

04-0029
Motor Vehicle
Signed 06/23/2005

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)		
)	ORDER	
Petitioner,)		
)	Appeal No.	04-0029
v.)		
)	Tax Type:	Motor Vehicle /
MOTOR VEHICLE ENFORCEMENT)		Advertisement Penalty
DIVISION OF THE UTAH)		
STATE TAX COMMISSION,)	Ref. Case No.	#####
)		
Respondent.)	Judge:	Robinson

Presiding:

R. Spencer Robinson, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE (by telephone)
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, from Motor Vehicle Enforcement
Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on February 28, 2005. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. On DATE, the Petitioner placed a newspaper advertisement in the (X) displaying two vehicles. One was a 1998 Subaru Forester station wagon. It was described as "(X)." The other was a 1990 Toyota Corolla, described as "(X)"
2. The advertisement said, "(X)" and "(X)"
3. Respondent provided copies of the NADA book for DATE and DATE. The DATE NADA highest retail value for the 1998 Subaru Forester wagon 5D S (the most expensive Forester model) was \$\$\$\$\$.

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The DATE NADA highest retail value was \$\$\$\$\$. Adding every possible option would increase the value by \$\$\$\$\$ in DATE, and by \$\$\$\$\$ in DATE. The highest NADA retail value in DATE would have been \$\$\$\$\$. The highest NADA retail value in DATE would have been \$\$\$\$\$. It is possible an adjustment for low mileage might have been sufficient to bring the price above \$\$\$\$\$. Neither party offered data on mileage adjustments.

4. The purchase price of the Forester on January 5, 2004, was \$\$\$\$\$, \$\$\$\$\$ more than the highest NADA value as of DATE, and \$\$\$\$\$ more than the highest NADA value as of DATE.
5. The Forester sold alone. It had ##### miles on the date of sale.
6. Neither party introduced evidence on the value of the Toyota.
7. Petitioner has not had another violation within the prior 12 months.

APPLICABLE LAW

Utah Code Ann. §41-3-210(1)(a) provides that a person licensed under the Motor Vehicle Business Regulation Act may not "intentionally publish, display, or circulate any advertising that is misleading or inaccurate in any material fact or that misrepresents any of the products sold, manufactured, remanufactured, handled, or furnished by a licensee."

Section A. of Utah Admin. Rule R877-23V-7 ("Rule 7") lists a number of standards of practice and provides that the violation of any of the standards is also considered a violation of UCA §41-3-210. The standard in R877-23V-7 (A)(15) provides, as follows:

Free. "Free" may be used in advertising only when the advertiser is offering an unconditional gift. If receipt of the merchandise or service is conditional on a purchase the following conditions must be satisfied:

- a) The normal price of the merchandise or service to be purchased may not have been increased nor its quantity reduced;
- b) The advertiser must disclose this condition clearly and conspicuously together with the offer and not by placing an asterisk or symbol next to the word "free" and then referring to the condition in a footnote; and

- c) The offer must be temporary. For purposes of this subsection, "temporary" means that the offer is made for no more than 30 days during any 12-month period.

DISCUSSION

Petitioner has the burden to show that the Division's assessment of the penalty is incorrect. In order to do this, Petitioner must show it complied with R877-23V-7 (15). Strictly construing the language of the rule eliminates the requirement to establish that the combined value of the two vehicles did not exceed the DATE advertised price. The rule requires only that Petitioner establish that the price of the Forester was not increased to cover the cost of the Corolla. In this case, the January 5, 2004 sale of the Forester for \$\$\$\$\$, \$\$\$\$\$ more than the DATE advertised price of \$\$\$\$\$ for both vehicles, shows that the price of the Forester was not increased above its market value in order to make up for the value of the Corolla.

It is important to note that the Respondent did not have information regarding the January 5, 2004 sale when it notified Petitioner, on DATE that the DATE advertisement was in violation of the statute and rule. The Respondent initiated the action in good faith, based on information regarding the NADA value of the Forester. Petitioner did not supply information regarding the January 2004 sale at the Initial Hearing. It was not until the Formal Hearing that Petitioner provided evidence of the January 2004 sale.

ORDER

Based upon the foregoing, the Commission finds that the advertisement at issue did not violate Utah Code Ann. §41-3-210(1)(a) and Rule R877-23V-7(15). Accordingly, the penalty cannot be sustained. It is so ordered.

DATED this _____ day of _____, 2005.

R. Spencer Robinson
Administrative Law Judge

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BY ORDER OF THE UTAH STATE TAX COMMISSION.

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this _____ day of _____, 2005.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Palmer DePaulis
Commissioner

Marc B. Johnson
Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63-46b-13. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §§59-1-601 and 63-46b-13 et. seq.

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