

08-0192
Motor Vehicle
Signed 07/11/2008

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER,</p> <p>Petitioner,</p> <p>vs.</p> <p>MOTOR VEHICLE ENFORCEMENT DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p>Respondent.</p>	<p>INITIAL HEARING ORDER</p> <p>Appeal No. 08-0192</p> <p>Account No. #####</p> <p>Tax Type: Advertisement Violation</p> <p>Audit Period: 11/23/07</p> <p>Judge: Jensen</p>
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Presiding:

Clinton Jensen, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE 1, from COMPANY A
PETITIONER REPRESENTATIVE 2, from COMPANY B
PETITIONER REPRESENTATIVE 3, from COMPANY C and
COMPANY D
PETITIONER REPRESENTATIVE 4, from COMPANY E
PETITIONER REPRESENTATIVE 5, from COMPANY F
PETITIONER REPRESENTATIVE 6, from COMPANY G

For Respondent: RESPONDENT REPRESENTATIVE, from the Motor Vehicle
Enforcement Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing on May 27, 2008 in accordance with Utah Code Ann. §59-1-502.5.

Although Petitioner is listed as PETITIONER, the parties agree that this is an appeal of ##### \$250 fines that were levied individually against the ##### (X) dealers making up the ASSOCIATION (the "Association"). Those dealers are COMPANY A, COMPANY B, COMPANY C, COMPANY D, COMPANY E, COMPANY F, and COMPANY G. Each of the dealers involved has paid a \$250 fine, but all dispute the validity of the fines. These fines arise out of a single advertisement that appeared on November 23, 2007.

The Division alleges that the November 23, 2007 advertisement violated Utah Code Ann. §41-3-210 and Utah Administrative Rule R877-23V-7 because it advertised a vehicle price without properly disclosing that the price listed was for a lease.

Petitioner does not dispute that the November 23, 2007 advertisement presented a technical violation of Utah law. However, Petitioner argues that the fines at issue and the record of this offense attributable to each of the dealers in this case be reversed because a group over which Petitioner has no direct control aired the advertisement.

Petitioner's representative explained that one of the requirements that (X) imposes on its dealers in Utah is that the dealers join the Association. Among other activities, the Association pools advertising funds and runs advertisements for all of the dealers in the association. The November 23, 2007 advertisement at issue in this case was an ad run by the Association. An out-of-state advertising agency produces advertisements for the Association and works to ensure compliance with the requirements of both (X) and any states in which the advertisements are to run. In the case of the November 23, 2007 advertisement, none of the ##### dealers making up the Association reviewed or approved the ad before its airing. While the advertisement itself refers to the (X) in the main ad, it closes with a representative map listing each of the ##### individual dealers by name and approximate location on the map.

APPLICABLE LAW

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; [or] (c) violate this chapter or the rules made by the administration; . . . (Utah Code Ann. Sec. 41-3-210 (1)).

When an advertisement relates to a lease, the advertisement must make it readily apparent that the transaction advertised is a lease. The word "lease" must appear in a prominent position in the advertisement in a typeface and point size comparable to the largest text used to directly advertise the vehicle. Statements that do not use the term "lease" do not constitute adequate disclosure of a lease. Lease advertisements may not contain the phrase "no down payment" or words of similar import if an outlay of money is required to lease the vehicle. Lease terms that are not available to the general public may not be included in advertisements directed at the general public. Limitations and qualifications applicable to the lease terms advertised shall be clearly and conspicuously disclosed. (Utah Administrative Rule R877-23V-7(20)).

A disclosure appearing in television advertisements must clearly and conspicuously feature all necessary information in a manner that can be read and understood if type is used, or that can be heard and understood if audio is used. Fine print and mouse print do not constitute clear and conspicuous disclosure. (Utah Administrative Rule R877-23V-7(21)).

The fines for violations of Utah Code Ann. § 41-3-210 increase with the number of violations within 12 months. (Utah Code Ann. § 41-3-702(2)).

DISCUSSION

There does not appear to be an issue of whether the advertisement at issue violates Utah Code Ann. §41-3-210 and Utah Administrative Rule R877-23V-7. The advertisement provides a lease payment amount and does not adequately disclose that it is a lease. As for Petitioner's position that a third party produced the advertisement, it is well settled that when a principal employs another to act in the place of the principal, the principal is accountable for the agent's actions. Thus, while it may involve time and expense for the ##### members of the Association to review advertisements produced for the Association, the members have the possibility of putting themselves at risk when they delegate production of advertisements to another individual or business.

Petitioner also expressed concern regarding possible problems that may arise in the future if a record of this violation remains on the record of each of the ##### dealers involved. The problem would come not with this violation but with additional violation(s) occurring between November 23, 2007 and November 23, 2008. Utah law allows for an increasing fine amount for additional violations occurring in a one-year period. The parties agree that any effect of the current violation on the amount of any future fine will be gone by one year from this violation, which will be November 23, 2008. The parties likewise agree that there were no additional violations between November 23, 2007 and the date of the May 27, 2008 hearing in this matter and that the history of each of the ##### dealers suggests that the chance of additional violations between May 27, 2008 and November 23, 2008 is negligible at most.

The problem with a record of a violation in this case is that it is not divisible among individual dealers. An individual dealer either has a violation on its record or it does not. It may burden ##### dealers to each have a violation on its record, but failing to place the violation on any record could show favoritism by conferring a benefit on some dealers that is not available to single dealers making a single violation. Reviewing this issue, the Commission determines that it is clear that the advertisement in question was in violation of Utah advertising rules and that it was aired by a group acting as agent for each of the ##### dealers making up the Association.

DECISION AND ORDER

The advertisement at issue is in violation of Utah Admin. Rule R877-23V-7 and Utah Code Ann. §41-3-210. On that basis, the Commission sustains the actions of the Division in finding a violation and levying fines for that violation.

This Decision does not limit a party's right to a Formal Hearing. Any party to this case may file a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed to the address listed below and must include the Petitioner's name, address, and appeal number:

Utah State Tax Commission
Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2008.

Clinton Jensen
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION.

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

DATED this _____ day of _____, 2008.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner