05-0013
MOTOR VEHICLE
SIGNED 01-06-2005

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, v. MOTOR VEHICLE ENFORCEMENT DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	)	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION** Appeal No. 05-0013 Case No: ##### Tax Type: Motor Vehicle Advertisement Violation Judge: Chapman

Presiding:
Marc B. Johnson, Commissioner
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER REP 1, Attorney
PETITIONER REP 2, General Manager
For Respondent: RESPONDENT REP 1, Assistant Attorney General
RESPONDENT REP 2, from Motor Vehicle Enforcement Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on August 18, 2005. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. PETITIONER is licensed as a motor vehicle dealer in Utah.

2. The Motor Vehicle Enforcement Division ("Division") issued a letter to

PETITIONER, the Petitioner, on December 29, 2004 in which it informed the Petitioner that an advertising flyer it had mailed to COUNTY residents was in violation of Utah law ("Exhibit R-3").

3. In its December 29, 2004 letter, the Division not only informed the Petitioner that the advertising violation was a Level III violation, but also that the violation was the Petitioner's second offense in the last 12 months. For these reasons, the Division assessed the Petitioner a $$$$$ fine.

4. At issue in this appeal is whether the advertising flyer referred to in the Division's December 29, 2004 letter is a violation of Utah law and, if so, whether the violation warrants a fine of $$$$$.

5. Prior to the end of the 2004 calendar year, the Petitioner mailed the advertising flyer referred to in the Division's January 29, 2004 letter ("Exhibit P-1") to residents of COUNTY, Utah to advertise a sale of motor vehicles at the PETITIONER dealership in CITY, COUNTY, Utah, that was to be held on December 30th and 31st, 2004 and January 1st, 2005.

6. Included in the information appearing on the front of the advertising flyer are the following clauses: " (PORTION REMOVED)."

7. The clause " (PORTION REMOVED)" also appeared on the back of the advertisement.

8. In a letter dated March 4, 2004 ("Exhibit R-2"), the Division fined the Petitioner $$$$$ for a March 2, 2004 advertisement violation. In the March 4, 2004 letter, the Division asserted that PETITIONER had violated Utah law by impermissibly including a statement

concerning trade-in amounts or trade-in allowances in its advertisement. PETITIONER paid the $$$$$ fine for the violation on April 26, 2004.

9. As an alternative to imposing a $$$$$ fine for the advertising violation at issue in this matter, the Petitioner proposes a "plea in abeyance," where the amount of the fine would become dependent on whether the Petitioner incurred another advertising violation within the next year. If the Petitioner did not incur another violation within the next year, the Commission would reduce the fine from $$$$$ to $$$$$. If the Petitioner were to commit another violation within the next year, the Petitioner would incur the full $$$$$ for the violation at issue in this appeal.

10. Should the Commission not accept the Petitioner's proposed plea in abeyance, the Petitioner argues that the current advertising violation should be fully abated because the Petitioner's use of the word "wholesale " in its advertising flyer was not used with the intent that the dealership would sell any motor vehicle at its wholesale price. Instead, the Petitioner claims that the word was used in a "modifying" sense to explain that it was offering the vehicles for sale prior to the vehicles going to an auction at which they would be sold for wholesale prices.

11. Furthermore, should the Commission not accept the plea in abeyance and not find that the Petitioner's use of the word "wholesale" was permissible under Utah law, the Petitioner argues that the violation at issue is the first offense within the past 12 months involving the impermissible use of the word "wholesale," and as such, the fine should only be $$$$$, not the $$$$$ imposed by the Division.

12. The Division argues that any use of the word "wholesale" in an advertisement involving motor vehicles is a violation of Utah law, regardless of the context. Furthermore, the Division asserts that, although the violation at issue may be the first involving the impermissible use of the word "wholesale," the violation is nevertheless the second advertising violation that the Petitioner has incurred within the past 12 months and, as a result, the fine should be $1,000 under Utah law.

APPLICABLE LAW

1. Utah Code Ann. §41-3-210 prohibits the holder of a license issued under the Utah Motor Vehicle Business Regulation Act from engaging in certain activities, pertinent parts as follows:

> (1) The holder of any license issued under this chapter may not:
> (a) 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, furnished by a licensee;
> . . .
> (c) violate this chapter or the rules made by the administration;
> . . . .

2. Utah Admin. Rule R877-23V-7 ("Rule 7") provides guidelines concerning misleading advertising as it relates to motor vehicles and provides, pertinent parts as follows:

> A. Violation of any of the following standards of practice for the advertising and selling of motor vehicles is a violation of Section 41-3-210.
> . . . .
> 4. Savings and Discount Claims. Because the intrinsic value of a used vehicle is difficult to establish, specific claims of savings may not be used in an advertisement. This includes statements such as, "Was priced at $....., now priced at $.....

> a) The word "wholesale " may not be used in retail automobile advertising.
>
> . . . .
>
> 6. Trade-in Allowance. Statements representing that no other dealer grants greater allowances for trade-ins may not be used. A specific trade-in amount or range of trade-in amounts may not be used in advertising.
>
> . . . .

3. Utah Code Ann. §41-3-702 provides that, for purposes of the Utah Motor Vehicle Business Regulation Act, certain activities are considered civil violations and subject to civil penalties, pertinent parts as follows:

> (1) The following are civil violations under this chapter and are in addition to criminal violations under this chapter:
>
> . . . .
>
> (c) Level III:
>
> . . . .
>
> (viii) advertising violation.
>
> (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.
>
> (b) When determining under this section if an offense is a second or subsequent offense, only prior offenses committed within the 12 months prior to the commission of the current offense may be considered.
>
> . . . .

DISCUSSION AND CONCLUSIONS OF LAW

PETITIONER is a dealership selling motor vehicles in CITY, Utah. On December 29, 2004, the Division informed the Petitioner that an advertising flyer it mailed to customers to advertise a sale occurring on December 30th and 31st, 2004 and January 1st, 2005 violated Utah law, specifically Section 41-3-210(1)(a) and Rule 7(A)(4)(a). The Division further concluded that this

violation was a Level III violation, as described under Section 41-3-702(1)(c)(viii). The Division also found that the Petitioner had incurred another Level III violation on March 2, 2004, less than 12 months prior to the 2004 year-end mailing of the flyer at issue in this matter. For these reasons, it considered the advertising violation at issue to be a second violation within 12 months and, in accordance with Section 41-3-702(2), imposed a fine of $1,000.

Plea in Abeyance. The Petitioner first asks the Commission to accept a "plea in abeyance," so that should the Petitioner not commit another advertising violation in 12 months, the $$$$$ fine imposed by the Division would be reduced to $$$$$. However, the Commission is given no authority to waive or reduce a civil penalty that is properly imposed under the Utah Motor Vehicle Business Regulation Act. Accordingly, the Petitioner's proposed plea in abeyance is denied.

Civil Violation. Before determining if the civil penalty was properly imposed, the Commission must first determine if a civil violation occurred. Section 41-3-702(1)(c)(viii) provides that an advertising violation is a Level III civil violation. The advertising flyer at issue (Exhibit P-1), contains, in two separate places, a sentence that reads, "(PORTION REMOVED)." Utah Code Ann. Sec. 41-3-210(1) prohibits the publication of advertising that is misleading or inaccurate. Rule 7, enacted with substantial input from the motor vehicle dealers associations and intended to provide guidance concerning advertisements that would be considered misleading, expressly prohibits the use of the word "wholesale " in retail automobile advertising (see Rule 7(A)(4)(a)) . The Petitioner admits that the word "wholesale " appeared in its advertising flyer, but argues that the context in which it is used is not misleading. The Commission disagrees. The Commission believes that a

customer reading the advertising flyer could reasonably believe that the Petitioner might be selling vehicles at wholesale prices. Furthermore, the prohibition of using the word "wholesale ," in Rule 7(A)(4)(a), in motor vehicle advertising is absolute and is not dependent on the context of the word's use. For these reasons, the Commission finds that the advertising flyer violated Section 41-3-210 and Rule 7 and, as a result, is an advertising violation. In accordance with Section 41-3-702, the advertising violation is also a Level III civil violation for which a penalty must be imposed.

Civil Penalty. Section 41-3-702(2)(a)(iii) provides that the amount of the penalty associated with a Level III civil violation is dependent on the number of Level III civil violations that have been committed within the past 12 months. Although neither party provided the Commission with information concerning the mailing date of the advertising flyer at issue (Exhibit P-1), the Commission finds that the flyer was mailed prior to the end of the 2004 calendar year because it advertised a sale occurring at the end of the year. In addition, the Division submitted evidence showing that the Petitioner committed another advertising violation on March 2, 2004, less than twelve months prior to the year-end 2004 (see Exhibit R-2). The Petitioner did not deny that it committed an advertising violation on March 2, 2004 or that it paid the resulting penalty without protest. The March 2, 2004 offense concerned an advertisement related to trade-in vehicles and, because it was a violation of Section 41-3-210 and Rule 7(A)(6), was an advertising violation. Accordingly, the March 2, 2004 offense was a Level III civil violation under Section 41-3-702.

Second Offense. The Petitioner argues that should the Commission find both offenses to have occurred in the same year and to be Level III civil violations, the Commission

should consider the offense at issue in this appeal to be a “first” offense because it is the first time that the Petitioner committed the offense of using the word “wholesale ” in its advertising. The Commission disagrees.

The language of Section 41-3-702(2)(b) specifically provides that when determining if an offense is a second or subsequent offense, one considers if a "prior offense" has been committed, not whether a prior offense of the same type has been committed. Section 41-3-702(1)(c) lists eight separate Level III offenses, with only one of these being an advertising violation. Subsection 702(2) does not specify that an offense is a second violation only if the violator committed the same type of Level III offense within the past 12 months. Instead, the only requirement for an offense to be considered a second offense is if another offense occurred within the past 12 months. As a result, committing two differently enumerated Subsection 702(1)(c) offenses within 12 months would result in the latter offense qualifying as a second offense. Likewise, the commission of two different advertising violations also qualifies as two Level III violations and, should they occur within a 12-month period, the latter offense would be considered a second offense. For these reasons, the Commission finds that the advertising violation at issue in this matter is the second Level III offense committed by the Petitioner within a 12-month period and, accordingly, the $$$$$ fine imposed by the Division is correct.

DECISION AND ORDER

Based on the foregoing, the Commission finds that the use of the word "wholesale " in the advertising flyer at issue (Exhibit P-1) is a Level III violation, and because this violation is the second Level III offense committed by the Petitioner within a 12-month period, the Division properly imposed a $$$$$ penalty. Accordingly, the Division's penalty is sustained and the Petitioner's appeal is denied. It is so ordered.

DATED this _____ day of _____, 2005.

_____
Kerry R. Chapman
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: 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.

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