

04-1032
Motor Vehicle
Signed 03/10/2005

BEFORE THE UTAH STATE TAX COMMISSION

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|-----------------------------|---|------------------------------|
| PETITIONER 1, PETITIONER 2, |) | FINDINGS OF FACT, |
| PETITIONER 3, PETITIONER 4, |) | CONCLUSIONS OF LAW, |
| |) | AND FINAL DECISION |
| |) | |
| |) | |
| Petitioners, |) | |
| |) | |
| v. |) | Appeal No. 04-1032 |
| |) | |
| MOTOR VEHICLE ENFORCEMENT |) | |
| DIVISION, UTAH STATE TAX |) | Tax Type: Penalty/Unlicensed |
| COMMISSION, |) | Salespersons |
| |) | Judge: Phan |
| Respondent. |) | |

Presiding: Palmer DePaulis, Commissioner
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE 1, Attorney at Law
PETITIONER REPRESENTATIVE 2
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, Director, Motor Vehicle Enforcement
Division
RESPONDENT REPRESENTATIVE 3, Assistant Director Motor Vehicle
Enforcement Division
RESPONDENT REPRESENTATIVE 4, Sergeant,

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. Petitioners are appealing fines assessed under Utah Code Sec. 41-3-702 for violations relating to unlicensed salespersons. The letters indicating the fines had been imposed were dated July 6, 2004.

The amounts of the fines for each dealership and number of violations upon which they were determined are as follows:

| PETITIONER REPRESENTATIVE 2 Dealership | Amount | Number of Violations |
|--|------------|----------------------|
| PETITIONER 2 | \$\$\$\$\$ | ##### |
| PETITIONER 4 | \$\$\$\$\$ | ##### |
| PETITIONER 3 | \$\$\$\$\$ | ##### |
| PETITIONER 1 | \$\$\$\$\$ | ##### |
| Total _____ | \$\$\$\$\$ | ##### |

2. The violations occurred from June 2002 to February 12, 2004. Each violation represents one unlicensed salesperson that was employed by the dealership that sold at least one vehicle for the dealership during the period at issue. There were several additional employees indicated in the personnel records that worked for a period as unlicensed salespersons that had not sold a single vehicle and they were not included in the number of violations. The statute provides a graduated fine for each offense, with a fine of “\$250 for the first offense, \$1,000 for the second offense, and “\$5,000 for the third and subsequent offenses.” Utah Code Sec. 41-3-702(2)(a). In determining the amount of the penalties Respondent considered each of the four dealerships separately. It calculated the fine for each dealership on the basis of \$250 for the first dealership violation, \$1,000 for the second dealership violation and \$5,000 for each additional dealership violation.

3. Originally Respondent had considered issuing the penalty by determining that a violation occurred every time an unlicensed salesperson sold a motor vehicle. During the period at issue ##### vehicles were sold by unlicensed salespersons by the combined dealerships. Respondent had concluded that using this approach the resulting fine would be \$\$\$\$\$.

4. Petitioners did not dispute that persons whom they employed were acting as salespersons and selling cars at their dealerships without the proper salesperson license. They did not dispute

the number of unlicensed salespersons, nor did they dispute the number of vehicles that the unlicensed sales persons sold for Petitioners.

5. The fines were the result of an investigation into the PETITIONER REPRESENTATIVE 2 Dealerships that started in February 2004. Although Respondent randomly visits dealerships and checks for the proper salesperson and dealer licenses as part of its enforcement duties, the investigation in this matter resulted from a conversation with a former employee. The former employee, (X) had worked for the PETITIONER 1 dealership as a salesperson. He reported to Sgt. RESPONDENT REPRESENTATIVE 4 that he had sold cars at the dealership without first obtaining a salesperson license and that he was aware other salespersons were unlicensed. As a result of this information Respondent investigated the PETITIONER REPRESENTATIVE 2 Dealerships.

6. When the investigators for Respondent visited the first PETITIONER REPRESENTATIVE 2 location they discovered that none of the salespersons at the dealership at that time had a salesperson license. In addition no salesperson licenses were posted at the dealership as is required by law. The investigations at the other PETITIONER REPRESENTATIVE 2 dealerships also resulted in the discovery of numerous unlicensed salespersons.

7. When interviewed by Sgt. RESPONDENT REPRESENTATIVE 4 concerning the violation, salespersons indicated that they were unaware that they needed to have a licenses and also generally that they had to “share” the commissions on their sales. The unlicensed salespersons did not indicate that they had already filled out the Salesperson License Application Forms, nor did they think they were already licensed. Respondent’s investigators requested the salespersons’ “jackets” and in looking through these files found employment information like W-4’s and sale transactions. However, they found no salesperson licenses or completed license application forms. Managers at the dealerships referred the investigators to EMPLOYEE, who was the central Human Resource/Payroll Administrator, for the combined PETITIONER REPRESENTATIVE 2 Dealerships and EMPLOYEE’S supervisor.

8. Sgt. RESPONDENT REPRESENTATIVE 4 then interviewed EMPLOYEE and together they looked through her personnel files and office. They found no salesperson licenses, no completed Salesperson License Application Forms, and no checks for the license fees.

9. After the investigation occurred at the dealership locations, and PETITIONER REPRESENTATIVE 2 was contacted of the violations, Respondent provided new Salespersons Application Forms and fingerprint cards that were completed and returned to Respondent along with a new check or checks for the fees. Licenses were issued on February 12, 2004, to all salespersons employed at that time who had not been licensed. The issuance of licenses occurred within two days of the initial visits to the dealership by Respondent's investigators.

10. Once a Salesperson License is issued the dealership is required by statute to post the Certificate of License in a conspicuous place at the dealership. In addition a pocket card license is issued to the individual salesperson, who is required to display it upon request.

11. PETITIONER REPRESENTATIVE 2 was an owner of the dealerships at issue. It was PETITIONER REPRESENTATIVE 2's position that after he had acquired the group of dealerships he had determined it would be better to centralize human resource and payroll functions and he determined this should be completed by EMPLOYEE. It was his understanding that making sure the salespersons were licensed fell under the human resource function and also that she had done this work for the single dealership prior to the consolidation. He testified that the company's policy during the period when the violations occurred was that as soon as a salesperson was hired at one of the four dealerships, that dealership would make sure the salesperson completed a Salesperson License Application Form and the hiring dealership would issue a check for the \$\$\$\$ fee, then the form and check would be forwarded to EMPLOYEE who would send it to Respondent. He also testified that none of the managers or salespersons brought to his attention the fact that they had not received the salesperson licenses. Two of the dealership managers testified that vehicles were sold by employees, never by non-employee trainees and they were aware that salespersons needed licenses,

although there was confusion on the part of one manager concerning salesperson who transferred from one of the other PETITIONER REPRESENTATIVE 2 Dealerships.

12. The Division had never previously assessed fines against a dealership for unlicensed salespersons in an amount as high as the fines against the Petitioners. However, the Division had never previously encountered dealerships with so many unlicensed salespersons.

13. Petitioners' assertion that the error was the lapse of the Human Resource/Payroll Administrator, that Salesperson License Application forms had been completed, fingerprints obtained and checks cut and forwarded to EMPLOYEE, was contradicted by the fact that none of these documents were ever found by Respondent, nor were they presented by Petitioners. If these documents had been prepared there would have at least been an accounting record of the checks, if not the completed application forms and finger print cards somewhere at the dealership. Petitioners did not produce this type of evidence. When the unlicensed salespersons obtained their licenses in February of 2004, they all completed new applications and new checks were cut. In addition, the unlicensed salespersons told investigators they did not know they were supposed to have a license. It was not their representation that they had already filled out the application form.

APPLICABLE LAW

Utah Code Ann. §41-3-201 (2) states a person may not act as salespersons without having procured a license issued by the administrator.

Utah Code Ann. §41-3-202 provides, in pertinent part, as follows:

(5) A salesperson's license permits the licensee to act as a motor vehicle salesperson and is valid for employment with only one dealer at a time.

Utah Code Ann. §41-3-203 provides, in pertinent part, as follows:

(1) (b) The license of each salespersons shall be delivered or mailed to the dealer employing the salesperson and it shall be kept in the custody and control of the dealer and conspicuously displayed in the dealer's place of business.

(2) (a) The administrator shall prepare and deliver a pocket card, certifying that the person whose name is on the card is licensed under this chapter.

(b) Each salesperson's card shall also contain the name and address of the dealer employing him.

(c) Each salesperson shall on request display his pocket card.

Utah Code Ann. §41-3-210, provides, in pertinent part, as follows:

(1) The holder of any license issued under this chapter may not:
(m) as anyone other than a salesperson licensed under this chapter, be present on a dealer display space and contact prospective customers to promote the sale of the dealer's vehicles;

....

(6) A dealer may not assist an unlicensed dealer or salesperson in unlawful activity through active or passive participation in sales, or by allowing use of his facilities or dealer license number, or by any other means.

Utah Code Ann. 41-3-702 provides, in pertinent part, as follows:

(1) The following are civil violations under this chapter and are in addition to criminal violations under this chapter:

(c) Level III:

(vii) assisting an unlicensed dealer or sales person in sales of motor vehicles:

(2)(a) The schedule of civil penalties for violations of Subsection (1) is:

(iii) Level III: \$250 for the first offense, \$1,000 for the second offense, and \$5,000 for the third and subsequent offenses.

CONCLUSIONS OF LAW

1. There is no need for the Commission to make a finding of fact as to whether the egregious nature of the violations in this matter rose to the level of intentional malfeasance. The applicable statute, Utah Code Sec. 41-3-702 is a strict liability statute. There is no basis in law for the Commission to reduce the fine if it determines the acts were unintentional or merely negligence. The Utah Legislature has not given the Tax Commission that discretion. If the violations have occurred, and the violations were not in dispute in this matter, the Commission must apply the statutory fine listed at Utah Code Sec. 41-3-702(2)(a)(iii).

2. Utah Code Sec. 41-3-702(1)(c)(vii) states that the offense is the "assisting an unlicensed dealer or salesperson in sales of motor vehicle." Considering that the statute specifies "sales" rather

than “a sale,” Respondent’s conclusion is reasonable that the number of offenses should be counted by the number of salespersons who sold a vehicle, rather than the number of vehicles sold by an unlicensed salesperson.

3. After determining what constitutes the offense, the next issue is to determine which were first offenses, second offenses and third offenses for purposes of determining the dollar amount for each offense. Petitioner points out in this matter that the graduated fines were intended as a way to give dealers notice that their act is in violation of the law. A first violation would occur. The dealer would be “notified” by Respondent when Respondent assessed the small first time fine. In this matter Petitioner argues it had no notice that its salespersons were not licensed. However, the Commission would point out that the responsibility is on the dealer and salesperson to make sure that they have the proper licenses and the industry in general is aware that salespersons need licenses and that licenses need to be posted at the dealership. In this matter there were ##### vehicles sold by unlicensed salespersons. Violations such as have occurred here were certainly much more serious than instances where one unlicensed salesperson sold a vehicle prior to obtaining a license and a fine of \$250 was imposed. It is reasonable that there be a fine for each offense and the Utah legislature has determined that the amounts be graduated and significant for third and subsequent offense.

4. Petitioners argues the penalties violates excessive fines clauses of the state and federal constitution and that the fine is “grossly disproportionate” to the gravity of the offense. They argue there was no harm to the public that resulted from the sales by unlicensed salespersons during this period. However, the Utah Legislature classified this type of violation as a Level III violation, which imposes the highest penalties. Therefore, the implication is that they considered sales by unlicensed salespersons to be a serious offense. Respondent argues that if the fine is considered in comparison to the total dollar amount of sales it is not excessive. Respondent points out that at an average price of \$\$\$\$\$ for each of the ##### new cars sold the total sales would be over \$\$\$\$\$ and the fine assessed around %%% of the total sales. In light of the number of violations and length of time over which they occurred, the Tax Commission would not consider the

amount of the fine to be excessive. Regardless, the Tax Commission notes that it does not have the authority to find that the applicable statute is unconstitutional. Petitioners have raised the issue in this proceeding as may be required of Petitioners should they appeal the matter to the District Court or Supreme Court. See Nebeker v. Utah State Tax Comm'n, 34 P.3d 180 (Utah 2001).

DECISION AND ORDER

Based upon the foregoing, the Tax Commission denies Petitioners appeal in this matter. It is so ordered.

DATED this ____ day of _____, 2005.

Jane Phan, Administrative Law Judge

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 and Payment Requirement: 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. Failure to pay the balance resulting from this order within thirty (30) days from the date of this order may result in a late payment penalty.

