

# Remote Retailers Held Responsible for Tax Collection in Washington

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If there's a lesson to be learned from the Washington Court of Appeals' recent holding in *Orthotic Shop Inc. and S&F Corporation v. Department of Revenue*, No. 39321-6-III (Jan. 23, 2024), it's that the use of a marketplace does not eliminate a remote seller's tax responsibilities, particularly for pre-*Wayfair* periods.

The dispute in *Orthotic Shop* involved a retailing business and occupation tax (B&O tax) and a retailing sales tax assessment against two merchants for sales they made on an online retailer's website. The audit report asserted that the merchants were "retailers" who maintained a nexus to Washington because they maintained a stock of goods in the online retailer's warehouses located in the state. As such, the audit report concluded that the merchants were liable for retailing B&O tax and sales tax on sales to Washington customers made via the online retailer's website.

The merchants admitted before the Court of Appeals that they sold their goods to consumers and not to the online retailer. However, the merchants challenged the assessment and argued that the online retailer's provision of fulfillment services necessarily rendered it a "consignee" responsible for remitting retailing B&O tax and sales tax on transactions facilitated through its website in accordance with WAC 458-20-159. The merchants also asserted that the assessment was unfair because they lacked an understanding that they could incur a tax collection liability in Washington through the storage of their merchandise in an in-state warehouse.

The Court of Appeals determined that the merchants failed to show that the online retailer was a consignee with sole responsibility for tax collection. "A consignee," the Court of Appeals explained, "makes sales on behalf of the consignor." By contrast, the merchants' product pages on the marketplace's website listed the merchants as the sellers, not the online retailer. Accordingly, the Court of Appeals concluded: "[s]ince the merchants sold to buyers, they are liable for retailing B&O tax on those sales."

The merchants' failure to list the online retailer as the "seller" on their respective sales pages was

also fatal to their argument that they were not liable for retailing sales tax on sales made via the online retailer's website. The Department of Revenue's administrative rules explain that while a consignee is responsible for collecting and remitting sales tax on sales made in its own name, when the consignee is selling in the name of the consignor, the consignor may instead report and remit the retail sales tax. Here, the Court of Appeals noted that while the online retailer's agreement with the merchants provided that it would remit the sales tax if the merchants asked it to do so, neither merchant made such a request.

The Court of Appeals also was unimpressed by the merchants' assertions that they did not understand that they could establish physical presence nexus and incur a tax liability based on the storage of their goods at a warehouse in the state. The Court of Appeals explained that ignorance of the law, was not an acceptable defense.

## CASE TAKEAWAYS

Although *Orthotic Shop* dealt with periods prior to Washington's implementation of marketplace laws on January 1, 2020, the case contains important considerations that remain relevant today. For example, because Washington's marketplace laws do not apply to B&O tax, a remote seller remains responsible for its own B&O tax remittance obligations under current law. Additionally, remote retailers selling tangible personal property must not forget to consider whether they have established "inventory nexus" in the state even if their total sales to Washington customers are under the state's \$100,000 economic nexus threshold.

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National Law Review, Volume XIV, Number 37

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