SCHOLASTIC BOOK CLUBS, INC. *v.* COMMISSIONER OF REVENUE SERVICES
(SC 18425)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.

*Argued October 24, 2011—officially released March 27, 2012*

*Gregory T. D'Auria*, senior appellate counsel, with whom were *Louis P. Buccari*, first assistant commissioner and general counsel, and, on the brief, *George Jepsen*, attorney general, and *Richard Blumenthal*, former attorney general, for the appellant (defendant).

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*Opinion*

ZARELLA, J. The principal issue in this tax appeal is whether the plaintiff, Scholastic Book Clubs, Inc.,[1] is liable under the Sales and Use Taxes Act (act), General Statutes § 12-406 et seq., for more than $3 million in sales and use tax deficiency assessments imposed by the defendant, the commissioner of revenue services (commissioner). The commissioner claims that the trial court incorrectly determined that the taxes could not be imposed because the schoolteachers are not the plaintiff's "representative[s]" within the meaning of General Statutes § 12-407 (a) (15) (A) (iv)[2] and the schoolteachers' administrative tasks do not supply the substantial nexus required between the plaintiff and the state to justify imposition of the taxes under the commerce clause of the United States constitution.[3] The plaintiff responds that the trial court correctly determined that the taxes could not be imposed under either of the foregoing theories. We agree with the commissioner and, accordingly, reverse the judgments of the trial court.

The following relevant findings of fact are set forth in the trial court's memorandum of decision. The plaintiff is a Missouri corporation with its principal place of business in Jefferson City, Missouri. The plaintiff also is a wholly owned subsidiary of Scholastic, Inc. Both the plaintiff and Scholastic, Inc., are for profit companies. Scholastic, Inc. employees are allocated to the plaintiff for staffing purposes. Although Scholastic, Inc. products are available through direct purchase or in retail stores, the plaintiff distributes its books and related items only through schools.

The plaintiff has been in operation for sixty years and has "a known reputation" in the elementary and secondary school community. In Connecticut, approximately 14,000 teachers participate in the plaintiff's programs.

The plaintiff has identified four categories of students, and a catalog is designed for each. Early childhood students are in the "firefly" group. Kindergarten and first grade students are in the "seesaw" group. Students in grades two and three are in the "lucky" group, and students in grades four, five and six are in the "arrow" group.

The plaintiff does not own or lease any real estate or personal property in Connecticut. The plaintiff also has no principal place of business, temporary facility, office, telephone number, mailing address or bank accounts in Connecticut. In addition, the plaintiff has no employees, representatives,[4] independent contractors, salesmen, agents, canvassers, solicitors or other personnel in the state. It does not advertise in the local media or engage in direct advertising to Connecticut customers, and has not communicated with residents

of Connecticut by means other than mail or Internet from locations outside the state. Moreover, it has never used state or local government services, such as the police or fire departments, and does not, and did not, use Connecticut vendors to design, prepare, print, store or mail catalogs describing its products. The plaintiff has not retained any security interests in any product sold to Connecticut customers and has no franchisees or licensees operating in Connecticut. The plaintiff does not conduct credit investigations or collection activities in Connecticut and does not solicit orders by telephone, computer, cable or other communication systems in Connecticut.

The plaintiff conducts its mail order business by mailing catalogs monthly during the school year to classrooms at nursery, primary and secondary schools throughout the United States, including Connecticut. Solely as a result of their academic interest in choosing books and other items for their students and themselves, Connecticut teachers play the following role in the plaintiff's sales and distribution process.

Initially, the classroom teacher receives a grade appropriate catalog from the plaintiff. The catalog contains flyers to be distributed to students. It also contains an order form and a memorandum, or "teacher memo," describing the bonus point system that a completed order brings to the classroom. The "teacher memo" states that no agency relationship is created between the teacher and the plaintiff.

Whether a teacher decides to participate in the program or any other book club is entirely the teacher's decision. If a teacher decides to participate, the teacher distributes the flyers to the students, who are expected to bring the flyers home to their parents. If there are not enough flyers, the teacher contacts the plaintiff for more. Sometimes, the teacher sends a "student memo" to the parents, a draft of which is supplied to the teacher by the plaintiff. The teacher also may purchase books from the catalog for the classroom or for gifts to students.

The individual selections are returned to the teacher with cash or checks from the parent or parents. A student with allowance money also may pay for the order with cash. The teacher collects all of the orders and submits them to the plaintiff, and may add his or her own order to the total. Although a teacher may delegate the collection of an order to a "parent helper," the order is submitted under the teacher's name and account number. The teacher may order online from the plaintiff with a credit card and may have the option of using a discount coupon. All orders are processed and filled in Jefferson City, Missouri. If the order is calculated incorrectly, the plaintiff contacts the teacher.

The books are delivered to the teacher by common

carrier with a packing slip addressed to the teacher. A list addressed to the teacher is enclosed with the order and shows the boxes contained in the delivery. The teacher distributes the order to the students. If a book is unavailable, the plaintiff includes a coupon for the affected student, or sometimes a different book. The plaintiff attempts to fill the order eventually. If the order cannot be filled, the teacher receives a refund check for the student or parent. Students with torn or defective books also receive a refund check from the plaintiff, which is sent to the teacher.

A classroom may receive bonus points, which do not expire, based on the number of books ordered each month. Teachers, not parents or students, decide how the bonus points will be spent, and parents are not informed regarding the teachers' redemption choices. The bonus points may be redeemed for book catalog items or from a separate catalog for goods that require a greater number of bonus points. These items include, inter alia, telephones, fax machines, televisions, small refrigerators, and microwave and toaster ovens. The "items catalog" provides that the teacher may redeem bonus points for "classroom use" only. Because the plaintiff does not police this requirement, a teacher could obtain a television, for example, and use it at home. The plaintiff trusts the teachers, however, and does not know of any patent abuse of the bonus point system.

New teachers or teachers new to a grade receive an additional letter from the plaintiff in September of each school year explaining the program. They also receive a catalog known as a "slug," which contains the same information as that sent to established teachers but omits the teacher's name. The plaintiff suggests that the new teacher call its offices in Missouri to "walk through" the process. The new teacher then learns about grade specific catalogs and special catalogs, such as those oriented to history or African-American studies. There is no restriction that would prohibit a teacher from giving a flyer to a teacher trainee, neighbor or friend.

There is no limit on the size or dollar amount of an order, but the plaintiff audits certain orders. For example, when an order contains a request for a large quantity of books or the same book, the plaintiff may conduct an audit to determine whether the teacher may be conducting a side business.

The plaintiff has been selling its products in this manner to Connecticut schoolchildren for many years. It is the plaintiff's view that teachers are acting to assist students in their purchase of books "in loco parentis," or in their role as surrogate parents.

On March 1, 2003, the commissioner imposed a sales and use tax deficiency assessment on the plaintiff in

the amount of $2,048,339.69, plus interest and penalties, for the period of June 1, 1995, through May 31, 2002. On September 11, 2006, the commissioner imposed an additional sales and use tax deficiency assessment on the plaintiff in the amount of $1,250,403.11, plus interest and penalties, for the period of June 1, 2002, through May 31, 2005, for a total tax assessment of $3,298,742.80. The plaintiff protested the assessments pursuant to General Statutes § 12-418.[5] On January 10, 2007, the commissioner issued a written decision in each case upholding the assessments because the plaintiff had sold its products by using "in-state representatives . . . pursuant to . . . § 12-407 (a) (15) (A)."

Following the plaintiff's appeals from the commissioner's decisions, the case was tried to the court on October 14 and 15, 2008. On April 9, 2009, the court rendered judgments sustaining the plaintiff's appeals. The court determined that the term "representative," as used in § 12-407 (a) (15) (A) (iv), means "a person who participates in an in-state 'sales force' to sell, deliver or take orders to generate revenue" and that Connecticut schoolteachers do not function as the plaintiff's "representatives" under the statute because they are "not in-state 'order takers' seeking to produce 'revenue' for themselves or [the plaintiff] . . . ." The court instead described the teachers as customers who purchase materials for themselves and act " 'in loco parentis' " by standing in the place of parents for the purpose of helping students select and order books. The court further determined that imposing tax liability on the plaintiff would violate constitutional principles because there existed no "definite link" or "minimum connection" between the state and the plaintiff. (Internal quotation marks omitted.) The court subsequently rejected the commissioner's challenge to the statutory and constitutional grounds for its decision, and denied the commissioner's motion for reargument and reconsideration. This consolidated appeal by the commissioner followed.[6]

## I

## STATUTORY CLAIM

The commissioner first contests the trial court's conclusion that the commissioner had no authority to impose the deficiency tax assessments because Connecticut schoolteachers do not serve as the plaintiff's in-state "representative[s]" for "the purpose of selling, delivering or taking orders" for children's books, among other items, pursuant to § 12-407 (a) (15) (A) (iv). The commissioner claims that a proper interpretation of the term "representative," as used in the statutory provision, focuses objectively on the nature of the teachers' activities, not on the teachers' motives, and that the teachers are the plaintiff's "representative[s]" because their activities are directly related to the plaintiff's business purpose of "selling, delivering or taking orders"

for the plaintiff's products. General Statutes § 12-407 (a) (15) (A) (iv). The plaintiff responds that the commissioner construes the term "representatitive" too broadly and that the trial court correctly concluded that Connecticut schoolteachers are merely customers who also act "in loco parentis" for the benefit of their classrooms and students. The plaintiff further argues that it has no contractual or other legal relationship with the teachers that could support the commissioner's claim that the teachers are its representatives, and there is no evidence that the legislature sought to imbue the term with that meaning. We agree with the commissioner.

We begin our analysis with the applicable standard of review. Whether the term "representative," as used in § 12-407 (a) (15) (A) (iv), can be construed to include the teachers in this case presents an issue of statutory interpretation, which is a question of law over which we exercise plenary review. See, e.g., *Rainforest Cafe, Inc.* v. *Dept. of Revenue Services*, 293 Conn. 363, 371–72, 977 A.2d 650 (2009).

"The principles that govern statutory construction are well established. When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *Bysiewicz* v. *Dinardo*, 298 Conn. 748, 765, 6 A.3d 726 (2010). "We recognize that terms in a statute are to be assigned their ordinary meaning, unless context dictates otherwise . . . ." (Internal quotation marks omitted.) *Brown & Brown, Inc.* v. *Blumenthal*, 297 Conn. 710, 722, 1 A.3d 21 (2010).

"[A]long with these principles, we are also guided by the applicable rules of statutory construction specifically associated with the interpretation of tax statutes. . . . [W]hen the issue is the imposition of a tax, rather than a claimed right to an exemption or a deduction, the governing authorities must be strictly construed against the commissioner . . . and in favor of the tax-

payer." (Internal quotation marks omitted.) *Rainforest Cafe, Inc.* v. *Dept. of Revenue Services*, supra, 293 Conn. 378. Nevertheless, "[i]t is also true . . . that such strict construction neither requires nor permits the contravention of the true intent and purpose of the statute as expressed in the language used." (Internal quotation marks omitted.) *Ruskewich* v. *Commissioner of Revenue Services*, 213 Conn. 19, 24, 566 A.2d 658 (1989); see also *Key Air, Inc.* v. *Commissioner of Revenue Services*, 294 Conn. 225, 242, 983 A.2d 1 (2009) ("[i]n tax law . . . substance rather than form determines tax consequences" [internal quotation marks omitted]).

Turning to the statute in question, General Statutes § 12-407 (a) (15) (A) provides in relevant part: " 'Engaged in business in the state' means and includes but shall not be limited to the following acts or methods of transacting business . . . ." The statute then sets forth numerous examples of activities that subject an out-of-state retailer to sales and use taxation, one of which is "having any representative, agent, salesman, canvasser or solicitor operating in this state for the purpose of selling, delivering or taking orders . . . ." General Statutes § 12-407 (a) (15) (A) (iv). The commissioner acknowledges that neither the statute itself nor any other provision in the statutory scheme defines the term "representative" in this context. Accordingly, we begin our analysis by examining the statute's language more closely.

As previously noted, General Statutes § 12-407 (a) (15) (A) initially provides that the term " '[e]ngaged in business in the state' . . . includes but shall not be limited to" the examples that follow. The word "includes" is a term of expansion. *Pacific Indemnity Ins. Co.* v. *Aetna Casualty & Surety Co.*, 240 Conn. 26, 31–32, 688 A.2d 319 (1997). Similarly, the phrase "but shall not be limited to," when "coupled with the enumeration of specific or illustrative acts of . . . conduct," is "indicative of a legislative intent . . . to delegate to the [commissioner] the duty of ascertaining what other or additional acts" fall within the articulated standard. *Leib* v. *Board of Examiners for Nursing*, 177 Conn. 78, 90, 411 A.2d 42 (1979). An objective reading of the statute thus suggests that it was intended to encompass a wide range of conduct and that the commissioner has discretion in determining what type of conduct falls within its purview. Cf. *Ex parte Newbern*, 286 Ala. 348, 352, 239 So. 2d 792 (1970) (rejecting legal formalism in construing term "salesman" under Alabama's sales and use tax statutes because court did not believe that "the legislature intended a seller conducting such solicitation to avoid collecting the use tax merely by showing that its salesmen failed to come within some technical definition of 'salesman' or lacked some legal relationship with the out-of-state seller not articulated in the statute"); *Commissioner of Revenue* v. *Jafra Cosmetics, Inc.*, 433 Mass. 255, 261, 742 N.E.2d 54 (2001)

(eschewing technical construction of term "representative" under Massachusetts sales and use tax statutes "that would permit vendors to escape . . . tax liability by artful drafting").

We next consider whether Connecticut schoolteachers are "representative[s]" within the meaning of § 12-407 (a) (15) (A) (iv). In the absence of a definition of "representative" in the statute itself, "[w]e may presume . . . that the legislature intended [the word] to have its ordinary meaning in the English language, as gleaned from the context of its use." (Internal quotation marks omitted.) *Paul Dinto Electrical Contractors, Inc.* v. *Waterbury*, 266 Conn. 706, 725, 835 A.2d 33 (2003). Webster's Third New International Dictionary defines "representative" as one who "stand[s] for or in the place of another: act[s] for another or others: [or] constitute[s] the agent for another esp[ecially] through delegated authority . . . ." Moreover, because the statute distinguishes between persons who may be acting as representatives, agents, salesmen, canvassers and solicitors, we may infer that the legislature was describing the different roles a person may assume for the purpose of "selling, delivering or taking orders" for the products of the out-of-state retailer. General Statutes § 12-407 (a) (15) (A) (iv); see *C. R. Klewin Northeast, LLC* v. *State*, 299 Conn. 167, 177, 9 A.3d 326 (2010) ("[t]he use of the different terms . . . within the same statute suggests that the legislature acted with complete awareness of their different meanings . . . and that it intended the terms to have different meanings" [internal quotation marks omitted]); *Hinchliffe* v. *American Motors Corp.*, 184 Conn. 607, 613, 440 A.2d 810 (1981) ("[t]he use of different terms within the same sentence of a statute *plainly* implies that different meanings were intended" [emphasis added]); see also *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 433, 994 A.2d 1265 (2010) ("It is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions. . . . [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous. . . . Because [e]very word and phrase [of a statute] is presumed to have meaning . . . [a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." [Internal quotation marks omitted.]). Accordingly, the most reasonable construction of "representative" that does not render the term superfluous and is consistent with the statute's purpose of applying to a wide range of conduct is that it means a person who is not an employee or an agent and who does not necessarily act through delegated authority for remuneration, as does a salesman, canvasser or solicitor, but who otherwise stands in the place of, or acts on behalf of, the out-of-state retailer "for the purpose of selling, delivering or taking orders" for the retailer's products.[7] Gen-

eral Statutes § 12-407 (a) (15) (A) (iv).

Applying this construction of the term in the present context, we conclude that the Connecticut schoolteachers who participate in the plaintiff's program may be considered its representatives. The trial court found that the plaintiff is a "for profit" mail order business that distributes its books and related products "only through schools," that approximately 14,000 teachers "participate in [the plaintiff's] programs" and that the plaintiff has no other personnel or means of selling its products in Connecticut. Accordingly, the teachers serve as the sole conduit through which the plaintiff advertises, markets, sells and delivers its products to Connecticut schoolchildren. Although individual teachers may decide not to participate in the program, those who participate distribute the plaintiff's catalogs, flyers, order forms and other materials to the children in their classrooms. The children then bring the information home to their parents and purchase the plaintiff's products by returning the completed order forms, with payments, to the teachers for submission to the plaintiff. All products ordered and sold through this process are delivered to the teachers, who, in turn, distribute them to their students and resolve any issues that may arise thereafter, such as damaged or defective products, backordered products and refunds. In other words, the plaintiff is able to sell its products in Connecticut only through the teachers who participate in its program.

We reject the trial court's and the plaintiff's assertions that the teachers are not the plaintiff's representatives because they are not in-state "order takers" seeking to produce "revenue" for themselves or the plaintiff, do not have a formal legal relationship with the plaintiff like that of an agent or are merely customers who act "in loco parentis" by standing in the place of a parent to help students select and order books. With respect to the first point, it is the effect of the in-state providers' participation in fostering the out-of-state retailer's goal of selling its products, not the providers' motivation, with which the statute is concerned. The statute contains no reference to the motivation that may inform a providers' conduct but simply requires that the retailer have a "representative" who is "operating" in the state for the specified purposes. General Statutes § 12-407 (a) (15) (A) (iv). If the legislature had intended motivation or any other mental attribute of the provider to be considered in construing the statute, it would have used such language therein or in the corresponding regulation,[8] as it is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly; e.g., *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 729, 6 A.3d 763 (2010); or to use broader or limiting terms when it chooses to do so. See, e.g., *Stitzer* v. *Rinaldi's Restaurant*, 211 Conn. 116, 119, 557 A.2d 1256 (1989).

We also reject the plaintiff's argument that, in order to be considered a representative, the in-state provider must have a legal or agency relationship with the retailer. Not only does the statute not require such a relationship, but, as previously discussed, it expressly distinguishes between a "representative," an "agent" and other more formal roles that a provider may assume in assisting an out-of-state retailer market and sell its products in this state, thus clearly indicating that the terms have different meanings. See *Hinchliffe* v. *American Motors Corp.*, supra, 184 Conn. 613 ("[t]he use of different terms within the same sentence of a statute *plainly* implies that different meanings were intended" [emphasis added]). Furthermore, when the legislature has intended the term "representative" to suggest a more formal legal relationship, it has used language indicating that intent, as it has done when defining the term "representative" in other contexts. See General Statutes § 21a-70b (2)[9] (defining " '[m]anufacturer's or distributor's representative' "); General Statutes § 42-481 (4)[10] (defining " '[s]ales representative' "); General Statutes § 52-146d (1)[11] (defining " '[a]uthorized representative' "). Thus, in the absence of more specific language, we conclude that the legislature did not intend the term "representative," as used in § 12-407 (a) (15) (A) (iv), to be understood as requiring a formal legal or agency relationship between the in-state provider and the retailer.[12]

We also disagree with the trial court and the plaintiff that the teachers are merely customers who act entirely on their own without compensation for the benefit of their classrooms and students. Despite the plaintiff's suggestion to the contrary, the terms "customer" and "representative" are not mutually exclusive. Although the teachers may be customers when they purchase books from the plaintiff and participate in the bonus point system to obtain additional materials, this should not obscure the fact that their *principal* function is to serve as the exclusive vehicle for selling the plaintiff's products to their students. Accordingly, the teachers' status as customers does not mean that they cannot also serve as the plaintiff's representatives.

We finally disagree with the trial court's characterization of the teachers as acting "in loco parentis" by helping students select and order books, in part because the court's own factual findings are ambiguous with respect to this point. On the one hand, the court found that the teachers, "[s]olely as a result of their academic interest in choosing books and other items for their students and themselves . . . play a role in [the plaintiff's] sales and distribution process . . . ." The role that the court described in its subsequent findings, however, does not include helping students select and order books. The court specifically found that (1) the plaintiff sends catalogs, flyers and order forms to the teachers,

(2) the teachers distribute the flyers to their students, who are expected to bring them home to their parents, (3) the teachers sometimes send a " 'student memo' " to the parents that has been prepared by the plaintiff, (4) the students return their order forms with their individual selections to the teachers with cash or checks from their parents, and (5) the teachers submit the orders to the plaintiff and distribute the books upon delivery. To the extent these latter findings indicate who helps students select and order books, they point to the parents rather than the teachers. Whether the trial court's findings support its conclusion that the teachers act "in loco parentis" is thus problematic.

There is also no support in Connecticut law for the trial court's conclusion that teachers act in loco parentis. The trial court itself acknowledged that, insofar as the doctrine has arisen in situations involving Connecticut teachers, it usually has been in the context of teacher discipline. See *Andreozzi* v. *Rubano*, 145 Conn. 280, 282, 141 A.2d 639 (1958); *Calway* v. *Williamson*, 130 Conn. 575, 579, 36 A.2d 377 (1944); *O'Rourke* v. *Walker*, 102 Conn. 130, 133–34, 128 A. 25 (1925); *Sheehan* v. *Sturges*, 53 Conn. 481, 483, 2 A. 841 (1885); see also *Loomis Institute* v. *Windsor*, 234 Conn. 169, 172–73, 661 A.2d 1001 (1995) (noting in dictum that faculty members at boarding school, unlike off campus faculty members, acted "in loco parentis" with respect to boarding students and in that capacity were required to be available on twenty-four hour basis to take care of *problems* that might occur at school).

In the absence of Connecticut law, the plaintiff relies on three cases from other jurisdictions. None of those cases, however, involved the construction of a statutory provision, much less a provision like the one at issue in this case, and, in any event, most of the language quoted by the plaintiff constitutes dictum relating to teacher discipline and control. See *Vernonia School District 47J* v. *Acton*, 515 U.S. 646, 654–55, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995) (discussing constitutionality of local school board's drug testing policy and privacy rights of schoolchildren, stating with respect to teacher "supervision and control" of students that, "[w]hen parents place minor children in private schools for their education, the teachers and administrators of those schools stand in loco parentis over the children entrusted to them," and quoting 1 W. Blackstone, Commentaries on the Laws of England (1769) p. 441, for proposition that "a parent may . . . delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of *restraint and correction*, as may be necessary to answer the purposes for which he is employed" [emphasis altered; internal quotation marks omitted]); *Rogliano* v. *Board of Education*, 176 W. Va. 700, 705–706, 347 S.E.2d 220 (1986)

(Neely, J., dissenting) (stating in dissent from per curiam opinion involving dismissal of teacher by local board of education due to drug possession arrest outside school that parents should not "have their children involuntarily subjected to the influence of an authority figure and role model who advocates, at least by example, the use of illegal drugs" and that "teachers stand in loco parentis" because they "are not merely instructors . . . [but] are authority figures, role models, behavioral examples, surrogate parents"). The only possibly relevant case is *Scholastic Book Clubs, Inc.* v. *Dept. of Treasury*, 223 Mich. App. 576, 567 N.W.2d 692 (1997), appeal denied, 457 Mich. 880, 586 N.W.2d 923 (1998), in which the court stated with respect to the substantial nexus prong of its commerce clause analysis that "teachers are not a sales force that works for [the retailer but] . . . are analogous to parents who order an item from a mail-order catalog for their children . . . ." Id., 584. We strongly disagree, however, with the Michigan court's characterization and note that no other jurisdiction appears to have expanded the concept of "in loco parentis" in this manner.

Nevertheless, even if the teachers were acting "in loco parentis," the fact remains that they also serve as the exclusive channel through which the plaintiff markets, sells and delivers its products to Connecticut schoolchildren. Accordingly, we conclude that the trial court incorrectly determined that the teachers are not the plaintiff's "representative[s]" within the meaning of § 12-407 (A) (15) (a) (iv).

II

COMMERCE CLAUSE CLAIM

The commissioner next claims that the trial court incorrectly concluded that there is no "substantial nexus" between the plaintiff and the state under the commerce clause of the United States constitution that would justify imposition of sales or use taxes. The commissioner claims that the trial court improperly focused on the technical label ascribed to the teachers but that the United States Supreme Court has stated that the facts under a substantial nexus analysis must be examined functionally from the perspective of the out-of-state retailer, focusing on the nature and extent of the activities of the in-state provider and whether those activities are significantly associated with the retailer's ability to establish and maintain a market in the state for the sale of its products. The commissioner also claims that, under the foregoing analysis, the teachers' activities in the present case satisfy that standard. The plaintiff responds that the tax assessments are barred under the commerce clause because the plaintiff does not occupy the bright-line physical presence in Connecticut required under the substantial nexus test affirmed by the United States Supreme Court in *Quill Corp.* v. *North Dakota ex rel. Heitkamp*, 504 U.S. 298, 315, 112

S. Ct. 1904, 119 L. Ed. 2d 91 (1992) (*Quill*). The plaintiff contends that the imposition of tax liability on the basis of the activities of the schoolteachers would blur the United States Supreme Court's rule, with dramatic implications for direct marketers, who would be deprived of any intelligible definitions or principles to determine where *Quill*'s bright line lies. We agree with the commissioner.

We first set forth the standard of review. Whether a substantial nexus exists between the plaintiff and the state that would justify the imposition of Connecticut sales and use taxes under the commerce clause presents a mixed question of law and fact over which this court exercises plenary review. See, e.g., *Lindholm* v. *Brant*, 283 Conn. 65, 77, 925 A.2d 1048 (2007) (mixed questions of law and fact involving application of legal standard to historical fact determinations require plenary review); *State* v. *Webb*, 252 Conn. 128, 137, 750 A.2d 448 (whether trial court properly concluded that defendant's constitutional rights were violated is mixed question of law and fact subject to plenary review), cert. denied, 531 U.S. 835, 121 S. Ct. 93, 148 L. Ed. 2d 53 (2000). In the present case, the parties do not contest the historical facts but, rather, the legal conclusions that may be drawn from those facts. Accordingly, we turn to United States Supreme Court precedent for an understanding of the applicable legal standard.

We begin with *Scripto*, *Inc.* v. *Carson*, 362 U.S. 207, 207–10, 80 S. Ct. 619, 4 L. Ed. 2d 660 (1960) (*Scripto*), in which the court considered whether Florida could constitutionally impose a state use tax on a Georgia retailer for the sale of goods shipped to purchasers in Florida. Noting that there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax"; (internal quotation marks omitted) id., 210–11; the court concluded that, because the seller had "[ten] wholesalers, jobbers, or 'salesmen' conducting continuous local solicitation in Florida and forwarding the resulting orders from that [s]tate to [Georgia] for shipment of the ordered goods," the required nexus was present. Id., 211. The court reasoned that, although the "salesmen" had written contracts describing them as "independent contractor[s]," were paid on commission and did not work exclusively for the seller; (internal quotation marks omitted) id., 209; the fact that they were "not regular employees of [the seller] devoting full time to its service . . . [was] a fine distinction . . . without constitutional significance. The formal shift in the contractual tagging of the salesman as 'independent' neither results in changing his local function of solicitation nor bears [on] its effectiveness in securing a substantial flow of goods into Florida. . . . To permit such formal 'contractual shifts' to make a constitutional difference would open the gates to a stampede of tax avoidance. . . . The test is simply the nature and extent of the

activities of the [seller] in Florida." (Citations omitted.) Id., 211–12.

A few years later, the court determined in *National Bellas Hess, Inc.* v. *Dept. of Revenue*, 386 U.S. 753, 754–55, 758, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967) (*Bellas Hess*), that an Illinois statute taxing goods purchased within the state from a mail order house in Missouri created an unconstitutional burden on interstate commerce where the seller had no outlets or sales representatives in the state and its only connection with its Illinois customers was by common carrier or the United States mail. In reaching that conclusion, the court explained that it had no intention of obliterating the "sharp distinction" generally recognized by state taxing authorities "between mail order sellers with retail outlets, solicitors, or property within a [s]tate, and those who do no more than communicate with customers in the [s]tate by mail or common carrier as part of a general interstate business." Id., 758.

The court subsequently articulated a four part test in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977) (*Complete Auto Transit*), to be used in considering commerce clause challenges to state taxation authority, stating that such challenges will be upheld if "the tax is applied to an activity with a substantial nexus with the taxing [s]tate, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the [s]tate." Id., 279. The court described the test as a "practical analysis"; id.; and added in *Tyler Pipe Industries, Inc.* v. *Dept. of Revenue*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987), that "the crucial factor governing nexus is whether the activities performed in [the] state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in [the] state for the sales." (Internal quotation marks omitted.) Id., 250.

Thereafter, in *Quill Corp.* v. *North Dakota ex rel. Heitkamp*, supra, 504 U.S. 301–302, the court revisited the question of whether a mail order house that had no outlets or sales representatives in the state could be required to pay a use tax on goods purchased by in-state users after the North Dakota Supreme Court decided not to follow *Bellas Hess* because of subsequent changes in the economic, commercial and retail environment. Surveying its precedent, the court noted that *Bellas Hess* was not inconsistent with *Complete Auto Transit* because *Bellas Hess* concerned only the first prong of the test and stood for the proposition that "a vendor whose only contacts with the taxing [s]tate are by mail or common carrier lacks the 'substantial nexus' required by the [c]ommerce [c]lause." Id., 311. The court emphasized the continuing validity of the " 'sharp distinction [articulated in *Bellas Hess*] between mail-order sellers with [a physical presence in the tax-

ing] [s]tate and those . . . who do no more than communicate with customers in the [s]tate by mail or common carrier as part of a general interstate business' "; id.; explaining that "[w]hether or not a [s]tate may compel a vendor to collect a sales or use tax may turn on the presence in the taxing [s]tate of a small sales force, plant, or office." Id., 315. The court concluded that the "bright line" rule articulated in *Bellas Hess* "firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes." Id.

On the basis of these principles, at least two jurisdictions concluded in circumstances like those in the present case that a substantial nexus existed between Scholastic and the state under a commerce clause analysis. In *Scholastic Book Clubs, Inc.* v. *Board of Equalization*, 207 Cal. App. 3d 734, 255 Cal. Rptr. 77 (1989),[13] a California appeals court described the case as "more analogous to *Scripto* than to . . . *Bellas* [*Hess*]"; id., 739; observing that, although the teachers did not have "written agency agreements with [Scholastic], they serve[d] the same function as did the Florida jobbers in *Scripto*—obtaining sales within California from local customers for a foreign corporation. In fact, they do more. Unlike the Florida jobbers, the California teachers collect payment from the purchasers, and receive and distribute the merchandise. [Scholastic] not only relies . . . but in fact depends on the teachers to act as its conduit to the students. Moreover, there is an implied contract between [Scholastic] and the teachers [because Scholastic] rewards them with the bonus points for merchandise if they obtain and process the orders. The bonus points are similar to the Florida jobbers' commissions in *Scripto*; the more sales the teachers make, the more bonus points they earn." Id., 739–40.

"[N]either the form of the remuneration, the amount thereof, nor the fact that the teachers . . . were not formally employed by, or dependent [on Scholastic] for their primary income has any legal significance in determining whether they acted as . . . representatives in soliciting orders for [Scholastic's] products in California. Further, unlike the Illinois customers in . . . *Bellas* [*Hess*], the students . . . are not solicited directly through the mail. The only way a student can order books is through a local intermediary—his or her teacher. [Scholastic] is thus exploiting or enjoying the benefit of California's schools and employees to obtain sales." Id., 740. Accordingly, the court concluded that Scholastic and the teachers had an implied agency relationship under California law that justified imposition of the California sales and use tax. Id.

Seven years later, the Kansas Supreme Court examined United States Supreme Court precedent and cases from other jurisdictions and found the reasoning in the California case persuasive. See *In re Scholastic Book*

*Clubs*, *Inc.*, 260 Kan. 528, 920 P.2d 947 (1996). The Kansas court explained: "The facts are similar to the case at bar. . . . Scholastic clearly has more of a connection with Kansas than catalog sales through the mail or by common carrier. Applying the test stated in . . . *Bellas Hess* and *Quill*, Scholastic's use of the Kansas teachers to sell its product to Kansas students provides a substantial nexus with the state of Kansas. Scholastic is a retailer doing business in Kansas. Application of the [Kansas Compensating Tax Act] does not violate the [c]ommerce [c]lause." Id., 546. Like the California court, the Kansas court concluded that, because Scholastic had an implied agency relationship with the teachers, there was no violation of the commerce clause. Id., 541.

The California and Kansas courts concluded that a substantial nexus existed between the retailer and the state because the retailer had an "implied" agency relationship with the teachers. *Scholastic Book Clubs*, *Inc.* v. *Board of Equalization*, supra, 207 Cal. App. 3d 737–38; *In re Scholastic Book Clubs*, *Inc.*, supra, 260 Kan. 541. In the present case, we conclude that a substantial nexus exists between the plaintiff and the state because the teachers are the plaintiff's representatives. The difference in terminology does not affect our analysis. See *Scripto*, *Inc.* v. *Carson*, supra, 362 U.S. 211 (contractual tagging of salesmen as " 'independent' " had no bearing on their local function of soliciting sales for retailer, the test being nature and extent of retailer's activities). The out-of-state retailer in this case, as well as the California and Kansas cases, is Scholastic, and the facts in all three cases are essentially the same. The trial court in the present case found that approximately 14,000 Connecticut schoolteachers receive and distribute the plaintiff's marketing materials to schoolchildren throughout the state and provide essential administrative services by (1) receiving, compiling and sending all orders and payments to the plaintiff, (2) receiving the plaintiff's products and distributing them to the students, and (3) resolving all complaints and problems arising following delivery of the plaintiff's products. Thus, because the teachers who participate in the program serve as the only means through which the plaintiff communicates with Connecticut schoolchildren, they provide the substantial nexus required to permit imposition of sales and use taxes under the bright-line physical presence rule established in *Bellas Hess* and *Quill*. See *Tyler Pipe Industries*, *Inc.* v. *Dept. of Revenue*, supra, 483 U.S. 250 ("activities performed in [the] state on behalf of the taxpayer [must be] significantly associated with the taxpayer's ability to establish and maintain a market in [the] state for the sales" [internal quotation marks omitted]).

We reject the reasoning of the Michigan Court of Appeals in *Scholastic Book Clubs*, *Inc.* v. *Dept. of Treasury*, supra, 223 Mich. App. 576, and the Arkansas

Supreme Court in *Pledger* v. *Troll Book Clubs, Inc.*, 316 Ark. 195, 871 S.W.2d 389 (1994), which involved similar programs. In *Pledger*, the Arkansas Supreme Court concluded that there was no substantial nexus between the retailer and the state because the teachers lacked a sufficient "physical presence," as defined under the bright-line test for mail order sales in *Quill*, and because the state had failed to prove that the teachers were the retailer's agents subject to its control under Arkansas agency law. See id., 200–201. Similarly, the Michigan appeals court determined that Scholastic did not have the requisite "physical presence" because the teachers were neither employees nor agents of Scholastic, there was no indication that the teachers were vested with authority to bind Scholastic or act on its behalf and there was no evidence that Scholastic exercised control over the teachers. *Scholastic Book Clubs, Inc.* v. *Dept. of Treasury*, supra, 583–84. The Michigan court further noted that the teachers were under no obligation to participate in the plaintiff's program but were merely invited to be consumers of its materials. Id., 584. Accordingly, the court concluded that the plaintiff's mail contacts with Michigan teachers did not give rise to the agency relationship required to establish a substantial nexus under the commerce clause. See id.

We disagree with the foregoing reasoning, and, insofar as the Arkansas and Michigan courts rely on their own state's agency law, we conclude that the holdings in those cases are inapplicable to the present case. The bright-line rule initially established in *Bellas Hess* and reaffirmed in *Quill* was that a "vendor whose only contacts with the taxing [s]tate are by mail or common carrier lacks the 'substantial nexus' required by the [c]ommerce [c]lause." *Quill Corp.* v. *North Dakota ex rel. Heitkamp*, supra, 504 U.S. 311. Thus, it is highly unlikely that the language in *Quill* that a state's ability to "compel a vendor to collect a sales and use tax *may turn on the presence in the taxing* [*s*]*tate of a small sales force, plant, or office*"; (emphasis added) id., 315; was intended as a *definitive* description of other contacts that might demonstrate the existence of a substantial nexus, because the issue in *Quill* involved vendors whose contacts with the taxing state were limited to mail or common carrier. Furthermore, insofar as the Arkansas and Michigan courts relied on agency law, we do not apply their reasoning because our legislature has determined that persons acting as "representative[s]" of out-of-state retailers may provide the presence necessary to justify imposition of sales and use taxes. General Statutes § 12-407 (a) (15) (A) (iv). We therefore need not consider whether the teachers and the plaintiff in this case had an express or implied agency relationship.

The plaintiff contends that the facts in three cases in which the United States Supreme Court found a substantial nexus underscore the lack of a substantial

nexus in the present case. The plaintiff notes that, in *Standard Pressed Steel Co.* v. *Dept. of Revenue*, 419 U.S. 560, 561, 95 S. Ct. 706, 42 L. Ed. 2d 719 (1975), the vendor had an employee residing in the state of Washington and using a home office as a base of operations to visit in-state customers, and that the employee was assisted by a group of the taxpayer's engineers who visited Washington three days every six weeks, that, in *Scripto*, *Inc.* v. *Carson*, supra, 362 U.S. 209, the vendor's commissioned sales agents were operating within the state under the vendor's authority, and that, in *Tyler Pipe Industries*, *Inc.* v. *Dept. of Revenue*, supra, 483 U.S. 249, the vendor's in-state sales representatives called on its customers and solicited orders on a daily basis. The plaintiff further notes that *Scripto* was viewed by the court in *Bellas Hess* and *Quill* as representing "[t]he furthest extension of [the state's taxing] power" under the federal constitution; *Quill Corp.* v. *North Dakota ex rel. Heitkamp*, supra, 504 U.S. 306; see also *National Bellas Hess*, *Inc.* v. *Dept. of Revenue*, supra, 386 U.S. 757 ("the case . . . which represents the furthest constitutional reach . . . of a [s]tate's power to deputize an out-of-state retailer as its collection agent for a use tax is *Scripto*"); and argues that it is not logical to extend the reasoning of *Scripto* to schoolteachers who have no oral or written agreement with the plaintiff to act as sellers of the plaintiff's products and who receive no compensation from the plaintiff for their efforts. We are not persuaded.

We first observe that the language in *Bellas Hess* and *Quill* describing *Scripto* as representing the "furthest" extension of the state's taxing power was no more than an observation concerning the state of the law at that time, and was not necessarily intended to mean that a substantial nexus between the out-of-state retailer and the state could not be found in other, as of yet undefined, circumstances. We also emphasize that the test involves a "practical analysis"; *Complete Auto Transit*, *Inc.* v. *Brady*, supra, 430 U.S. 279; and that the court viewed the evolution of its case law as "a retreat from the formalistic constrictions of a stringent physical presence test in favor of a more flexible substantive approach . . . ." (Internal quotation marks omitted.) *Quill Corp.* v. *North Dakota ex rel. Heitkamp*, supra, 504 U.S. 314. Under this approach, in which we consider the "nature and extent of the activities" of the seller; *Scripto*, *Inc.* v. *Carson*, supra, 362 U.S. 211; and whether "the activities performed in [the] state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in [the] state"; *Tyler Pipe Industries*, *Inc.* v. *Dept. of Revenue*, supra, 483 U.S. 250; it is clear that Connecticut schoolteachers provide the substantial nexus required under the commerce clause to permit imposition of the taxes at issue in the present case. The fact that there is no oral or written agreement compelling the teachers to serve as

agents or sellers of the plaintiff's products and that they receive no direct compensation from the plaintiff is not dispositive. The nature of the program necessarily places the teachers in a position in which they are functioning in much the same way as salesmen, in that they are bringing the plaintiff's products to the attention of the students and are providing them with the means to order, pay for and receive delivery of those products. Moreover, the teachers derive benefits from the program because they earn bonus points that enable them to purchase other items of value from the plaintiff's catalog. Accordingly, under the bright-line rule established in *Bellas Hess* and *Quill* and the "practical analysis" required by United States Supreme Court precedent, we conclude that the activities of the Connecticut schoolteachers who participate in the plaintiff's program provide the requisite nexus under the commerce clause to justify imposition of the taxes at issue in this case.

The judgments are reversed and the case is remanded with direction to deny the plaintiff's appeals and to render judgments for the commissioner of revenue services.

In this opinion the other justices concurred.

[1] We hereinafter refer to Scholastic Book Clubs, Inc., as the plaintiff throughout this opinion except to the extent that we discuss other cases in which Scholastic Book Clubs, Inc., is also a party, in which we refer to it as "Scholastic."

[2] General Statutes § 12-407 (a) (15) (A) provides in relevant part: " 'Engaged in business in the state' means and includes but shall not be limited to . . . (iv) . . . having any representative, agent, salesman, canvasser or solicitor operating in this state for the purpose of selling, delivering or taking orders . . . ."

[3] Article one, § 8, of the United States constitution provides in relevant part: "The Congress shall have Power . . . [t]o regulate Commerce . . . among the Several States . . . ."

"The commerce clause prohibits state taxation that discriminates against interstate commerce." *Altray Co.* v. *Groppo*, 224 Conn. 426, 434 n.6, 619 A.2d 443 (1993).

[4] The trial court distinguished between other persons who might be considered the plaintiff's representatives in Connecticut and the schoolteachers who are the subject of this litigation.

[5] General Statutes § 12-418 (1) provides: "(A) Any person against whom an assessment is made under section 12-414a, 12-415, 12-416 or 12-424 or any person directly interested may petition for a reassessment not later than sixty days after service upon such person of notice thereof. If a petition for reassessment is not filed within the sixty-day period, the assessment becomes final at the expiration of the period.

"(B) Any person against whom an assessment is made under section 12-417 or any person directly interested may petition for a reassessment not later than ten days after service of notice upon such person. If a petition for reassessment is not filed within such ten-day period, the assessment becomes final at the expiration of the period."

[6] Thereafter, the commissioner appealed to the Appellate Court, and we transferred the commissioner's consolidated appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[7] We therefore disagree with the trial court that "representative[s]" in the statutory definition are "in the same class as 'salesmen, canvassers or solicitors.' "

[8] Section 12-426-22 (a) of the Regulations of Connecticut State Agencies provides in relevant part: "The term 'engaged in business in this state' shall include but not be limited to the following acts or methods of transacting business . . . having any representative, agent, salesman, canvasser or solicitor operating in this state for the purpose of selling or leasing, delivering or taking orders for tangible personal property or services." The regulation,

for the most part, mirrors the language of the statute.

[9] General Statutes § 21a-70b (2) defines " '[m]anufacturer's or distributor's representative' " as "any person authorized by a manufacturer or distributor of any drug, as defined in section 21a-92, to offer or sell any such product to the public at retail."

[10] General Statutes § 42-481 (4) defines " '[s]ales representative' " as "a person who: (A) Establishes a business relationship with a principal to solicit orders for products or services, and (B) is compensated in whole, or in part, by commission. 'Sales representative' does not include an employee or a person who places orders or purchases on the person's own account or for resale or a seller . . . ."

[11] General Statutes § 52-146d (1) defines " '[a]uthorized representative' " as "(A) a person empowered by a patient to assert the confidentiality of communications or records which are privileged under sections 52-146c to 52-146i, inclusive, or (B) if a patient is deceased, his personal representative or next of kin, or (C) if a patient is incompetent to assert or waive his privileges hereunder, (i) a guardian or conservator who has been or is appointed to act for the patient, or (ii) for the purpose of maintaining confidentiality until a guardian or conservator is appointed, the patient's nearest relative . . . ."

[12] In light of our conclusion that a "representative" is distinguishable from an "agent" under § 12-407 (a) (15) (A) (iv), we need not address the plaintiff's argument that the courts in *Pledger* v. *Troll Book Clubs*, *Inc.*, 316 Ark. 195, 201, 871 S.W.2d 389 (1994), and *Troll Book Clubs*, *Inc.* v. *Tracy*, Docket No. 92-Z-590, 1994 Ohio Tax LEXIS 1374, *17 (Ohio Bd. Tax App. August 1, 1994), found no agency relationship between teachers and out-of-state retailers in similar circumstances, or the commissioner's argument that the courts in *Scholastic Book Clubs*, *Inc.* v. *Board of Equalization*, 207 Cal. App. 3d 734, 738, 255 Cal. Rptr. 77 (1989), and *In re Scholastic Book Clubs*, *Inc.*, 260 Kan. 528, 541, 920 P.2d 947 (1996), concluded that the teachers were "agents" or "representatives" for Scholastic. We also do not address the plaintiff's argument as to the relevance of *Scholastic Book Clubs*, *Inc.* v. *Dept. of Treasury*, 223 Mich. App. 576, 581–84, 567 N.W.2d 692 (1997), appeal denied, 457 Mich. 880, 586 N.W.2d 923 (1998), and *Dell Catalog Sales*, *L.P.* v. *Commissioner of Revenue Services*, 48 Conn. Sup. 170, 179–88, 834 A.2d 812 (2003), in our analysis of the commissioner's statutory claim because the courts' discussion of the in-state service providers' status in those cases was in the context of their determination as to whether the tax assessments were constitutional under the commerce clause.

[13] We note that the case was decided approximately three years before *Quill* but that *Quill* did not change the principles previously established in *Bellas Hess*.