THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge

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Case No. 09-ALJ-17-0160-CC
Appellate Case No. 2017-000265

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

v.

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

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# PETITIONER'S RESPONSE TO *AMICUS CURIAE* BRIEF OF COUNCIL ON STATE TAXATION

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William J. Condon, Jr.
Sean G. Ryan
Jason P. Luther
South Carolina Department of Revenue
PO Box 12265
Columbia, SC 29211-9979
(803) 898-5278
Attorneys for Petitioner

Other Counsel of Record:

John C. von Lehe, Jr.
Bryson M. Geer
Nelson Mullins Riley & Scarborough
151 Meeting Street, Sixth Floor
Charleston, SC 29401-2239
(843) 853-5200
Attorneys for Respondent

Burnet Rhett Maybank, III
James Peter Rourke
Nexsen Pruet, LLC
PO Drawer 2426
Columbia, SC 29202
(803) 771-8900
Attorneys for Council on State Taxation

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John C. von Lehe, Jr.
Bryson M. Geer
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151 Meeting Street, Sixth Floor
Charleston, SC 29401-2239
(843) 853-5200
Attorneys for Respondent

Burnet Rhett Maybank, III
James Peter Rourke
Nexsen Pruet, LLC
PO Drawer 2426
Columbia, SC 29202
(803) 771-8900
Attorneys for Council on State Taxation

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On March 8, 2017, the South Carolina Department of Revenue ("Department" or "Petitioner") filed a Petition for a Writ of Certiorari ("Petition") with this Court. Subsequently, the Council on State Taxation ("COST") filed an *Amicus Curiae* Brief of Council on State Taxation in Support of Respondent, Rent-A-Center West, Inc. ("*Amicus* Brief"). Pursuant to Rule 213 of the South Carolina Appellate Court Rules and this Court's Order dated October 18, 2017, the Department files Petitioner's Response to *Amicus Curiae* Brief of the Council on State Taxation ("Response"). Rule 213, SCACR.

This Court should ignore COST's *Amicus* Brief and grant the Department's Petition because (1) this Court did not already decide the issues applicable in this case when it decided *Carmax Auto Superstores West Coast, Inc. v. South Carolina Department of Revenue*, 411 S.C. 79, 767 S.E.2d 195 (2014); (2) COST did not limit its *Amicus* Brief to the argument of the issues on appeal as presented by the parties; (3) COST is attempting to add evidence to the record through its discussion of tax policy; and (4) the South Carolina General Assembly never adopted the Uniform Division of Income for Tax Purposes Act ("UDITPA"), so COST is incorrect when stating that how South Carolina applies UDITPA is of importance to COST's membership.

## INTEREST OF THE AMICUS

COST asserted in its *Amicus* Brief that its members have an interest this this case because "[h]ow South Carolina applies UDITPA is . . . of vital interest and importance to COST's membership," *Amicus* Brief, p. 1, and because the issue of whether the Department has proved that the statutory apportionment formula did not fairly reflect Respondent's business activity in South Carolina "has already been properly resolved by this Court in its decision in *CarMax*," *Amicus* Brief, p. 2.

However, the assertions made by the Amicus are not accurate, so its membership does not have an important interest in this case. First, South Carolina is not a UDITPA state. *DIRECTV, Inc. v. South Carolina Dep't of Revenue*, Docket No. 14-ALJ-17-0158-CC, p. 17 (S.C. Admin. Law Ct. June 12, 2015) (Amended Final Order and Decision) (stating "[i]t is clear that South Carolina is not a UDITPA state); *see also Dish DBS Corp. v. South Carolina Dep't of Revenue*, Docket No. 14-ALJ-17-0285-CC, p. 14 (S.C. Admin. Law Ct. July 11, 2016) (Amended Final Order) (stating that the General Assembly "*specifically chose not* to include [UDITPA's] phrase 'based on costs-of-performance'"). Additionally, despite COST's frequent allegations in its *Amicus* Brief, the South Carolina General Assembly never adopted and the Department never applied the regulation of the Multistate Tax Commission (MTC) limiting the use of the alternative apportionment provision to "unusual fact situations." *See* S.C. Rev. Rul. 15-5, p. 4. Second, the issues raised by the Department in its Petition were (1) whether the Department presented sufficient evidence to meet its burden of proving that the standard formula did not fairly represent the extent of the Respondent's business activity in South Carolina and (2) whether the Respondent's retail and trademark operations where not unitary such that the Respondent should not combine its retail and trademark gross receipts into the same apportionment formula. Pet. Petition for Writ of Cert., p, 11-24. These issues can be resolved only by examining the record of this case, so the Amicus is wrong in asserting that this Court resolved these issues in *Carmax*.

## SUMMARY OF RELEVANT FACTS

The Department has already stated the procedural history and the facts in this case. Pet. Petition for Writ of Cert., pp. 1-11.

## ARGUMENTS

### I. This Court Did Not Already Decide the Applicable Issues in this Case when It Decided *Carmax*.

The Amicus incorrectly states in its *Amicus* Brief that the issue of whether the Department provided sufficient evidence to demonstrate that the statutory apportionment formula did not fairly represent the extent of Respondent's business activities in South Carolina "has already been properly resolved by this Court in its decision in *CarMax*." *Amicus* Brief, p. 2. However, Amicus' assertion is misplaced because this Court is not bound by the evidence presented in *Carmax* in determining whether the Department presented sufficient evidence in this case.

In *Carmax*, this Court decided that the proponent of an alternative apportionment method under S.C. Code Ann. § 12-6-2320(A) (2014) has to prove two items by a preponderance of the evidence. *Carmax*, 411 S.C. at 89, 767 S.E.2d at 200. First, the proponent must prove that the statutory apportionment formula did not fairly represent the extent of the taxpayer's business activities in South Carolina. *Id.* Second, the proponent must prove that the alternative method selected was reasonable. *Id.*

Here, the Court of Appeals and the Administrative Law Court (ALC) differ in their findings of whether the Department presented sufficient evidence to satisfy its burden of proof. The South Carolina Court of Appeals held that the Department did not present sufficient evidence in this case to prove that the statutory formula did not fairly represent the extent of the Respondent's business activities in South Carolina. (APP 013.) However, the ALC found that the Department presented sufficient evidence at the hearing to support its finding that the Department proved that the standard statutory formula did not fairly represent the extent of the Respondent's business activities in South Carolina. (ROA 0014.) In its Petition, the Department asserted that it presented

sufficient evidence to satisfy its burden of proof. Pet. Petition for Writ of Cert, pp. 11-18. This Court can decide this issue only by examining the record in this case, not by relying on its decision in *Carmax*.

Further, in *Carmax* both the ALC and the Court of Appeals applied incorrect burdens of proof. *Carmax*, 411 S.C. at 88, 92, 767 S.E.2d at 199, 201. Although the parties agreed to allow this Court to decide the *Carmax* matter without remanding the case, the Department asserts that this Court should rely on its *Carmax* decision solely for the legal conclusion regarding the burden of proof under section 12-6-2320(A) and no more. Pet. Petition for Writ of Cert. p. 13, n. 4. Because of the errors regarding the burden of proof, the evidentiary record in *Carmax* may be limited or otherwise tainted such that this Court should not decide this case based on its evidentiary findings in *Carmax* as the Amicus urges.

Therefore, this Court has not already decided in *Carmax* whether the Department has satisfied its burden of proof in this case, and this Court should not use *Carmax* to make such a conclusion. The Department respectfully requests this Court grant its Petition and make a finding on the sufficiency of evidence based on the record in this case.

## II. COST Did Not Limit its Brief to the Argument of the Issues on Appeal as Presented by the Parties.

COST presented two arguments in its *Amicus* Brief: (1) this Court decided the sufficiency of the evidence issue in this case when in 2014 it decided the *Carmax* case and (2) the Department has violated tax policy and the voluntary compliance system. By making these two arguments, COST has violated Rule 213 of the South Carolina Appellate Court Rules by failing to limit is argument to the issues on appeal as presented by the parties. *See* Rule 213, SCACR.

The brief of an Amicus "shall be limited to argument of the issues on appeal as presented by the parties." Rule 213, SCACR.

Here, the Department argued two issues. First, the Department argued that it satisfied its burden of proof by presenting sufficient evidence that the statutory gross-receipts formula did not fairly represent the extent of Respondent's business activities in South Carolina. Pet. Petition for Writ of Cert., pp. 11-18. Second, the Department argued that the Respondent's retail and trademark businesses were not unitary and that the Court of Appeals therefore erred by not finding that Respondent cannot combine non-unitary activities in one gross-receipts formula, as it did in this case. Pet. Petition for Writ of cert., pp. 18-24. The Respondent argued against the Department on both issues and did not raise any other issues. Resp. Return to Petition, pp. 9-19.

Although Rule 213 limits the scope of the Amicus' brief to these two issues, the Amicus exceeded its limitation. The Amicus, as discussed above, improperly argued that this Court had already decided this case in *Carmax*. Even the Respondent did not argue that a decision in 2014 decided this case. Resp. Return to Petition, pp. 9-17. The Respondent focused on this case and argued that the Department did not meet its burden based solely on the record in this case, not on the record in *Carmax*. Resp. Return to Petition, pp. 9-17.

The Amicus also improperly argued that the Department violated sound tax policy when it required the Respondent to use an alternative apportionment method. Although the Respondent presented a tax policy expert at the hearing, the Amicus in its brief did not attempt to limit its policy discussion to that expert's testimony, Amicus Brief, pp. 8-14, but, even if it did, the Amicus violated Rule 213 because the parties did not address the tax policy issues that the Amicus discussed. *See* Rule 213, SCACR.

Because the Amicus did not properly limit the scope of its brief, this Court should not consider the *Amicus* Brief when deciding whether to grant the Department's Petition for Writ of Certiorari.

## III. COST Is Attempting to Add Evidence to the Record through its Discussion of Sound Tax Policy.

In addition to improperly exceeding the scope of its brief by discussing tax policy, the Amicus also is attempting to add evidence to the record in this case through its discussion of "sound tax policy."

In its discussion of tax policy, the Amicus focused on the argument that an alternative apportionment method under UDITPA should be used only in "limited circumstances' when "unusual fact circumstances" exist. *Amicus* Brief, p. 10. The Amicus included a great deal of evidence to try to support its assertion and argued that South Carolina's alternative apportionment provision may be applied only in unusual circumstances. For example, it included a quotation from William Pierce, UDITPA's principal drafter, about limiting the use of the alternative apportionment provision and an MTC regulation (never adopted by South Carolina) that limited the use of alternative apportionment to unusual fact circumstances (but was later amended to delete this limiting requirement). *Amicus* Brief, pp. 10-11; S.C. Rev. Rul. 15-5, p. 4. From these facts, the Amicus improperly argued that the Department must follow UDITPA in order to avoid a "chaotic condition." *Amicus* Brief, p. 12.

The evidence that the Amicus presented in its brief regarding the limitation of the use of the alternative apportionment provision to only unusual circumstances is not in the record and should not be added indirectly through its Amicus' brief.

In order to set the record straight, however, the Department refuted the Amicus' argument about this "unusual fact circumstances" limitation in Revenue Ruling # 15-5. The Department wrote that in 2010 the MTC removed the language of its regulation that once limited the use of alternative apportionment to "unusual fact circumstances." S.C. Rev. Rul. 15-5. The Department also stated that South Carolina never adopted nor applied the MTC regulation. S.C. Rev. Rul. 15-5. Finally, the Department stated, "While many of the alternative apportionment situations may involve unusual or unique circumstances. The Department will not require unusual or unique fact situations before it requires or allows a taxpayer to use an alternative apportionment method." S.C. Rev. Rul. 15-5. Instead, the Department focuses on the plain text of the statutory law under section 12-6-2320(A): "whether the statutory apportionment method fairly represents the taxpayer's business activity in South Carolina." *See* section 12-6-2320(A).

This Court should ignore the new evidence presented by the Amicus in its brief. Alternatively, this Court should also consider the Department's longstanding position of not limiting the alternative apportionment provision under section 12-6-2320(A) to unusual fact circumstances and recognize that South Carolina's alternative apportionment provision is not limited to unusual fact circumstances.

## IV. South Carolina Never Adopted UDITPA, so COST Is Incorrect when It Stated that How South Carolina Applies UDITPA is Important to its Members.

The Amicus contends that how South Carolina applies UDITPA is important to its members, *see Amicus* Brief, p. 1, but South Carolina is not a UDITPA state. The Amicus correctly acknowledges that South Carolina adopted only a modified version of UDITPA, but the Amicus essentially attempts to bind South Carolina to all of UDITPA, even to the legislative intent of those

who adopted UDITPA and to the MTC regulation that South Carolina never adopted or applied. *See Amicus* Brief, pp. 9-14.

The ALC correctly found that South Carolina is not a UDITPA state. *DIRECTV, Inc. v. South Carolina Dep't of Revenue*, Docket No. 14-ALJ-17-0158-CC, p. 17 (S.C. Admin. Law Ct. June 12, 2015) (Amended Final Order and Decision). Although South Carolina adopted provisions similar in some respects to portions of UDITPA, South Carolina like many states chose not to adopt UDITPA wholesale. *See, e.g., Dish DBS Corp. v. South Carolina Dep't of Revenue*, Docket No. 14-ALJ-17-0285-CC, p. 14 (S.C. Admin. Law Ct. July 11, 2016) (Amended Final Order) (stating that the South Carolina General Assembly was aware of the "costs-of-performance" language in UDITPA section 17 but "*specifically chose not* to include" that phrase when it enacted section S.C. Code Ann. § 12-6-2295(A)(5) (2014)).

Two significant examples demonstrate that South Carolina did not adopt UDITPA and did not apply similar provisions in the same way. First, as described above, although South Carolina adopted an alternative apportionment provision similar to UDITPA's section 18, UDITPA's alternative apportionment provision, South Carolina did not adopt or apply the "unusual fact circumstances" limitation expressed by William Pierce and the MTC regulation. S.C. Rev. Rul. 15-5, p. 4. By making it clear that South Carolina disregarded this limitation and followed the text of South Carolina's alternative apportionment provision (whether the statutory formula fairly represented the extent of the taxpayer's business activities in South Carolina), Revenue Ruling # 15-5 is a major indication that South Carolina is not a UDITPA state and that it applies its alternative apportionment provision differently than pure UDITPA states apply UDITPA's section 18. Second, for decades South Carolina did not have a provision similar to UDITPA's section 17 regarding the sourcing of sales for taxpayers other that those selling tangible personal property. In

2007, South Carolina enacted section 12-6-2295(A)(5), which made two significant changes to UDITPA's section 17. The ALC described these two differences as follows:

> Specifically, while section 12-6-2295(A)(5) is similar to section 17 of UDITPA, the differences between the two are determinative. The General Assembly, while aware of section 17 of UDITPA, *specifically chose not* to include the phrase "based on costs-of-performance" in section 12-6-2295(A)(5). Moreover, unlike section 17 of UDITPA or the Hellerstein example of costs of performance, section 12-6-2295(A)(5) does not result in an all-or-nothing outcome where only the state with the most income-producing activity, *as measured by costs of performance*, can source receipts for tax purposes. Rather, section 12-6-2295(A)(5) focuses solely on the "income-producing activity" and where that activity takes place. The only real similarity between the South Carolina statute and UDITPA is that both rely on "income producing activity" as a measure of sales; however, as noted above, unlike section 12-6-2295(A)(5), section 17 of UDITPA requires the use of cost of performance as a proxy for income-producing activity. . . . Therefore, based on the clear language of section 12-6-2295(A)(5) and its marked differences from section 17 of UDITPA, I find South Carolina is not a strict costs of performance state.

*Dish DBS Corp. v. South Carolina Dep't of Revenue*, Docket No. 14-ALJ-17-0285-CC, p. 14 (S.C. Admin. Law Ct . July 11, 2016) (Amended Final Order).

South Carolina is not a UDITPA state, so, despite the assertions of the Amicus, South Carolina does not apply UDITPA. Although South Carolina adopted a similar provision as UDITPA's alternative apportionment provision, South Carolina never adopted or applied the MTC regulation that limited the use of alternative apportionment to unusual fact circumstances; hence, South Carolina did not apply its alternative apportionment provision similarly to states that adopted and applied the limiting MTC regulation. Therefore, the Amicus is incorrect when its states how South Carolina applies UDITPA is relevant to this case.

## CONCLUSION

The Amicus incorrectly asserts that a major issue in this case - whether the Department presented sufficient evidence demonstrating that it satisfied its burden of proof that the statutory formula did not fairly represent the extent of Respondent's business activities in South Carolina - has already been resolved by this Court in its *Carmax* decision. Instead, this Court can resolve this issue only by an examination of the record in this case, not by reference to the evidentiary findings by this Court in *Carmax*. Additionally, the Amicus is misguided about the importance in this case of how South Carolina applies UDITPA. South Carolina is not a UDITPA state; therefore, the arguments of the Amicus related to the application of UDITPA's "unusual fact circumstances" limitation are not relevant when applying South Carolina law. Accordingly, this Court should ignore the brief of the Amicus and grant the Department's Petition for Writ of Certiorari.

Respectfully submitted,

William J. Condon, Jr. (Bar No. 72632)
Sean G. Ryan (Bar No. 76585)
Jason P. Luther (Bar No. 78021)
P. O. Box 12265
Columbia, SC 29211-9979
(803) 898-5278
Attorneys for Petitioner
South Carolina Department of Revenue

Columbia, South Carolina
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**CERTIFICATE OF COUNSEL**

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The undersigned certified that this Petitioner's Response to *Amicus Curiae* Brief of Council on State Taxation complies with Rule 211(b), SCACR.

William J. Condon, Jr. (Bar No. 72632)
Managing Counsel for Litigation
Sean G. Ryan (Bar No. 76585)
Managing Counsel for Litigation
Jason P. Luther (78021)
General Counsel for Litigation
South Carolina Department of Revenue
P.O. Box 12265
Columbia, SC 29211-9979
803-898-5278
Attorneys for Petitioner
William.Condon@dor.sc.gov
CourtOrders@dor.sc.gov

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**PROOF OF SERVICE**

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I, Tonie M. Miranda, do hereby certify that I have caused to be mailed postage pre-paid, a copy of the Petitioner's Response to *Amicus Curiae* Brief of Council on State Taxation re: Rent-A-Center West, Inc., Respondent, v. South Carolina Department of Revenue, Petitioner, Trial Court Case No. 09-ALJ-17-0160-CC, Appellate Case No. 2017-000265 to John C. von Lehe, Jr., Esquire and Bryson M. Geer, Esquire, Nelson Mullins Riley & Scarborough, 151 Meeting Street, Sixth Floor, Charleston, SC 29401-2239 and to Burnet Maybank, III, Esquire and James Rourke, Esquire, Nexsen Pruet, LLC, P.O. Drawer 2426, Columbia, SC 29202 on this 2nd day of November, 2017.

Tonie M. Miranda