

09-2279
MISCELLANEOUS
SIGNED 10-02-2009

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER,</p> <p style="padding-left: 40px;">Petitioner,</p> <p>vs.</p> <p>MOTOR VEHICLE ENFORCEMENT DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="padding-left: 40px;">Respondent.</p>	<p>INITIAL HEARING ORDER</p> <p>Appeal No. 09-2279</p> <p>Account No. #####</p> <p>Tax Type: Advertisement Violation</p> <p>Audit Period: May 25, 2009</p> <p>Judge: Jensen</p>
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Presiding:
Clinton Jensen, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER REP, for PETITIONER
For Respondent: RESPONDENT REP, from the Motor Vehicle Enforcement Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing on September 2, 2009 in accordance with Utah Code Ann. §59-1-502.5.

Petitioner is appealing a \$\$\$\$ fine assessed for publishing an advertisement in violation of Utah Code Ann. Section 41-3-210 and Utah Admin. Rule. R877-23V-7(2)(f). The advertisement, which was published on May 25, 2009, stated, "(X)." The Division characterized this violation as the fourth advertising violation for the holder of this license in a 12-month period.

Petitioner did not dispute that it had placed the claimed advertisement on May 25, 2009, that the advertisement was in violation of Utah law, or that this would be the fourth violation under the license under which Petitioner conducted business on May 25, 2009. However, Petitioner's representative disagreed with the Division's characterization of the violation as a fourth violation by the Petitioner.

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).)

A specific trade-in amount or range of trade-in amounts may not be used in advertising. (Utah Admin. Rule R877-23V-7(2)(f).)

Utah Code Ann. Section 41-3-702 sets forth civil penalties for violations of the Motor Vehicle Business Regulation Act (the “Act”). In subsection (1)(c)(viii), it provides that advertising violations are “Level III” violations.

Utah Code Ann. Section 41-3-702(2) provides for different civil penalties for violations of the Act depending on the number of violations:

- (a) The schedule of civil penalties for violations of Subsection (1) is:
 - (i) Level I: \$25 for the first offense, \$100 for the second offense, and \$250 for the third and subsequent offenses;
 - (ii) Level II: \$100 for the first offense, \$250 for the second offense, and \$1,000 for the third and subsequent offenses; and
 - (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

The parties agree that Petitioner placed the advertisement at issue and that this advertisement violates Utah Admin. Rule R877-23V-7(2)(f) and, by definition, Utah Code Ann. Sec. 41-3-210(1). Petitioner’s representative explains, however, that Petitioner is one of several dealerships operating under a single license number. Although the dealerships are related and have common ownership, each has separate management, sells different lines of cars, and makes independent decisions regarding advertising. Petitioner’s representative points out that this is the first advertising violation for this particular location and notes that three previous violations took place at different locations managed by different personnel.

The Division’s representative agreed that this particular location of the related dealerships has not had a previous advertising violation in the past twelve months. Nevertheless, the Division’s position is that all dealership locations operating under a common license count toward the total number of violations. In support of this position, the Division relies on the language of Utah Code Ann. Sec. 41-3-210(1), which discusses violations in terms of license holders rather than dealership locations. The Division’s representative explained that while there may be advantages and disadvantages to related dealerships operating under one license, the Petitioner and its related dealerships chose to operate under a single license number.

The Commission agrees. While it may have been possible for the related dealerships at issue in this case to secure separate licenses and to operate as separate license holders, Petitioner was operating under a common license with other dealerships as of the date of the May 25, 2009 violation. Having made the choice to operate under a single license, Petitioner and other dealerships operating under a single license are a single entity for purposes of computing past advertising violations.

DECISION AND ORDER

The advertisement at issue is in violation of Utah Admin. Rule R877-23V-7 and Utah Code Ann. 41-3-210. The Commission finds no grounds for waiver. On the basis of the foregoing the \$\$\$\$ penalty is sustained. It is so ordered.

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 _____, 2009.

Clinton Jensen
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION.

DATED this ____ day of _____, 2009.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson

D'Arcy Dixon Pignanelli

Appeal No. 09-2279

Commissioner

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Commissioner