SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES E. D'AUGUSTE** **PART** **55**

Justice

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PEOPLE OF THE STATE OF

Plaintiff,

- v -

B&H FOTO & ELECTRONICS CORP.

Defendant.

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INDEX NO. 452106/2019

MOTION DATE 12/31/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 36, 37, 38, 39

were read on this motion to/for DISMISSAL.

Hon. James E. d'Auguste, J.S.C.

This action is brought by plaintiff The People of the State of New York, by the Office of the Attorney General of the State of New York (Attorney General), seeking penalties pursuant to Executive Law §63 (12), the New York State False Claims Act, State Finance Law §187 et seq., and Articles 28 and 29 of the Tax Law for the alleged failure by defendant B&H Foto & Electronics Corp. (B&H) to collect and remit certain New York State sales taxes. B&H now moves, pursuant to CPLR 3211 (a) (7), for an order dismissing the action for failure to state a cause of action. The Attorney General opposes this motion. This motion to dismiss is granted.

The transactions that the Attorney General contends that a sales tax is due consist of sales of goods, accompanied by so-called "Instant Savings," that is, sums of money that certain manufacturers provide to B&H as an incentive to sell those manufacturers' goods. B&H has engaged in these transactions since 2006. The sums are directly based on the volume of those manufacturers' goods sold by B&H, but B&H is not contractually required to, although it may

choose to, pass those sums on to its customers in the form of discounts from B&H's listed prices. (*See* Summons and Complaint, NYSCEF Doc. No. 11, ¶ 85). It is undisputed that B&H could retain the sums, or use them to pay for advertisements, or other expenses. The complaint alleges at length that B&H sought confirmation from its suppliers that it was not required to pass the sums that it received on to its customers, as though this effort, of itself, is evidence of an attempt on the part of B&H to avoid paying sales tax that was due. Similarly, the complaint alleges disagreements among B&H executives as to the proper tax treatment of the instant savings program as evidence that B&H knew that the program required the remittal of sales tax on disbursements received through "Instant Savings." The primary issue on this motion, however, is not what B&H believed it was required to do, but whether sales tax was in fact legally required to be levied on the funds provided to B&H by the manufacturers.

The "Instant Savings" program operates as follows. B&H purchases inventory wholesale from a manufacturer. If B&H and the manufacturer agree to participate in the "Instant Savings" program, the manufacturer will provide B&H with a promotional calendar for the items subject to the program. During the promotional period, B&H will receive some form of payment (typically a credit applied to future orders) for every item sold. Critically, B&H may, but is not required to, discount the items during the promotional period to encourage sales. Per screen captures provided by the defendants (*see* NYSCEF Doc. No. 38, at 2), items that are within the "Instant Savings" promotional period often have text below the item stating "Save [a dollar amount] Instantly" or "Save [a percentage of the purchase price] Instantly." At the end of the promotional period, B&H reports completed sales to the manufacturer to receive payment or a credit against future orders.

The Attorney General argues that "Instant Savings" funds transferred from the manufacturer are part of the total amount received as consideration in a retail transaction, and therefore, funds received through "Instant Savings" from the manufacturer are factored into "receipts" and subject to sales tax. To support this argument, the Attorney General compares the "Instant Savings" program to manufacturer's coupons, stating both are third-party payments to the retailer when an item is sold. (*See* Summons and Complaint, NYSCEF Doc. No. 1, ¶29). A manufacturer's coupon is a coupon that the customer provides as partial consideration at the point of sale, and the retailer uses the coupon to seek reimbursement from the manufacturer. For example, a customer purchasing a $1,000 camera would present a $200 manufacturer's coupon and pay the difference of $800 to the retailer. In some cases, the manufacturer's coupon can be incorporated into the retailer's checkout process and applied automatically. Then, the retailer presents the manufacturer's coupon to the manufacturer and receives the additional $200. Per the Attorney General's argument using the same example as above, during an "Instant Savings" promotional period, the retailer would drop the price of the camera from $1000 to $800 because the retailer knows that they will receive an additional $200 from the manufacturer. According to the Attorney General, New York retailers must remit sales tax for the full value of the camera when the customer uses a manufacturer's coupon as partial consideration, and the retailer is responsible for the difference in sales tax if the customer is only charged sales tax on the $800 payment. (*See* Summons and Complaint, NYSCEF Doc. No. 1, ¶29, citing 20 NYCRR § 526.5 [c][4]).

The Attorney General asserts that, even if B&H characterizes the transactions otherwise, the transactions under the "Instant Savings" program function as *de facto* manufacturer's coupon. The Attorney General highlights that the manufacturers remit payment per item sold,

and B&H's statements to the manufacturers that it retains pricing discretion in the retail sale are irrelevant for the tax analysis. (*See* Summons and Complaint, NYSCEF Doc. No. 1, ¶¶ 37-8 [internal citations omitted]). Additionally, since B&H always discounts the retail price of items during a manufacturer's "Instant Savings" promotional period, the Attorney General believes that the "Instant Savings" programs are just manufacturer's coupons by a different name.

B&H argues that the "Instant Savings" programs function as wholesale discounts calculated into the Cost of Goods Sold ("COGS"), rather than additional consideration transferred during the retail transaction. To support this, B&H distinguishes "Instant Savings" transactions from manufacturer's coupons in two ways. First, B&H receiving "Instant Savings" credits or payments are not contingent on whether B&H extended an equivalent retail price reduction, and second, the customer is not providing any form of consideration (such as a coupon) that can be calculated into the final value of the item purchased. (Pope Memorandum of Law, NYSCEF Doc. No. 12 at 2-3). In addition, B&H argues that calculating "Instant Savings" into COGS is consistent with Generally Accepted Accounting Principles and, therefore, is standard industry practice. (*Id.* at 2). Therefore, B&H believes that the "Instant Savings" transactions are discounts offered by the wholesaler solely to the retailer, and B&H has the discretion to put the "Instant Savings" items on sale to be competitive with other retailers.

The primary issue in this present action is whether disbursements through B&H's "Instant Savings" program are considered a "receipt," and thus subject to New York sales tax, or a reduction against the COGS, and thus not subject to sales tax. In New York, the Tax Law defines "receipts" as "the *sale* price of any property…, valued in money, whether received in money or otherwise. (NY CLS Tax Law § 1101[b][3] [emphasis added]). 20 NYCRR § 526.5(c) discusses using manufacturers coupons and rebates. Under subsections 1, 2, and 4, the

retailer must remit sales tax on the full amount including coupon value because the manufacturer has agreed to reimburse the retailer for the value of the coupon. Subsection 3 states that retailers may offer coupons, and if the coupon is not reimbursed by the manufacturer, sales tax is due only on the discounted price of the item. 20 NYCRR § 526.5(d)(2) reiterates this approach; except for certain exceptions that are not relevant to the present issue, consumer discounts are deducted against receipts and the retailer must remit sales tax on the discounted price, rather than the full price.

The Court focused on the mechanics of the transaction to determine whether "Instant Savings" disbursements are a "receipt" subject to sales tax or a reduction against the COGS. Per Professor Richard Pomp's opinion, sales tax is intended to tax personal consumption. (Pomp Opinion, NYSCEF Doc. No. 38, at 1). For manufacturer's coupons, the customer is providing full consideration for the item – cash payment for part of the value and a coupon for the cash value of the remainder of the payment. Using the example above, the buyer is still providing $1,000 in value for the camera when using a manufacturer's coupon – split between $800 in cash and a $200 manufacturer's coupon to be reimbursed by the manufacturer. In contrast, a customer during an "Instant Savings" promotional period provides only $800 in consideration (a cash payment) for the camera to the retailer, and thus has only consumed $800.

The Attorney General's position that "Instant Savings" disbursements are "receipts" does not properly take into account how the transaction between the manufacturer and the retailer works. Advertising "Instant Savings" is merely a marketing tactic to attract customers to a storewide sale, rather than evidence of a manufacturer's coupon. (*See* Attorney General Aff. in Opp., NYSCEF Doc. No. 18, at 3). A manufacturer's coupon is a negotiable instrument created by the manufacturer for the customer to use; manufacturer Instant Savings are not intended to

create a direct benefit to provide to the consumer. Since there is no privity between the manufacturer and the customer, B&H's Instant Savings program cannot be considered a manufacturer's coupon.

The two advisory opinions submitted by B&H---N.Y. Advisory Opinion No. TSB-A-98(88)S (12/30/1998) ("GM TSB") and N.Y. Advisory Opinion No. TSB-A-99(10)S (03/01/1999) ("Scan-Down TSB")---provide persuasive support for B&H's position that "Instant Savings" disbursements are not calculated into "receipts." While advisory opinions are limited to the facts presented in the respective advisory opinion and are not binding on other circumstances, the Court finds these two advisory opinions to provide persuasive guidance. In the GM TSB, General Motors ("GM") offered "dealer cash" as incentive payments to dealers for selling cars. However, the dealer had to pass-through 100% of the "dealer cash" to GM employees as a retail discount if a GM employee purchased a car through a dealer participating in this program. In this example, a dealer would receive $5,000 from the manufacturer per car sold, including cars sold to the public. Assuming the retail price of a car is $30,000, when a GM employee purchases the car, the dealer must sell the car for $25,000 and pass along the $5,000 in savings as a discount. The Technical Services Bureau concluded that the dealer does not add the $5,000 dealer cash into "receipts," and thus, the dealer does not need to remit sales tax on the $5,000 manufacturer payment. Due to the mandatory discount for GM employees, that part of the "dealer cash" program is more similar to a manufacturer's coupon than B&H's "Instant Savings."

The "Scan-Down TSB" advisory opinion fits this present action closely. In this advisory opinion, a supplier pays the retailer a fixed amount per product unit sold to the customer. This payment or price reduction is solely contingent on the number of units sold. The Technical

Services Bureau concluded that this type of transaction was not subject to sales tax. Like the present case, the retailer receives a payment from the manufacturer regardless of whether the customer receives a discount. In contrast, the advisory opinions provided by the Attorney General do not match the facts of this present case – primarily by addressing the tax implications of manufacturers coupons.

The Attorney General also alleges that B&H made "reverse false claims" pursuant to the New York State False Claims Act when failing to declare "Instant Savings" disbursements as receipts subject to sales tax. (*See* New York ex rel Seiden v Utica First Ins., 96 AD3d 67, 71 [1st Dept 2010] [internal citations omitted]). A "reverse false claim" is when an individual "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the state or local government." (*Id.*; State Finance Law § 189[1][g]). While factual allegations must be presumed to be true on a motion to dismiss, pursuant to CPLR 3211 (a) (7), legal conclusions need not be so presumed. (Landmark Ventures, Inc. v InSightec, Ltd., 179 AD3d 493, 494 [1st Dept 2020], citing Leder v Spiegel, 31 AD3d 266 [1st Dept 2006], affd, 9 NY2d 836 [2007], cert. denied sub nom Spiegel v Rowland, 552 US 1257 [2008]). Here, the allegations that B&H filed understated sales tax returns, and that it did so knowingly (Attorney General Aff. in Opp., NYSCEF Doc. No. 17 at 14-15), are both legal conclusions and need not be presumed to be true. For reasons stated above, B&H did not make any false statements on their tax returns when calculating "Instant Savings" disbursements into COGS rather than reporting these disbursements as "receipts" subject to sales tax.

Executive Law § 63 (12) is inapplicable here, because B&H has shown that it did not commit persistent fraud or illegality in the manner alleged by the Attorney General's petition.

B&H asserts that it merely recognized a potential tax issue with the "Instant Savings" program, discussed it internally (resulting in different opinions), consulted competitors, and amended future contracts with their manufacturers to clarify that the transactions in which they were engaging were structured properly for tax purposes. The Attorney General contends that B&H's actions are evidence of fraud, specifically B&H executives believing there may be a tax issue demonstrates knowledge. As an initial matter, the Court recognizes that internal discussions could support the existence of persistent fraud if coupled with a statutory violation. However, the absence of a statutory violation means that persistent fraud or illegality was not committed even if B&H believed that it was acting unlawfully.

Accordingly, the motion of defendant B&H Foto & Electronics, Corp. to dismiss this action is granted. The Clerk is directed to enter judgment dismissing complaint without costs or disbursements. This constitutes the decision and order of this Court.

9/21/2021
DATE

JAMES D'AUGUSTE, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE