NEXSEN|PRUET

Burnet R. Maybank, III
Member
Admitted in SC

September 21, 2017

RECEIVED
SEP 21 2017
S.C. SUPREME COURT

BY HAND DELIVERY

Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201

Re: Rent-A-Center West, Inc., v. South Carolina Department of Revenue

Dear Honorable Shearhouse:

Enclosed for filing with the Court please find the following:

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

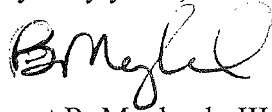
- Original and 6 copies of the Motion for Leave to File Amicus Curiae Brief of Council on State Taxation ("COST") in Support of Petition for Writ of Certiorari with Proof of Service;
- COST Certificate of Counsel;
- Original and 14 copies of the Amicus Curiae Brief of Counsel on State Taxation ("COST") in Support of Petition for Writ with Proof of Service; and
- $25 check for the filing fee.

Please also find an extra copy of each of the above items to be clocked and returned with our courier.

1230 Main Street
Suite 700 (29201)
PO Drawer 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803.540.2048
F 803.727.1472
E BMaybank@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

Very truly yours,



Burnet R. Maybank, III

BRM/mw

Enclosures

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
SEP 21 2017
S.C. SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

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

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

v.

South Carolina Department of Revenue, ...Petitioner

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF COUNCIL ON STATE TAXATION IN SUPPORT OF RESPONDENT, RENT-A-CENTER WEST, INC.

Pursuant to South Carolina Appellate Court Rule 213, The Council on State Taxation ("COST") moves for leave of the Court to file an amicus brief as *amicus curiae*. As permitted by Rule 213, COST files its amicus brief conditionally herewith, pending the Court's decision to grant this Motion.

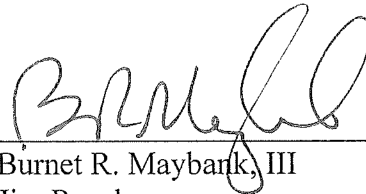
COST is a nonprofit trade association based in Washington, D.C. COST formed in 1969 as an advisory committee to the Council on State Chambers of Commerce. Today, COST has grown to an independent membership of approximately 600 major corporations engaged in interstate and international business. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. COST members employ a substantial number of South Carolinians, own and lease property in South Carolina, and conduct substantial business in South Carolina.

Similar to most other states, South Carolina apportions the income of multistate businesses by using apportionment rules closely modeled on the Uniform Division of Income for Tax

Purposes Act ("UDITPA"). UDITPA has been adopted in whole or in part by most states and those states often look to court decisions in other states when interpreting this uniform law. How South Carolina applies UDITPA is, therefore, of vital interest and importance to COST's membership.

As *amicus curiae*, COST will urge this Court to reject the South Carolina Department of Revenue's ("Department") petition for *certiorari* in this case because the Department was not justified in deviating from the State's statutory apportionment formula when it apportioned Rent-A-Center West, Inc.'s income to the State. There is no need for this Court to review the Court of Appeals' decision overturning the holding of the Administrative Law Court ("ALC") in this case because the Department is again attempting to circumvent the State's statutory apportionment formula, and this issue has already been properly resolved by this Court in its decision in *CarMax Auto Superstores West Coast, Inc. v. South Carolina Dep't of Revenue*, 411 S.C. 79, 767 S.E.2d 195 (2014)

Accordingly, COST requests leave to file this amicus brief to assist the Court with understanding and considering the interests of COST members in this matter.



Burnet R. Maybank, III
Jim Rourke
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
Phone: 803-771-8900
Fax: 803-727-1472
Cell: 803-960-3024
Email: bmaybank@nexsenpruet.com

Attorneys for Council On State Taxation

Columbia, South Carolina
September 21, 2017

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

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

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

v.

South Carolina Department of Revenue, ... Petitioner

---

PROOF OF SERVICE

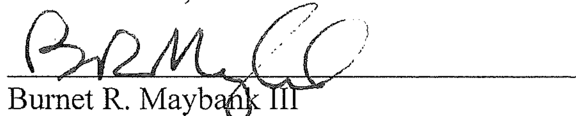
I certify that I served the **Motion for Leave to File Amicus Curiae Brief on Behalf of Council on State Taxation.** on the Appellant and Respondent by depositing copies of it in the United States Mail, postage prepaid, on September 21, 2017 addressed to their attorneys of record as follows:

<u>Attorneys for the South Carolina Department of Revenue</u>:

Sean G. Ryan, Esq.
William J. Condon, Jr., Esq.
Department of Revenue
State of South Carolina
P.O. Box 12265
Columbia, SC 29211

<u>Attorneys for Rent-A-Center West, Inc.:</u>

John C. Von Lehe, Jr., Esq.
Bryson M. Greer, Esq.
Nelson Mullins Riley & Scarborough LLP
151 Meeting Street, 6th Floor
Charleston, SC 29401-2239



Burnet R. Maybank III
James Rourke
Nexsen Pruet, LLC
Post Office Box 2426
Columbia, South Carolina 29202
803-771-8900

Attorneys for Amicus Curiae Council on State Taxation

Columbia, South Carolina
September 21, 2017

RECEIVED
SEP 21 2017
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

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

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

v.

South Carolina Department of Revenue, ... Petitioner

---

AMICUS CURIAE BRIEF OF COUNCIL ON STATE TAXATION IN SUPPORT OF RESPONDENT, RENT-A-CENTER WEST, INC.

Burnet R. Maybank III
Jim Rourke
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
Phone: 803-771-8900
Fax: 803-727-1472
Cell: 803-960-3024
Email: bmaybank@nexsenpruet.com

Attorneys for Council On State Taxation

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS 1

SUMMARY OF RELEVANT FACTS 3

ARGUMENT 5

I. The Court Should Reject Petitioner's Petition for Certiorari Because the Issues in This Case Were Resolved by This Court in CarMax 5

II. The Department's Attempt to Circumvent the Statutory Apportionment Method Violates Principles of Sound Tax Policy and Undermines Our Voluntary Compliance System. 8

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

CarMax Auto Superstores West Coast, Inc. v. S.C. Dep't of Rev., 411 S.C. 79, 767 S.E.2d 195 (2014) 2, 4, 5, 6, 7, 8, 10
Citizens Utils. Co. of Ill. v. Department of Rev., 488 N.E.2d 984 (1986) 9
Eastman Kodak Co. v. S.C. Tax Comm'n, 308 S.C. 415, 419, 418 S.E. 2d 542, 544 9
HMN Fin., Inc. v. Comm'r of Rev., 782 N.W.2d 558 (Minn. 2010) 13
Rent-A-Center West, Inc., 418 S.C. at 323, 333, 792 S.E.2d at 262-63, 267 .... 4, 5, 6, 7, 9
United States v. Davey, 543 F.2d 996, 1000 (2d Cir. 1976) 7
United States v. Doyle, No. 07-2276-JWL, 2007 WL 2670057, at *7-8 7
United States v. Toyota Motor Corp., 569 F. Supp. 1158, 1161 7

Statutes

S.C. Code Ann. § 12-6-210(B)... 8
S.C. Code Ann. § 12-6-2252 8
S.C. Code Ann. § 12-6-2290 .... 3, 8
S.C. Code Ann. §12-6-2310 8
S.C. Code Ann. § 12-6-2320 10
S.C. Code Ann. § 12-6-2320(A) 5

Other Authorities

Hellerstein & Swain's State Taxation (3d ed.) 11
Keesling and Warren, *California's Uniform Division of Income for Tax Purposes Act*, 15 UCLA L. Rev. 156, 171 (1967) 12
Uniform Division of Income for Tax Purposes Act 1

INTEREST OF THE AMICUS

The Council On State Taxation ("COST") is a nonprofit trade association based in Washington, D.C. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce. Today COST has grown to an independent membership of approximately 600 major corporations engaged in interstate and international business. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. COST members employ a substantial number of South Carolinians, own and lease property in South Carolina, and conduct substantial business in South Carolina.

Similar to most other states, South Carolina apportions the income of multistate businesses by using apportionment rules closely modeled on the Uniform Division of Income for Tax Purposes Act ("UDITPA").[1] UDITPA has been adopted in whole or in part by most states, including South Carolina, and those states often look to court decisions in other states when interpreting this uniform law. How South Carolina applies UDITPA is, therefore, of vital interest and importance to COST's membership.

As *amicus curiae*, COST urges this Court to reject the South Carolina

[1] UDITPA was approved by the National Conference of Commissioners on Uniform State Laws (now the Uniform Law Commission) in 1957. It provides "a uniform method of division of income for tax purposes among the several taxing jurisdictions." UDITPA, Prefatory Note, 7 U.L.A. 142 (2002).

Department of Revenue's ("Department") petition for *certiorari* in this case. The Department was not justified in deviating from the State's statutory apportionment formula when it rejected the statutory apportionment method in favor of one it devised to apportion Rent-A-Center West, Inc.'s ("RAC West") income to South Carolina. There is no need for this Court to review the Court of Appeals decision overturning the holding of the Administrative Law Court ("ALC") in this case. The Department is again attempting to circumvent the State's statutory apportionment formula without proving that the statutory formula did not fairly represent the extent of the taxpayer's business activity in South Carolina. This issue has already been properly resolved by this Court in its decision in *CarMax Auto Superstores West Coast, Inc. v. S.C. Dep't of Rev.*, 411 S.C. 79, 767 S.E.2d 195 (2014), affirming as modified *Carmax Auto Superstores West Coast, Inc. v. S.C. Dep't of Rev.*, 397 S.C. 604, 725 S.E.2d 711 (Ct. App. 2012) ("*CarMax*").

COST and its members have an interest in promoting efficiencies and controlling costs in litigation so that taxpayers—and the State—can avoid an extended, time-consuming, and expensive process that results in substantial financial burdens and delayed resolutions for taxpayers. Just as in *CarMax*, the Department has failed to provide sufficient support for its use of alternative apportionment, and, therefore, the assessment against the taxpayer was properly dismissed. This Court should reject the Department's petition for *certiorari* to reconsider an issue it has already addressed.

SUMMARY OF RELEVANT FACTS

RAC West is in a business group that conducts rent-to-own businesses that rent and sell appliances, furniture, and various other electronics to customers. The business group has a presence in all 50 states and is divided between three entities—RAC West, which owns and operates retail stores in the Western United States; Rent-A-Center East, Inc. ("RAC East"), which owns and operates retail stores in eastern states; and Rent-A-Center Texas, LP ("RAC Texas"), which owns and operates retail stores in Texas. RAC West also owns the business group's "Rent-A-Center" intellectual property ("IP"). It licenses the IP to RAC East and RAC Texas in exchange for royalty payments. RAC West has no activities in South Carolina other than a licensing agreement (signed out of state), in which RAC East makes royalty payments to it in exchange for use of the Rent-A-Center IP in this State.

RAC West reported its income to the State using the statutory gross receipts apportionment method, which apportions a corporation's total net income by applying a fraction consisting of the corporation's gross receipts from South Carolina in the numerator over the corporation's total gross receipts in the denominator. *See* S.C. Code Ann. § 12-6-2290. As required by statute, the numerator of RAC West's apportionment formula included gross receipts from royalty payments for IP used by RAC East in South Carolina and its denominator included RAC West's nationwide gross receipts from royalty payments for use of IP, retail rentals and sales, and other income. The Department rejected this statutorily

mandated apportionment of income and, instead, applied a new formula of its own taxing only RAC West's gross receipts from South Carolina. As in *CarMax*, the Department alleged that including all of RAC West's gross receipts in the apportionment formula, as required by statute, would distort the portion of RAC West's income derived from its activities in South Carolina.

In January 2012, the South Carolina Administrative Law Court ("ALC") issued a decision approving the Department's use of an alternate apportionment method in this case. *See Rent-A-Center West, Inc. v. S.C. Dep't of Rev.*, Docket No. 09-ALJ-17-0204-CC (S.C. Admin. Law Ct. filed January 6, 2012). An appeal of that decision was stayed pending the resolution of *CarMax*, a case with a fact pattern substantially similar to this case. In December 2014, this Court rendered its decision in *CarMax*, holding, "the proponent of the alternate 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. In October 2016, the Court of Appeals applied this Court's *CarMax* decision and overturned the ALC's RAC West decision because, as in *CarMax*, the Department failed to meet the requisite burden of proof. *See Rent-A-Center West, Inc. v. S.C. Dep't of Rev.*, 418 S.C. 320, 792 S.E.2d 260 (Ct. App. 2016) (rehearing denied Jan. 20, 2017).

ARGUMENT

I. The Court Should Reject Petitioner's Petition for *Certiorari* Because the Issues in This Case Were Resolved by This Court in *CarMax*

In *CarMax*, this Court determined that the Department bears the burden of proof to show by a preponderance of the evidence that a statutory apportionment formula does not fairly represent the extent of the taxpayer's business activity in South Carolina when it seeks to impose an alternative method of apportionment. *See* S.C. Code Ann. § 12-6-2320(A); *CarMax*, 411 S.C. at 90-91, 767 S.E.2d at 201. The Department's conclusory statements were not sufficient to satisfy the Department's burden of proof that the statutory apportionment method produced a distorted result. *Id.* As this Court said in *CarMax*, "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 (quoting *Amicus Curiae* brief of the South Carolina State Chamber of Commerce).

Given the Department's repeat performance in this case, the Court of Appeals correctly looked to this Court's *CarMax* decision to determine that the Department's allegations were not supported by sufficient evidence to justify a deviation from the statutory method of apportionment selected by this State's legislature. *Rent-A-Center West, Inc.*, 418 S.C. at 332-33, 792 S.E.2d at 267.

As identified by the Court of Appeals, the core evidence the Department introduced in this case included the testimony of an auditor who said the audit at

issue was initiated because RAC West's business group consists of multiple entities (in a so-called "East/West" structure); however, the Department failed to introduce any evidence addressing the fair reflection of business activity between those entities under the statutory apportionment formula. The Department also relied on the testimony of an expert witness on law and economics who asserted, without adequate analysis, that the statutory apportionment method failed to provide an accurate reflection of RAC West's "economic connection" to the state. As in *CarMax*, the expert failed to show the alternative method applied by the Department was a better apportionment method than the statutory method, and that the statutory method should not be used because it was "like having apples in the numerator and apples and oranges in the denominator." *Rent-A-Center West, Inc.*, 418 S.C. at 323, 333, 792 S.E.2d at 262-63, 267.[2]

In *CarMax*, the Department offered similarly weak evidence, which was correctly identified as "bald assertions" that failed to satisfy the Department's burden of proof. *CarMax*, 411 S.C. at 91, 767 S.E.2d at 201. In *CarMax*, the proffered evidence included an auditor's testimony that the business structure at

[2] This apples and oranges argument itself does nothing to bolster the Department's position that the statutory apportionment formula does not operate correctly. Instead it reflects exactly how the apportionment formula is intended to work—that is, if a taxpayer's business activities consist of apples and oranges across the nation, then the total gross receipts from all business activities in South Carolina over the total gross receipts from all business activities nationwide produces the appropriate proportion of RAC West's business activities in South Carolina vis-à-vis its business activities in the U.S. as a whole. *See Rent-A-Center West, Inc.*, 418 S.C. at 324, 792 S.E.2d at 263 (citing the taxpayer's tax policy expert's statement at trial that the standard apportionment worked the way it was supposed to in this case).

issue was "often linked with tax minimization strategies," evidence regarding the sourcing of the taxpayer's income, and evidence comparing the results for the taxpayer of using the statutory apportionment formula. *CarMax* at 767 S.E.2d at 201. Though the Department now attempts to explain that there were more facts considered by the ALC that support its position in this case than in *CarMax*, the Court of Appeals adequately considered the ALC's findings of fact and justifiably concluded that the substance of this evidence is no different than that in *CarMax*. *See* Petitioner's Reply at 5.

As this Court said in *CarMax*, this evidence "merely 'describe[d]…'" what the Department did "rather than cite any evidence justifying what it did." *CarMax*, 411 S.C. 90, 767 S.E.2d at 200. This Court deemed this level of proof to be insufficient "as a matter of law." *Id.*, 411 S.C. at 91, 767 S.E.2d at 201. The same is true in this case, and this Court should not grant *certiorari* simply to reiterate that the Department must advance actual evidence to satisfy a burden of proof.[3]

---

[3] In an effort to distinguish this case from *CarMax* and circumvent this Court's holding in that case, the Department highlights the taxpayer's alleged failure to present sufficient evidence to substantiate its trademark-related expenses. However, this issue is only relevant to the question of whether the Department's alternative separate accounting method was reasonable, which is not at issue in this appeal. *See* Department Petition for *Certiorari* at 16 and Reply at 7-8. The record reflects that RAC West provided testimony at trial stating it did not have this information to give. *See* R. p. 132 at 111- p. 133 at 115:17; p. 155 at 204:3- p. 156 at 205:8. The law is clear that a taxing authority cannot require a taxpayer to create documents that do not exist. United States v. Doyle, No. 07-2276-JWL, 2007 WL 2670057, at *7-8 (D. Kan. Sept. 7, 2007)(holding that taxpayer need not produce depreciation schedules and lists requested by IRS because such documents did not exist); United States v. Toyota Motor Corp., 569 F. Supp. 1158, 1161 (C.D. Cal. 1983)(stating that court "cannot compel the production of non-existent documents" and finding that taxpayer need not produce certain cost records or materials related to its transfer pricing policies that no longer existed); United States v. Davey, 543 F.2d 996, 1000 (2d Cir. 1976)(stating that section 7602 of the Internal Revenue Code does not require "preparation or

This Court rendered a principled and sound decision with *CarMax*, and now the Department is attempting to re-litigate the issues in this case, even though the facts and circumstances are nearly identical. Thus, this Court should deny the Department's petition for *certiorari*.

II. The Department's Attempt to Circumvent the Statutory Apportionment Method Violates Principles of Sound Tax Policy and Undermines Our Voluntary Compliance System.

Under this State's law, a company such as RAC West must calculate its income attributable to its activities in the State by applying to its total income a fraction consisting of a numerator with its gross receipts from all business activities in South Carolina and a denominator with the gross receipts derived from all business activities in every state in the nation. S.C. Code Ann. §§ 12-6-210(B), 12-6-2252, 12-6-2290,12-6-2310; *CarMax* 411 S.C. at 83, 767 S.E.2d at 197. That is exactly what RAC West did in this case; it followed the law—as clearly provided by statute—and apportioned its income to South Carolina by utilizing a fraction consisting of its gross receipts from all South Carolina business activities over its gross receipts from all U.S. business activities for the years at issue.

The end result of RAC West's use of the legislature's chosen apportionment method was the apportionment of the company's income in a way that "reflects a 'reasonable representation' of [RAC West's] business in this state." *See Eastman*

production of records not yet in existence").

Kodak Co. v. S.C. Tax Comm'n, 308 S.C. 415, 419, 418 S.E. 2d 542, 544; *see also Citizens Utils. Co. of Ill. v. Department of Rev.*, 488 N.E.2d 984 (1986) (rejecting a taxpayer's claim of unconstitutional distortion of income based on the allegation that the use of formula apportionment increased its tax liability 213% over the amount determined by separate accounting).

As the Court of Appeals stated, "[a] very small amount of RAC West's business comes from the royalties; therefore, this should only comprise a small amount of its taxes." *Rent-A-Center West, Inc.*, 418 S.C. at 333, 792 S.E.2d at 267 (citing *Eastman Kodak Co.*, 308 S.C. 415, 419, 418 S.E.2d 542, 544 (1992), to state "[t]he 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 in which Kodak's payroll, property, and sales in this state are computed. Therefore, the apportionment formula reflects a 'reasonable representation' of Kodak's business in this state.")

The Department, however, sought to impose a method of apportioning income different from what the Legislature chose without any proof that the statutory apportionment formula did not work as intended. The Department arbitrarily considered only receipts from RAC West's IP business activities, ignoring that the bulk of its receipts were from its primary business activity, retail sales. In doing so, the Department relies on a safety valve that was provided in UDITPA (and adopted by South Carolina) for a taxpayer or a revenue agency to use alternative

apportionment to address unusual circumstances of income not fairly being apportioned to a state by the statutory method. *See* UDITPA, § 18 (adopted by the South Carolina's legislature in 1995. *See* S.C. Code Ann. § 12-6-2320).

Sound tax policy supports the requirement that alternative apportionment be used in limited circumstances. South Carolina alternative apportionment law is modeled after the alternative formula contained in UDITPA. This standard was evoked by Prof. William Pierce, UDITPA's principal draftsman, who stated that the equitable apportionment provision should be limited to the "unusual case":

> Of course, departures from the basic formula should be avoided except where reasonableness requires. Nevertheless, some alternative method must be available to handle the constitutional problem as well as the unusual cases, because no statutory pattern could ever resolve satisfactorily the problems for the multitude of taxpayers with individual business characteristics. (Emphasis added.)
>
> W. Pierce, 'The Uniform Division of Income for State Tax Purposes," 35 Taxes 747, 781 (1957).

The Multistate Tax Commission Regulations during the years at issue took a similar position. MTC Reg. IV.18(a) provides:

> [UDITPA §] 18 permits a departure from the allocation and apportionment provisions of [UDITPA] only in limited and specific cases. [UDITPA § 18] may be invoked only in specific cases where unusual fact situations (which ordinarily will be **unique and nonrecurring**) produce incongruous results under the apportionment and allocation provisions contained in [UDITPA]. (Emphasis added.)[4]

[4] The Multistate Tax Commission in February 2017 adopted amendments to its model regulations on UDITPA § 18. These changes do not change the spirit or intent of the alternative apportionment provision, and as this Court held in *CarMax*, made it clear the burden of proof

Hellerstein & Swain's State Taxation (3d ed.), the seminal treatise on state and local taxation which is cited with approval in a number of South Carolina cases, reflects this "unusual case" standard in ¶9.20[3][c]:

> A number of courts—often invoking the remarks of Professor William Pierce, UDITPA's principal drafter, that the equitable apportionment provision should be limited to the "unusual case" and to the Multistate Tax Commission (MTC) regulations (prior to their revision in 2010) taking a similar position—have insisted that the central question under UDITPA's relief provision "is not whether some quantitative comparison has produced a large-enough 'distortive' figure," but rather "whether there is an unusual fact situation that leads to an unfair reflection of business activity under the standard apportionment formula."

South Carolina adopted a modified version of UDITPA to join other states in applying a standard statutory apportionment formula. The goal of UDITPA, and the South Carolina statutes modeled on it, is to provide consistent and uniform rules across the nation to ensure that each state taxes only an appropriate portion of a corporation's income to avoid duplicative taxation. Uniform rules are intended to address virtually every situation, and deviation from the rules should be used in the rarest of circumstances. As the primary technical drafter of UDITPA noted:

> There are completely compelling reasons for giving the [alternative apportionment] provisions a narrow construction. Under a broad construction the purposes of obtaining uniformity through the adoption of the Uniform Act would be defeated. If a choice of methods is permitted, different administrators in different states inevitably will choose different methods. As a result, even if all the states imposing taxes on or measured by

---

should fall on the party seeking its use.

> income should adopt the Uniform Act, the chaotic condition heretofore existing would continue to exist.
>
> Keesling and Warren, *California's Uniform Division of Income for Tax Purposes Act*, 15 UCLA L. Rev. 156, 171 (1967) (emphasis added).

The ad hoc approach pursued by the Department, if allowed to stand, will open the door to the "chaotic condition" that UDITPA seeks to ameliorate.

The drafters of UDITPA made it clear that the alternative apportionment provisions were "designed to permit the use of methods different than those prescribed in the Act only in unusual cases and in cases where the application of the specifically prescribed methods might be held unconstitutional." *Id.* While the distortion requirement has often been interpreted to be satisfied at a level of less than what is unconstitutional, the intent of the UDITPA drafters is clear—the provision should be used sparingly.

Simply stated, no such circumstances warrant the use of alternative apportionment in this case. Neither side contends that application of the standard apportionment formula produced an unconstitutional result. Nor was there any substantive showing that the standard UDITPA formula failed to fairly represent the extent of RAC West's activities in South Carolina because of unusual circumstances. No unusual circumstances existed. To the contrary, the standard applicable formula operated in this case precisely as it was intended to by the drafters of UDITPA and—more to the point—by the South Carolina Legislature.

The standard formula accurately reflects the fact that RAC West had minimal activities associated with this State.

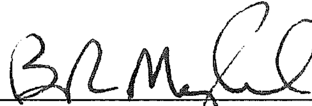
The Department essentially determined that RAC West had different types of receipts and income—retail and intangibles—and that some of that income and receipts should not be reported on a South Carolina return. Every multistate taxpayer has different types of receipts and income and consequently could be subject to a similar ad hoc determination. As the Minnesota Supreme Court noted in a decision that prevented the Minnesota Tax Commissioner from deviating from its statutory tax rules: "[t]he Commissioner clearly dislikes the tax consequences that occur under the relevant statutes, but it is for the legislature, not the Commissioner, to change the law that creates such consequences." *HMN Fin., Inc. v. Comm'r of Rev.*, 782 N.W.2d 558 (Minn. 2010).

The Department's effort to revisit this Court's precedential *CarMax* decision on a nearly identical fact pattern within a short window of that decision being rendered is an attempt to both override the method chosen by the legislature to apportion business income in the State and taxpayers' ability to rely on this Court's precedential decisions. By excluding an entire aspect of RAC West's core business activity, the Department undermines the Legislature's choice of what properly reflects a taxpayer's portion of its business activity in the State and artificially inflates the portion of RAC West's income attributable to such activities. This Court already struck down this approach to imposing alternative apportionment in

CarMax. 411 S.C. 79, 767 S.E.2d 195. It should reject the Department's attempt to overturn such recent precedent by declining to grant c*ertiorari* here.

CONCLUSION

COST respectfully urges this Court to reject the Department's petition for *certiorari*. Review is inappropriate for all the reasons detailed in the Appeals Court decision. Moreover, continued litigation of the case will result in more significant and unnecessary expenses and delays for the taxpayer and the State.



Burnet R. Maybank III
Jim Rourke
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803-771-8900

Attorneys for Council On State Taxation

Columbia, South Carolina
September 21, 2017

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

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

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

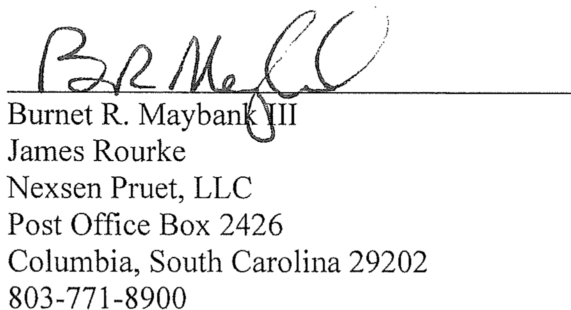
v.

South Carolina Department of Revenue, ... Petitioner

---

CERTIFICATE OF COUNSEL

The undersigned certifies that this Amicus Curiae Brief filed by the Council on State Taxation complies with Rule 211(b), SCACR.



Burnet R. Maybank III
James Rourke
Nexsen Pruet, LLC
Post Office Box 2426
Columbia, South Carolina 29202
803-771-8900

Attorneys for Amicus Curiae
Council on State Taxation

Columbia, South Carolina
September 21, 2017

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

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

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

v.

South Carolina Department of Revenue, ... Petitioner

PROOF OF SERVICE

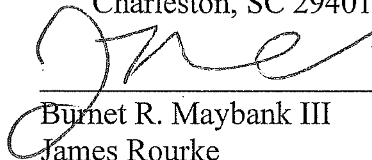
I certify that I served the **Amicus Curiae Brief of Council On State Taxation in Support of Respondent, Rent-A-Center West, Inc.** on the Appellant and Respondent by depositing copies of it in the United States Mail, postage prepaid, on September 21, 2017 addressed to their attorneys of record as follows:

Attorneys for the South Carolina Department of Revenue:

Sean G. Ryan, Esq.
William J. Condon, Jr., Esq.
Department of Revenue
State of South Carolina
P.O. Box 12265
Columbia, SC 29211

Attorneys for Rent-A-Center West, Inc.:

John C. Von Lehe, Jr., Esq.
Bryson M. Greer, Esq.
Nelson Mullins Riley & Scarborough LLP
151 Meeting Street, 6th Floor
Charleston, SC 29401-2239



Burnet R. Maybank III
James Rourke
Nexsen Pruet, LLC
Post Office Box 2426
Columbia, South Carolina 29202
803-771-8900

Attorneys for Amicus Curiae Council on State Taxation

Columbia, South Carolina
September 21, 2017