR presented no specific evidence that the standard formula did not represent RAC West's business activities (id. at p. 14), and the record shows that no documentary evidence (such as management fee studies) was offered in support of the auditor's assertion regarding such fees. In fact, SCDOR stipulated at trial that it did not dispute that the amount of this fee was reasonable (see R. p. 259 at 134:5-6 and 9-10) and chose not to challenge the deduction for those expenses taken by RAC East, which the auditor acknowledged would have addressed SCDOR's concerns. See R. p. 256.

As to the factual finding in the ALC's Order that RAC West's total net income for 2004 was $19,840,800 and that the standard method only apportioned $40,317 of that net income to South Carolina, this is similarly unsupportive of SCDOR's argument. These facts are very similar, if not identical, to those relied upon by the ALC in CarMax. The ALC here simply compared RAC West's computation using the standard formula to SCDOR's alternative computation and observed that the latter's method produces a higher tax. If this were a reliable

method, then every formula that SCDOR comes up with that shows more tax should be accepted. SCDOR merely showing what it did is not evidence of anything, much less distortion, and showing that its method will produce a higher tax, as this Court recognized, is insufficient as a matter of law under CarMax to establish that the standard statutory method does not reasonably reflect a taxpayer's business activities in this State. CarMax, 411 S.C. at 91, 767 S.E.2d at 201, citing St. Johnsbury Trucking Co., 385 A.2d at 217 ("Merely because the use of an alternative form of computation produces a higher business activity attributable to New Hampshire, is not in and of itself a sufficient reason for deviating from the legislatively mandated formula.").

SCDOR relies on the ALC's observation that RAC West had $861,437 of gross receipts from South Carolina in 2004 but only paid $40,317 of tax. The obvious error here is that the formula is not taxing a percentage of gross receipts but instead is designed to tax a portion of the taxpayer's net income. As the gross receipts statute indicates and as RAC West's tax policy expert testified, that is exactly how formulary apportionment works for multi-state taxpayers.[3]

SCDOR also pointed to testimony that retail sales accounted for 87% of RAC West's total corporate income while royalties accounted for only 13%. How this relates to the issue at hand is a mystery, and SCDOR has given no explanation as to why this is relevant to the issue of measuring the taxpayer's business activity in South Carolina. The fact that RAC West's royalty receipts are a relatively low percentage of its income proves nothing and could

[3] RAC West's tax policy expert used a pizza pie analogy to illustrate this point. He explained that formulary apportionment takes the total pizza (i.e. the total corporate income of a business in all states) and determines the slice of the pizza that the taxing state should get. R. p. 238 at 49:3-5. Separate accounting, on the other hand, "just want[s] to tax the pepperoni." R. p. 238 at 49:5-7. It seeks to tax only the "high profit item" and ignores the entire pizza. R. p. 238 at 49:19-22.

be true of any taxpayer with multiple lines of business. SCDOR never provided any evidence as to why RAC West's retail sales are not a true reflection of its business activity.

SCDOR also claims that this Court overlooked the fact that RAC West did not operate any retail stores nor did it have any management or employees in South Carolina. However, these facts support RAC West's and not SCDOR's position. All RAC West does in this State is receive royalties from a related company doing business in South Carolina, and even these royalties are primarily the result of activities that take place out-of-state. See supra pp. 2-3. RAC West has no physical presence here. Id. Despite this minimal presence, the royalties from South Carolina have not been ignored but have been placed in the numerator of the apportionment formula. The higher the royalties from South Carolina are, the higher the apportionment ratio will be resulting in increased South Carolina income and tax. The fact that RAC West's activities in this State are minimal cannot be ignored. The standard method has allocated a fair share of RAC West's total income to South Carolina when compared to its minimal activities here.

Finally, SCDOR makes the unsupported and inaccurate assertion that RAC West's "out-of-state retail operations had 'nothing' to do with its trademark activities in South Carolina." Whether this (with all due respect, clearly erroneous conclusion) is true or not, it relates primarily to the unitary question not reached by this Court as directed by the CarMax decision. See infra §III. It simply does not address the threshold question of what substantial proof was offered by SCDOR upon which the ALC could have reached its conclusion that RAC West's minimal activities in this State are not fairly represented by the standard apportionment method.

B. SCDOR Failed to Present Evidence to Support its Assertions that the Retail Sales and Trademark Activities have Widely Divergent Profit Margins and that Combining Both Activities in the Standard Method is a Dilution and Distortion of RAC West's business activity in South Carolina.

SCDOR claims for the first time in this case in its Petition that RAC West's retail sales and trademark activities have widely divergent profit margins and thus that combining these activities is a dilution and distortion of RAC West's business activities in South Carolina.[4] Although not argued by SCDOR below, the ALC's Order stated that "the evidence does not show that RAC West's retail operations, which generate a very large portion of its gross receipts, contribute a comparable amount to RAC West's net income" and then erroneously concluded that including RAC West's income from its retail sales would dilute its gross receipts and distort its economic activity in this State. Order at p. 11. The implication, which is now being explicitly asserted by SCDOR, is that RAC West's retail business is less profitable than its royalty business. However, the ALC reached this conclusion not based on any evidence in the record (there was none) but on the basis that the evidence did not show that this conclusion was *not* accurate. Id. The ALC then cited a California case (which is not even cited in SCDOR's Final Brief before this Court) holding that a taxpayer's investment income from short-term securities distorted the results of the standard apportionment formula because the investments produced less than 2% of the company's business income but 73% of its gross receipts. Id. (citing Microsoft Corp. v. Franchise Tax Bd., 139 P.3d 1169, 1178-79 (Cal. 2006)). Thus, the ALC appears to have concluded that because RAC West did not prove that

[4] Kennedy, 349 S.C. at 532, 564 S.E.2d at 322 (citations omitted) (stating that the purpose of a petition for rehearing is not to "present points which lawyers for the losing parties have overlooked or misapprehended.").

its retail business is as profitable as its royalty business, that amounts to proof of distortion in this case.

However, as this Court properly held, it was not RAC West's burden to prove anything; SCDOR bore the burden of showing that the standard formula did not reasonably represent RAC West's business activities in South Carolina. If SCDOR wanted to try to establish this by showing that the royalty business was more profitable than the retail business, then it could have chosen to do so; however, it presented no such evidence.[5] The supposed evidence SCDOR points to in its Petition is a general statement by the auditor that a "pure Geoffrey company has very large income, very little expense . . . ," a statement by RAC West's witness that RAC Texas manages RAC West's trademark portfolio, and testimony that SCDOR had requested RAC West's trademark expenses but none had been provided. Petition at pp. 7-8; R. p. 256 and 154. First, a general statement that "a pure Geoffrey company" has a large income and little expense can in no way be considered as evidence as to RAC West's royalty business, nor can a statement that certain functions of the company are outsourced be considered as evidence as to what those functions cost. RAC West could not provide SCDOR with information regarding its royalty expenses because none of the 50 states in which Rent-A-Center operates had ever asked for this information and so it was not tracked. R. p. 132 at 112:1-4. RAC West is under no obligation to create documents that do not exist for SCDOR. SCDOR could have examined RAC West's detailed financial records, which RAC West did provide, and attempted to prepare its own analysis of royalty expenses, but it failed to do so.

[5] And if evidence that one line was more profitable than another was sufficient to show distortion, then all taxpayers would have to determine the profit margin for each line of business in South Carolina and separately report every line of business with differing profit margins, which would be an administrative nightmare for taxpayers.

Moreover, SCDOR never introduced any evidence in the record regarding the expenses or profitability of RAC West's retail business. Thus, even if the testimony regarding royalty companies in general or the absence of evidence of expenses by the party not bearing the burden of proof was somehow sufficient to establish the profitability of RAC West's royalty business, no comparison (such as was made in Microsoft) could be made vis à vis RAC West's retail business.

Thus, the record is devoid of any facts that would support applying the Microsoft decision here. Additionally, the court in Microsoft based its holding, in large part, on the fact that Microsoft's treasury function was unrelated to its primary business. That is not the case here where RAC West's retail sales business is highly related to and interconnected with its IP business. See Microsoft, 139 P.3d at 1179; RAC West Brief at pp. 4-5 and 28-33. Moreover, Microsoft had complete control over its treasury receipts and could arbitrarily increase them to reduce its California apportionment. That is not the case here because RAC West cannot control its retail sales; only RAC West's customers can do that.

Even if SCDOR had presented evidence showing that the royalty business was more profitable than the retail business and could show that the two business lines were not related, the Microsoft remedy was to take the lower margin portion of the business (the short term investment security sales) out of the denominator of the apportionment formula and then multiply this fraction by the corporate net income. Microsoft, 139 P.3d at 1178-83. However, SCDOR did not do this; instead it abandoned formulary apportionment and taxed only the gross royalty receipts.

III. THE COURT OF APPEALS DID NOT NEED TO REACH THE ISSUE OF WHETHER RAC WEST WAS A UNITARY BUSINESS.

SCDOR claims that this Court failed to consider evidence in the record that RAC West's "out-of-state retail business and its trademark businesses are not unitary" (Petition at p. 4) and claims that the alleged fact that it is not unitary provides additional support for SCDOR's position that the standard method should not be applied. Id. at pp. 10-15.

In its Opinion, this Court determined, as the Supreme Court did in CarMax, that it need not reach the issue of whether RAC West operated a unitary business because SCDOR failed to establish the threshold issue of whether the standard method fairly reflected RAC West's business activities in South Carolina. While RAC West has argued in this case that the fact that it operates a unitary business provides additional support that the standard method does fairly reflect its activities in this State, SCDOR has made no arguments in its briefing in this case that whether RAC West was unitary was relevant, and, in fact, pointed in its Final Brief to the testimony of its expert that whether RAC was unitary was a "red herring." See SCDOR Final Brief at pp. 32-38 (also stating that whether the business is unitary "is not the primary issue that Appellant makes it" and arguing that even if the business is unitary, it can still be separated). Thus, because this argument regarding whether RAC West is operating a unitary business is being asserted for the first time by SCDOR in its Petition for Rehearing, it is not appropriate for this Court to consider it. Kennedy, 349 S.C. at 532, 564 S.E.2d at 322 (citations omitted) (stating that the purpose of a petition for rehearing is not to "present points which lawyers for the losing parties have overlooked or misapprehended.").

However, if this Court does decide to review the issue of whether RAC West operated a unitary business, the overwhelming evidence in the record supports that it was, and RAC

West would submit that this evidence provides additional support for the conclusion that the standard apportionment method fairly reflected RAC West's business activities in South Carolina. See RAC West Brief at pp. 4-5 and 28-39.

CONCLUSION

Based on the foregoing, RAC West respectfully requests that this Court deny SCDOR's Petition for Rehearing.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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Attorneys for Rent-A-Center West, Inc.

Charleston, South Carolina
December 19, 2016

CERTIFICATE OF SERVICE

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

Pleadings:

Counsel Served:

Sean G. Ryan, Esq.
William J. Condon, Jr., Esq.
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December 19, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
PO Box 11629
Columbia, SC 29211

RE: Rent-A-Center West, Inc. v. South Carolina Department of Revenue
ALJ Docket No.: 09-ALJ-17-0204-CC
Court of Appeals Case No.: 2012208608
Our File No.: 17856/09000

Dear Ms. Kitchings:

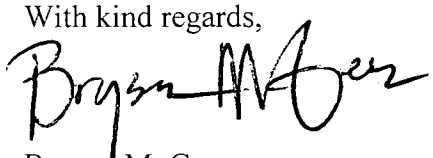
Enclosed are the originals and seven (7) copies of the following documents in the above matter:

1. Appellant's Return to Petition for Rehearing; and
2. Proof of Service.

Please file the original pleadings and return the clocked-in copies to us in the enclosed envelope. By copy of this letter, we are serving these pleadings on counsel for Respondent.

Thank you for your assistance with this matter.

With kind regards,



Bryson M. Geer

BMG:dh
Enclosures
cc: (w/enclosures)
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