

BEFORE THE GEORGIA TAX TRIBUNAL
STATE OF GEORGIA



FILED
GA. TAX TRIBUNAL

FEB 14 2017

Yvonne Bouras
Yvonne Bouras
Tax Tribunal Administrator

SCHOLASTIC BOOK CLUBS, INC.,

Petitioner,

v.

LYNNETTE T. RILEY, in her Official
Capacity as Commissioner of the GEORGIA
DEPARTMENT OF REVENUE,

Respondent.

DOCKET NO.: 1552367

DECISION

2017 – 2, Ga. Tax Tribunal, February 14, 2017

I. INTRODUCTION

This matter is an appeal by Scholastic Book Clubs, Inc. (“Petitioner” or “SBC”) of an Official Assessment and Demand for Payment, Letter ID L1025271648, dated March 23, 2015 (“Assessment”) issued by Respondent Commissioner of the Georgia Department of Revenue (“Department”) for sales and use tax during the period of June 1, 2008 through May 31, 2013 (“Audit Period”). Department filed a Motion for Summary Judgment on October 25, 2016, and Petitioner filed a Motion for Summary Judgment on October 28, 2016. Petitioner responded to the Department’s Motion on November 23, 2016, and the Department responded to Petitioner’s Motion on November 29, 2016. On December 12, 2016, the Department filed a Sur-reply Brief in Further Support of its Motion. An oral argument was held on December 16, 2016.

After careful consideration of the parties’ motions and arguments and for the reasons set forth below, the Department’s Motion for Summary Judgment is **GRANTED** and Petitioner’s Motion for Summary Judgment is **DENIED**.

II. FINDINGS OF UNDISPUTED FACT

A. SBC's Business Structure

1.

SBC is a corporation incorporated under the laws of Missouri and headquartered in Jefferson City, Missouri. (Joint Stipulation of Facts ("Stip.") ¶ 1; Joint Ex. 1.)

2.

SBC's business structure and manner of doing business as set forth in Joint Exhibit 1 are the same with respect to Georgia. (Stip. ¶ 2; Joint Ex. 2.)

3.

SBC sells books and other educational materials (excluding textbooks) by mail order and via the Internet to Georgia schoolteachers, Georgia parent educators (in home schools), Georgia parents and Georgia students from locations outside of Georgia. (Stip. ¶ 3; Joint Ex. 1.)

4.

All of SBC's customers, within and without Georgia, are mailed the same catalogs, order forms, and promotional materials by SBC from locations outside of Georgia. (Stip. ¶ 4; Joint Ex. 1.)

5.

SBC is a national business that sells books and educational materials to customers located in all fifty states by mail and via the Internet. (Stip. ¶ 5; Joint Ex. 1.)

6.

SBC does not have retail stores or offices located in Georgia. (Stip. ¶ 6; Joint Ex. 3.)

7.

SBC is not registered to do business in Georgia. (Stip. ¶ 7; Joint Ex. 1.)

8.

SBC does not maintain a mailing address or local telephone number in Georgia. (Stip. ¶ 8; Joint Ex. 3.)

9.

Georgia schoolteachers and parent educators do not have written contracts with SBC. (Stip. ¶ 9; Joint Ex. 1.)

10.

SBC is wholly owned by Scholastic Inc. (Stip. ¶ 10; Joint Ex. 3.)

11.

Scholastic Inc. and its subsidiary, Scholastic Book Fairs, Inc. are registered with the Georgia Department of Revenue to collect sales and use tax. (Stip. ¶ 11.)

12.

Scholastic Inc. and Scholastic Book Fairs, Inc. have an office, warehouse, and distribution center in Kennesaw, Georgia and in Covington, Georgia. (Stip. ¶ 12.)

13.

SBC and Scholastic Book Fairs, Inc. use the red bar logo of Scholastic Inc. SBC pays Scholastic Inc. a licensing fee to use the logo. (Stip. ¶ 13; Joint Ex. 2.)

14.

SBC and Scholastic Book Fairs, Inc. sell similar books to customers located in Georgia. (Stip. ¶ 14; Joint Ex. 4.)

15.

Scholastic Inc. hosts websites for SBC and Scholastic Book Fairs, Inc. The Scholastic Inc. website contains links to the websites of SBC and Scholastic Book Fairs, Inc. (Stip. ¶ 15;

Joint Ex. 2.)

16.

SBC pays Scholastic Inc. a fee for hosting SBC's website and providing technological support for the website. (Stip. ¶ 16; Joint Ex. 2.)

17.

SBC pays Scholastic Inc. a fee for providing SBC with a list of schools in Georgia which Scholastic Inc. obtains from a third party. This list is updated on a monthly basis. SBC sends catalogs and promotional materials to those schools. (Stip. ¶ 17; Joint Ex. 2.)

B. SBC's Business

18.

SBC distributes catalogs (which contain order forms) and promotional coupons each month to Georgia schools (in care of classroom teachers) and Georgia home schools (in care of parent educators) via the United States Postal Service only from locations outside of Georgia. Secretaries or school staff may place the catalogs and other SBC material in the teachers' mailboxes, but SBC has no knowledge of how catalogs and promotional materials are handled by schools. (Stip. ¶ 18; Joint Exs. 1, 3, 4.)

19.

Georgia schoolteachers and parent educators who receive SBC catalogs and order forms each month may order from SBC or disseminate individual order forms from the catalogs (which are pages in the catalog) to students if they wish, but are under no obligation to do so. As described below, orders from schoolteachers, parent educators, and students are sent to SBC together on a single master order form. (Stip. ¶ 19; Joint Exs. 1, 3.)

20.

If a Georgia schoolteacher or parent educator decides to hand out pages from SBC's catalogs in their classrooms to their students, then the Georgia school teacher or parent educator is the responsible adult who facilitates the ordering process by consolidating all student, teacher, and parent educator orders onto a single master form, collecting money for student orders, and mailing the master form and money (including the teacher's/parent educator's money for his or her own orders) to SBC's offices in a postpaid envelope provided with the SBC catalog. (Stip. ¶ 20; Joint Exs. 1, 3.)

21.

The master order form indicates each item being ordered but does not indicate who has ordered each item. (Stip. ¶ 21; Joint Ex 2.)

22.

After collecting money for book orders from students and parents should they choose voluntarily to do so, the Georgia school teacher or parent educator may issue a personal check to SBC or use a personal credit card for all of the orders placed by the students and parents in the teacher's classroom. SBC has no control of how its customers pay for their orders and they are free to do so in any way they wish. (Stip. ¶ 22; Joint Exs. 2, 3.)

23.

SBC provides an online marketplace through its website, www.scholastic.com/bookclubs. Students, parents, and teachers of Georgia Students can place orders for books online if they use a Class Activation Code provided to the parents by the classroom teacher or parent educator. Use of the Class Activation Code allows the parent, student, or teacher to link to a page created by SBC for the specific classroom associated with the code and to place an order. The use of the

code allows for the accumulation of bonus points to the associated classroom. (Stip. ¶ 23; Joint Exs. 2, 5.)

24.

Once a parent or student places an online order, the order is submitted to the classroom account of the classroom teacher or parent educator, but is not submitted to SBC until the classroom teacher or parent educator places the full classroom order. Books ordered online are delivered to the school or homeschool associated with the Class Activation Code provided by the classroom teacher or parent educator. (Stip. ¶ 24; Joint Exs. 2, 5.)

25.

SBC markets its merchandise in Georgia only to classrooms in Georgia schools and to homeschools and only teachers, parent educators, school administrators, students, and parents of students can order merchandise from SBC as part of a classroom order. (Stip. ¶ 25; Joint Exhibit 2.)

26.

From its fulfillment center in Missouri, SBC mails the products requested on the master order forms to Georgia classrooms (at the school addresses) and home schools to the attention of the responsible adult for each respective transaction (either a schoolteacher or a parent educator). (Stip. ¶ 26; Joint Ex. 5.)

27.

The responsible adult in receipt of the products takes responsibility for accepting and distributing them in his or her classroom, a process in which SBC has no role. Products ordered by schoolteachers and parent educators are mailed by SBC in the same packages as products ordered by students. (Stip. ¶ 27; Joint Ex. 1.)

28.

SBC does not have a system to monitor whether, when or how the teacher or parent educator distributes the ordered products to the students or parents who placed the orders. (Stip. ¶ 28; Joint Ex. 2.)

29.

Georgia teachers and parent educators, as the responsible adults, may communicate with SBC with complaints or concerns regarding their classroom orders. For example, they may communicate with SBC if products received differed from the products requested on the master form or if there was a discrepancy regarding the amount due for the order. (Stip. ¶ 29; Joint Ex. 1.)

30.

In the event that an ordered book is unavailable or defective, SBC may issue a refund check in the name of the classroom teacher, administrator, or parent educator associated with the classroom account under which the product was ordered. The classroom teacher, administrator, or parent educator is then responsible for dispersing the refund money to the student who ordered the defective or unavailable book, or retain it themselves if they placed the order. SBC does not have a system to monitor whether or when the classroom teacher, administrator, or parent educator disperses the refund money to the appropriate customers. (Stip. ¶ 30; Joint Exs. 1, 2.)

31.

In the event that the classroom receives a defective product or a product that was not ordered, the torn or defective books could be returned to SBC by the responsible Georgia adult—teachers, administrators, and parent educators—for replacement. (Stip. ¶ 31; Joint Exs. 4, 5.)

32.

SBC's business model is based upon the classroom teacher or parent educator deciding to participate in the book club program and deciding to help their students participate in the program by distributing catalog pages (which include an order form), submitting a master order form and payment to SBC, and distributing the items shipped to the classroom by SBC to the specific individuals who placed the orders. (Stip. ¶ 32; Joint Ex. 6.)

33.

Three schoolteachers, Sandra Munn, Jane Johnson, and Korey Collins, have each testified by affidavit concerning their interactions with SBC. The teachers testified by affidavit that they order from SBC, and give their students "the opportunity to order" from SBC "based on the best interests of the classroom," and not on behalf of SBC. (Munn. Aff. ¶ 5; Johnson Aff. ¶¶ 17, 20; Collins Aff. ¶¶ 13, 14.)

34.

Ms. Munn testified, "I have never obtained any items for personal use using bonus points and I do not consider them in any way to be compensation to me." Ms. Johnson stated: "I am also not paid in any way by Scholastic for assisting my students in ordering. We do receive classroom bonus points based on my students' orders, but I would support Scholastic in the classroom even without the offer of bonus points." (Munn Aff. ¶ 11; Johnson Aff. ¶¶ 23, 24.)

C. Bonus Points and Sales

35.

Georgia classrooms whose teachers or parent educators serve as the responsible adults for SBC transactions receive bonus points that may be redeemed for free classroom materials, books

or equipment to be used solely in the classroom. The number of bonus points awarded is based upon the size of the order placed by each class. Should a teacher leave a school for any reason, including a new teaching position at a different school, bonus points remain with the classroom that earned them. Scholastic explains in its catalogs that bonus points cannot be used to obtain items for the personal use of teachers or parent educators. (Stip. ¶ 33; Joint Exs. 1, 2, 5.)

36.

Bonus points are also awarded to classrooms when classroom teachers and parent educators refer new classrooms to SBC. (Stip. ¶ 34; Joint Ex. 2.)

37.

The bonus point system is used as a promotional tool to attract classrooms to participate in SBC's program over its competitors. (Stip. ¶ 35; Joint Ex. 7.)

38.

Georgia teachers and parent educators receive notifications from SBC regarding the points balance earned by their classrooms from placing classroom orders with SBC. (Stip. ¶ 36; Joint Ex. 1.)

39.

SBC provides classrooms with a separate catalog displaying items for which bonus points can be redeemed. These items included books, educational material, iPads, iPods, computers, printers, cameras, televisions, small refrigerators, microwaves, toaster ovens, Target and Staples gift cards and other items. (Stip. ¶ 37; Joint Exs. 2, 3.)

40.

Bonus points can be redeemed online, by phone, or by mail or fax. (Stip. ¶ 38; Joint Ex. 1.)

41.

Products distributed as a result of bonus point redemption are sometimes mailed to the classroom in the same box as paid purchases and are sometimes mailed to the classroom separately. (Stip. ¶ 39; Joint Exs. 1, 5.)

42.

Bonus point orders that are shipped separately are, like products paid for by teachers and students, mailed to Georgia classrooms to the attention of the Georgia teacher or parent educator assigned to that classroom. (Stip. ¶ 40; Joint Ex. 1.)

43.

SBC does not have a system to monitor how products distributed as a result of bonus point redemption are used by schoolteachers or parent educators. (Stip. ¶ 41; Joint Exs. 2, 3.)

44.

During the Audit Period, SBC's total sales to Georgia amounted to \$24,231,168.00. (Stip. ¶ 42.)

45.

The number of Georgia schools, including public, private, and home schools that placed orders with SBC for each year of the Audit Period is as follows:

2008: 3,607
2009: 3,772
2010: 3,746
2011: 3658
2012: 3,601
2013: 2,907

(Stip. ¶ 43; Joint Ex. 5.)

46.

The number of Georgia classrooms, including public, private, and home school classrooms, that placed orders for each year of the Audit Period is as follows:

2008: 23,494
2009: 24,763
2010: 23,329
2011: 21,407
2012: 19,874
2013: 10,655

(Stip. ¶ 44; Joint Ex. 5.)

47.

The number of bonus points awarded to Georgia classrooms, including public, private, and home school classrooms, that placed orders with SBC for each year of the Audit Period is as follows:

2008: 33,439,745
2009: 33,314,607
2010: 40,620,431
2011: 34,840,187
2012: 38,117,489
2013: 12,104,420

(Stip. ¶ 45; Joint Ex. 5.)

48.

The number of bonus points redeemed by Georgia classrooms, including public, private, and home school classrooms for each year of the Audit Period is as follows:

2008: 24,575,582
2009: 34,805,022
2010: 38,027,865
2011: 33,894,553
2012: 32,595,533
2013: 12,338,459

(Stip. ¶ 46; Joint Ex. 5.)

49.

During the Audit Period, the following reflects the fair market value and costs of items for which Georgia classrooms redeemed bonus points:

| | FMV | Cost |
|-------|-------------|-----------|
| 2008: | \$1,147,386 | \$200,793 |
| 2009: | \$1,524,128 | \$266,722 |
| 2010: | \$1,634,935 | \$286,114 |
| 2011: | \$1,221,436 | \$213,751 |
| 2012: | \$1,003,516 | \$175,615 |
| 2013: | \$380,986 | \$66,673 |

(Stip. ¶ 47; Joint Ex. 5.)

50.

During the Audit Period, the following reflects the fair market value and costs for items for which Georgia homeschool classrooms redeemed bonus points:

| | FMV | Cost |
|------|---------|---------|
| 2008 | \$4,741 | \$830 |
| 2009 | \$6,856 | \$1,200 |
| 2010 | \$6,276 | \$1,098 |
| 2011 | \$4,292 | \$751 |
| 2012 | \$5,672 | \$993 |
| 2013 | \$2,226 | \$389 |

(Stip. ¶ 48; Joint Ex. 5.)

51.

During the Audit Period, 49,550 bonus points were awarded to classrooms whose teacher or parent educator referred new classrooms to SBC. (Stip. ¶ 49; Joint Ex. 5.)

D. Teacher Advisor Program

52.

SBC has developed a program called Scholastic Book Club Teacher Advisor Program. In connection with this program, SBC reaches out once a year to teachers by mail to determine if a teacher is interested in participating as an advisor to SBC and to provide feedback to SBC

regarding the SBC experience. The Teacher Advisor Program is a customer focus group through which SBC gains insights into the interests and needs of classrooms and homeschools. (Stip. ¶ 50; Joint Exs. 2, 4.)

53.

SBC selected a teacher from Georgia to be a teacher advisor in 2009. There were no other participants from Georgia during the Audit Period in this case. SBC paid for the travel and meals of this teacher in connection with the teacher's attendance at SBC's annual teacher advisor conference held in New York City, New York in 2009. In addition to the paying for the teacher's travel and meals, SBC provided the Georgia teacher advisor with a red fleece vest, bonus points for her classroom, a tote bag and 4 or 5 books. (Stip. ¶ 52; Joint Exs. 2, 5.)

54.

One of SBC's Editorial Directors visited the Georgia teacher advisor's classroom in February 2009 for one day in connection with the Teacher Advisor Program. The Editorial Director spent the day with the classroom to observe curriculum and acquire information as to the types of books the classroom would likely be interested in ordering. The Editorial Director's visit was part of a "listening tour" through which the company tries to better understand its customers. (Stip. ¶ 52; Joint Exs. 2, 5.)

55.

SBC staff and the Georgia teacher advisor interacted by telephone and by email in scheduling the visit of the Georgia teacher advisor to New York and in scheduling the Editorial Director's visit to the Georgia classroom. (Stip. ¶ 53; Joint Ex. 5.)

E. Assessment and Appeal

56.

On or about February 19, 2015, the Department issued a Notice of Proposed Assessment to the Petitioner for sales and use tax for the period June 1, 2008 through May 31, 2013. (Stip. ¶ 54; Joint Ex. 8.)

57.

SBC did not file a protest with the Department regarding the Notice of Proposed Assessment. (Stip. ¶ 55.)

58.

On or about March 23, 2015, the Department issued an Official Assessment and Demand for Payment to SBC for sales and use tax for the period June 1, 2008 through May 31, 2013. The Assessment includes sales and use tax in the amount of \$1,890,474.10, penalty in the amount of \$472,607.24, and interest in the amount of \$972,568.39. (Stip. ¶ 56; Joint Ex. 9.)

59.

The Department prepared its Assessment of sales and use tax based upon sales and expenses information provided by SBC. SBC does not dispute the amount of tax calculated by the Department or the methodology used by the Department to calculate the tax. (Stip. ¶ 57; Joint Ex. 2.)

60.

SBC timely appealed the Official Assessment to the Georgia Tax Tribunal. (Stip. ¶ 58.)

III. CONCLUSIONS OF LAW

A. Standard of Review

To prevail on a motion for summary judgment, the moving party must demonstrate that there is no genuine issue as to any material fact as to each element of its claim and that the undisputed facts, when viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. O.C.G.A. § 9-11-56(c); see also Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991); Zantzinger v. Comm'r, 2014-2 Ga. Tax Tribunal, Jan. 31, 2014.

B. Statutory Claim

The Georgia Retailers and Consumers Sales and Use Tax Act (the "Act") levies and imposes a tax on the "retail purchase, retail sale, rental, storage, use, and consumption of tangible personal property" in Georgia. O.C.G.A. § 48-8-1. Pursuant to the terms of the Act, a sales tax is imposed on all sales of tangible personal property that occur in Georgia, and a complimentary use tax is imposed on property purchased outside of Georgia for use or consumption in Georgia. O.C.G.A. § 48-8-30. The Act imposes a requirement on retailers and dealers to collect and remit the sales or use tax. O.C.G.A. § 48-8-30(b). Thus, in order for SBC to be obligated to register for, collect, and remit use taxes on its sales to Georgia customers, the company must fall under the statutory definition of a "dealer." See O.C.G.A. § 48-8-30. The General Assembly has enacted numerous definitions of dealer that set forth a wide range of conduct that trigger a retailer's obligation to collect and remit sales and use tax. See O.C.G.A. § 48-8-2(8).

1. SBC is a dealer pursuant to O.C.G.A. § 48-8-2(8)(H).

First, subpart (H) defines a dealer as every person who "[s]olicits business by an agent, employee, representative, or any other person" O.C.G.A. § 48-8-2(8)(H). Although

“representative” is not defined in the Act, two well-established rules of statutory construction provide guidance for the interpretation of the term. First, in the absence of a definition, a word should be given its commonly understood meaning. See O.C.G.A. § 1-3-1. 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” Scholastic Book Clubs, Inc. v. Connecticut Comm’r of Revenue Servs., 38 A.3d 1183, 1190 (Conn. 2012). Second, “all the words of a statute are to be given due weight and meaning.” Undercofler v. Colonial Pipeline Co., 114 Ga. App. 739, 742 (1966); see also Berryhill v. Georgia Cmty. & Support Sols., Inc., 281 Ga. 439, 441 (2006) (“Courts should give a sensible and intelligent effect to every part of a statute and not render any language superfluous.”); Collins v. J.C. Penny Co., 218 Ga. App. 405, 407-08 (1995). Accordingly, in order for “representative” to have meaning and effect in subparagraph (H), it must mean a person acting in a capacity other than as an agent or employee; otherwise its inclusion in the list would be superfluous.

In interpreting the term “representative” in a statutory scheme similar to Georgia’s to determine whether Connecticut teachers acted as representatives for SBC, the Supreme Court of Connecticut found that a representative is “a person who is not an employee or agent and who does not necessarily act through delegated authority for remuneration . . . but who otherwise stands in the place of, or acts on behalf of, the out-of-state retailer” Scholastic Book Clubs, Inc. v. Connecticut, 38 A.3d at 1190-91 (finding Connecticut schoolteachers acted as representatives for SBC in that “teachers serve as the sole conduit through which [SBC] advertises, markets, sells and delivers its products to Connecticut schoolchildren”). The Court expressly rejected SBC’s arguments that a representative must have a formal legal relationship

with the out-of-state vendor or that a representative must be motivated to produce revenue for SBC. Id. at 1191; see also Scholastic Book Clubs, Inc. v. Alabama Dep't of Revenue, Docket No. S-14-374 (Ala. Tax Tribunal Mar. 25, 2016) (finding SBC had a duty to collect and remit use tax even in the absence of a contractual or legal relationship with Alabama schoolteachers).

Georgia schoolteachers and parent educators who participate in SBC's program are representatives. SBC's only contact in the state is through teachers and parent educators. SBC mails its catalogs only to Georgia schools in care of classroom teachers and Georgia home schools in care of parent educators. A parent or student can only place an order online with a code provided by the teacher and the online order is only submitted to SBC when the classroom teacher or parent educator places the full classroom order. SBC sends all merchandise to Georgia schools or homeschools to the attention of the classroom teacher or parent educator who then distributes the merchandise by reviewing the individual orders. Georgia teachers and parent educators handle all complaints or concerns as well as returns and refunds. In short, as Alabama and Connecticut found, SBC is able to sell its products in Georgia only through the teachers and parent educators who "serve as the exclusive vehicle for selling [SBC's] products to their students." Scholastic Book Clubs, Inc. v. Connecticut, 38 A.3d at 1192. Accordingly, the Tribunal finds that SBC falls under the definition of representative in O.C.G.A. §48-8-2(8)(H).

2. SBC is a dealer pursuant to O.C.G.A. § 48-8-2(8)(I).

SBC is also a dealer under O.C.G.A. § 48-8-2(8)(I), which defines a dealer as a person who:

Engages in the regular or systematic solicitation of a consumer market in this state, unless the dealer's only activity in this state is:

- (i) Advertising or solicitation by:
 - (I) Direct mail, catalogs, periodicals, or advertising fliers;
 - (II) Means of print, radio, or television media; or

- (III) Telephone, computer, the Internet, cable, microwave, or other communication system;
- (ii) The delivery of tangible personal property within this state solely by common carrier or United States mail; or
- (iii) To engage in convention and trade show activities

O.C.G.A. § 48-8-2(8)(I).

The Tribunal finds that throughout the Audit Period, SBC did more than merely function as a mail-order company. SBC specifically targeted Georgia schools, Georgia teachers, and Georgia classrooms to establish and maintain its market in Georgia. In addition to its ongoing relationship with Georgia schools and teachers, SBC selected a Georgia teacher to participate in its Teacher Advisor Program. SBC communicated directly with the teacher advisor, paid for her to attend a SBC conference in New York, and sent an SBC employee to her classroom to observe the curriculum and interests of the classroom. SBC utilized and incentivized Georgia teachers for their participation in the book club and systematically solicited a consumer market in Georgia through its ongoing relationship with schoolteachers and parent educators. Accordingly, the Tribunal finds that SBC falls under the definition of dealer in O.C.G.A. § 48-8-2(8)(I).

3. SBC is a dealer pursuant O.C.G.A. § 48-8-2(8)(K).

Subparagraph (K)(i) provides that a dealer is any person who:

- (i) Makes sales of tangible personal property or services that are taxable under this chapter if a related member, as defined in Code Section 48-7-28.3, other than a common carrier acting in its capacity as such, that has substantial nexus with the state:
 - (I) Sells a similar line of products as the person and does so under the same or a similar business name; or
 - (II) Uses trademarks, service marks, or trade names in this state that are the same or substantially similar to those used by the person.
- (ii) The presumption that a person described in this subparagraph qualifies as a dealer in this state may be rebutted by showing that the person does not

have a physical presence in this state and that any in-state activities conducted on its behalf are not significantly associated with the person's ability to establish and maintain a market in this state.

O.C.G.A. § 48-8-2(8)(K).¹

The Tribunal finds that SBC is a dealer under subparagraph (K) because of its relationship with Scholastic Inc. and Scholastic Book Fairs, Inc. SBC and Scholastic Book Fairs, Inc. are wholly owned subsidiaries of Scholastic Inc. and, therefore, are related members under O.C.G.A. § 48-7-28.3. Scholastic Inc. and Scholastic Book Fairs, Inc. both have an office, warehouse, and distribution center in Georgia and are registered with the Department to collect sales and use tax. SBC and Scholastic Book Fairs, Inc. share similar names, market and sell similar books to Georgia schools, and both use Scholastic Inc.'s red bar logo.

The interrelated nature of these three entities is demonstrated by their shared use of the Scholastic Inc. website. Scholastic Inc. hosts a website for SBC and Scholastic Book Fairs, Inc. Furthermore, Scholastic Inc. provides technological support for the website and hosts webpages designed by SBC. The website provided by Scholastic Inc. provides an internet platform for SBC to make sales in Georgia. Moreover, Scholastic Inc. provides SBC with a list of Georgia schools, updated on a monthly basis. SBC sends catalogs and promotional materials to the schools on these lists, which enhances SBC's ability to solicit sales at Georgia schools. Accordingly, the Tribunal finds that SBC also falls under the definition of "dealer" in O.C.G.A. § 48-8-2(8)(K) for the period of October of 2012 to May of 2013.

C. Constitutional Claim

1. Legal Framework of the Commerce Clause

Georgia's imposition of the duty to collect use tax on SBC's sales in Georgia does not

¹ This code section became effective on October 1, 2012, and thus applies to sales made by SBC from October of 2012 to May of 2013.

violate the Commerce Clause of the United States Constitution. The Commerce Clause authorizes Congress to “regulate Commerce with foreign Nations, and among the several States.” U.S. Const. art. 1, § 8, cl. 3. The United States Supreme Court has held that this language contains a negative aspect known as the dormant commerce clause, which prohibits certain state taxation of interstate commerce. Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992). A state may tax interstate commerce when 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.” Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). Here, SBC contends that Georgia’s imposition of a use tax violates the Commerce Clause because SBC does not have substantial nexus with Georgia.

“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.” Tyler Pipe Indus., Inc. v. Washington State Dep’t of Revenue, 483 U.S. 232, 250 (1987); see also Scripto, Inc. v. Carson, 362 U.S. 207 (1960). The Supreme Court has carved out a safe harbor for vendors “whose only connection with customers in the [taxing] [s]tate is by common carrier or the United States mail.” National Bellas Hess, Inc. v. Illinois Dep’t of Revenue, 386 U.S. 753, 758 (1967); see also Quill, 504 U.S. at 315 (reaffirming the bright-line physical presence test in Bellas Hess, but acknowledging that application of the practical analysis test articulated in Tyler Pipe and Scripto may vary depending on the facts of each case).

2. Previous SBC cases assessing SBC’s Commerce Clause Argument

Relying on Quill, SBC contends that it does not have substantial nexus with Georgia because it does not have a physical presence in Georgia in the form of an office, employees, or

agents. SBC has unsuccessfully raised this argument in multiple jurisdictions. In these cases, courts have found that SBC's reliance on schoolteachers to market and sell its merchandise has created substantial nexus. See Scholastic Book Clubs, Inc. v. Connecticut, 38 A. 3d at 1183, cert. denied, 2012 U.S. LEXIS 8019 (2012); Scholastic Book Clubs, Inc. v. Farr, 373 S.W.3d 558 (Tenn. Ct. App. 2012), cert. denied, 2012 U.S. LEXIS 9047 (2012); In Re Scholastic Book Clubs, Inc., 920 P.2d 947 (Kan. 1996); Scholastic Book Clubs, Inc. v. State Bd. of Equalization, 255 Cal. Rptr. 77 (1989); Scholastic Book Clubs, Inc. v. Alabama Dep't of Revenue, Docket No. S-14-374 (Ala. Tax Tribunal Mar. 25, 2016).

In the two most recent appellate decisions, Tennessee and Connecticut courts examined the same business model and legal arguments that are raised here and found that SBC operations exceeded the safe harbor recognized by Quill. In rejecting SBC's argument, the Tennessee Court of Appeals held that "SBC is not a vendor whose *only* connection with customers in Tennessee is by common carrier or by mail." Scholastic Book Clubs, Inc. v. Farr, 373 S.W.3d at 565. Rather, SBC "created a *de facto* marketing and distribution mechanism within Tennessee's schools . . . [and] [c]ontrary to SBC's assertion that it uses no public services in Tennessee, this [s]tate's school facilities and teachers are, in large part, funded by taxpayer dollars." Id.

Similarly, the Connecticut Supreme Court found that Connecticut schoolteachers, as SBC's representatives, engaged in activities that satisfied the nexus requirement of the Commerce Clause. Scholastic Book Clubs, Inc. v. Connecticut, 38 A.3d at 1199-1201. In so finding, the Court rejected SBC's arguments that state law required a representative to have a legal or agency relationship with a vendor in order to be subject to use tax. Id. The Court observed that, like salesmen, teachers brought SBC's products to their student's attention, provided a means to order, and delivered the products to students. Id.

The Alabama Tax Tribunal likewise upheld an assessment against SBC for sales and use tax under Commerce Clause scrutiny. Scholastic Book Clubs, Inc. v. Alabama, Docket No. S-14-374 at 21. The Alabama Tax Tribunal examined teacher affidavits substantially similar to the affidavits that SBC submitted in this case and found that the “reasons or motivations” for the teachers’ participation in the SBC book club are not relevant to the determination of constitutional nexus. Id. at 18-19. Both the Connecticut Supreme Court and the Alabama Tax Tribunal concluded that the controlling factor in finding nexus was “the effect of the in-state (teachers’) participation in fostering the out-of-state retailer’s goal of selling its products, not the (teachers’) motivation.” Scholastic Book Clubs, Inc. v. Connecticut, 38 A.3d at 1191; Scholastic Book Clubs, Inc. v. Alabama, Docket No. S-14-374 at 19.

3. Application of the Commerce Clause in this case

Just as in Connecticut, Tennessee, and Alabama, SBC has created a substantial nexus in Georgia through its reliance on Georgia schools, Georgia schoolteachers, and Georgia parent educators to solicit and sustain a consumer market in Georgia. All of SBC’s sales transactions in Georgia are dependent on and carried out by Georgia schoolteachers and parent educators who serve the essential solicitation, administration, collection, distribution, and customer service functions of transacting SBC sales in Georgia. SBC sends catalogs on a monthly basis to Georgia schools and classrooms. Classroom teachers and parent educators facilitate SBC sales by distributing order forms to students, collecting, and consolidating orders on a master order form, collecting money for the orders, and submitting the master order form and payment to SBC. SBC mails the ordered items to Georgia classrooms addressed either to the school or home school and the classroom teacher and parent educator sort and distribute the ordered items and handle any complaints, returns or refunds. Virtually all of SBC’s operations are conducted by

Georgia classroom teachers or parent educators who, in turn, are rewarded with bonus points based upon sales volumes and referrals of other teachers. Georgia teachers and parent educators therefore serve as the sole conduit through which SBC makes its Georgia sales. Thus, the activities performed by Georgia classroom teachers and parent educators are “significantly associated with [SBC’s] ability to establish and maintain a market” in Georgia. Tyler Pipe, 483 U.S. at 250.

Finally, the Tribunal finds that the cases to which SBC cites in support of its challenge are distinguishable. The Michigan Court of Appeals focused on the legal characterization of the relationship between SBC and the teachers and found that “physical presence” requires the existence of an agency relationship under Michigan law. Scholastic Book Clubs, Inc. v. Michigan, 567 N.W.2d 692, 695 (Mich. App. 1997), appeal denied, 586 N.W.2d 923 (Mich. 1998). Moreover, the court did not engage in further analysis of constitutional nexus and did not cite to, nor analyze, Tyler Pipe. Id. SBC also cites to Pledger v. Troll Book Clubs, 871 S.W.2d 389 (Ark. 1994), a case that is not applicable to the instant case in that the Arkansas Supreme Court never reached the issue of nexus. In short, only one state appellate court has found that SBC’s business model does not establish nexus, but based upon an analysis of state agency law and not upon an analysis of commerce clause nexus.

4. Petitioner’s *in loco parentis* argument

Petitioner argues that Georgia teachers and parent educators are not representatives of SBC because Georgia law recognizes that teachers act *in loco parentis* with respect to the children in their classroom. However, this argument was rejected by the Connecticut Supreme Court in Scholastic Book Clubs, Inc. v. Connecticut, 38 A.3d at 1193-94 (“[E]ven if the teachers were acting ‘*in loco parentis*,’ the fact remains that they also serve as the exclusive channel through

which [SBC] markets, sells and delivers its products to Connecticut schoolchildren.”). The undisputed facts in both cases show that the teachers distribute SBC catalogs and order forms to students to take home to their parents, and that the students return the order forms with individual selections and checks or cash from their parents. Based on these facts, the parents are helping their own children select and purchase books. Id. at 1193-94.

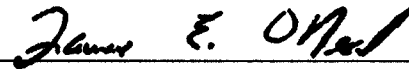
More importantly, SBC’s legal argument regarding the application of the doctrine of *in loco parentis* in Georgia is inapplicable because the cases cited by SBC pertain solely to the authority of the teacher to discipline and control students in the classroom. See Farmer v. State, 156 Ga. App. 837 (1980) (upholding principal’s search of student in possession of marijuana); State v. Young, 234 Ga. 488 (1975) (upholding principal’s authority to enforce school rules). These cases only demonstrate that Georgia law recognizes the teacher’s role as *in loco parentis* in the limited context of the teacher’s delegated authority to enforce rules in schools. The Tribunal finds that neither the cases nor the statute cited by SBC are relevant or dispositive as to the Department’s position that schoolteachers act as representatives of SBC for purposes of collecting sales tax. See Scholastic Book Clubs, Inc. v. Connecticut, 38 A.3d at 1193 (holding that SBC relied solely on cases involving the authority of a teacher to discipline and not the construction of a tax statute).

IV. CONCLUSION

Because SBC’s claims fail as a matter of law, the Court hereby **DENIES** SBC’s Motion for Summary Judgment and **GRANTS** the Department’s Motion for Summary Judgment and

thereby upholds the Department's Official Assessment and Demand for Payment against SBC.

SO ORDERED, this 14th day of February, 2017.



LAWRENCE E. O'NEAL, JR.
CHIEF JUDGE
GEORGIA TAX TRIBUNAL

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PETITIONER

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