

09-2525
ADVERTISING VIOLATION
TAX YEAR: 2009
SIGNED: 11-03-2010

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER,</p> <p>Petitioner,</p> <p>v.</p> <p>MOTOR VEHICLE ENFORCEMENT DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p>Respondent.</p>	<p>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</p> <p>Appeal No. 09-2525 Account No. ##### Tax Type: Advertising Violation Tax Year: 2009</p> <p>Judge: Marshall</p>
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Presiding:

D'Arcy Dixon Pignanelli, Commissioner
Jan Marshall, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP., Owner
For Respondent: RESPONDENT REP. 1, Assistant Attorney General
RESPONDENT REP. 2, Motor Vehicle Enforcement Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for Formal Hearing on May 13, 2010. PETITIONER ("Dealership") is appealing a fine in the amount of \$\$\$\$ assessed by the Motor Vehicle Enforcement Division ("Division") for the failure to prominently display that vehicles advertised for sale had a branded title. Based on the testimony and evidence presented at the Formal Hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. Dealership is an automobile dealership that sells used vehicles, including those that may have a branded title.
2. On July 2, 2009, the Division issued a letter to the Dealership assessing a fine of \$\$\$\$ for the publication of advertisements for a 2009 Nissan Versa and a 2008 Cadillac CTS, both of which had branded titles. (Exhibit R-2). The letter indicated that this was the Dealership's second offense in a twelve month period.
3. The 2009 Nissan Versa was advertised on WEBSITE. (Exhibit R-1). The title of the ad read, in large, bold, print, "Used 2009 Nissan Versa Hatchback \$\$\$\$". A photograph of

the vehicle follows. Under the photograph is a section labeled, “Primary Information about this vehicle”, it included the price, mileage, body style, exterior and interior colors, engine, transmission, drive type, fuel type, number of doors, stock number, and a place to enter the VIN”. Following that was a section titled “Seller’s Description and Comments”, printed in a smaller font, which read as follows:

(PORTION REMOVED) 2007 NISSAN VERSA 1.8 S HATCHBACK – COME TEST DRIVE TODAY! SEE OUR INVENTORY AT PETITIONER WEBSITE OR CALL US AT #####, WE TAKE TRADES, SE HABLE ESPANOL. All dealers claim to be different. But most car dealers all go to the same auctions bidding on the same cars at the same prices. Their (WORDS REMOVED) is all the same. Because thier product is essentially identical they have to be different in things other than their product. Like who has the biggest advertising budgets, diabolical pricing games, obnoxious jingles, predatory sales tactics, expensive state street locations, eye catching inflatable animals etc etc. PETITIONER IS different What is different, well it is (PORTION REMOVED). (SENTENCES REMOVED). Our products truly sell themselves. We can be all of this because our PETITIONER is different. We get the autos that SELL at prices that are truly unbelievable. (SENTENCE REMOVED)! OPTIONS: CD Player – Ipod/Aux Input – Branded Title Power Windows and Door Locks – SEE OUR INVENTORY AT PETITIONER WEBSITE OR CALL US AT #####. [sic]

4. The 2008 Cadillac CTS was also advertised online. (Exhibit R-1). The title of the ad, read, in large, bold, print, “2008 Cadillac CTS 3.6L SIDI with Navigation”. A photograph of the vehicle was to the side. The following information was included immediately below the title: stock number, VIN, year, make, model, trim, interior, color, transmission, engine, drive train, mileage, price, state, contact person, and phone number. Following that was a section titled “Vehicle Options”. The last section is entitled “Seller Notes”, and reads as follows:

(SENTENCE REMOVED). 2008 CADILLAC CTS 3.6L SIDI – COME TEST DRIVE TODAY! SEE OUR INVENTORY AT PETITIONER WEBSITE OR CALL US AT #####, WE TAKE TRADES, SE HABLA ESPANOL. All dealers claim to be different. But most car dealers all go to the same auctions bidding on the same cars at the same prices. Their PETITIONER is the same. Because thier product is essentially identical they have to be different in things other than their product. Like who has the biggest advertising budgets, diabolical pricing games, obnoxious jingles, predatory sales tactics, expensive state street locations, eye catching inflatable animals etc etc. PETITIONER IS different what is different, well it is (PORTION REMOVED) (SENTENCES REMOVED). We get the autos that SELL at prices that are truly unbelievable. (SENTENCE REMOVED)! OPTIONS: Air Conditioned Seats CD Changer MP3 CD Player Rear Air Air Conditioning Cruise Control Navigation Rear Airbags Alarm System Driver Airbag On-Star Rear Defroster Alloy Wheels Fog Lights Passenger Airbag Satellite Radio AM/FM Handsfree Wireless Power Locks Side Airbags Anti-Lock Brakes Heated Seats Power Mirrors Sun Roof Automatic Branded Title Climate Control Keyless Entry Power Seats Tilt Wheel Aux Audio Jack Leather Seats Power Steering Traction Control Back Up Sonar Memory Seats Power Windows Woodgrain Bluetooth TOUCH SCREEN NAVIGATION – REMOTE CAR START – BUILT IN HARD DRIVE FOR MUSIC – SMART KEY – BACKUP SENSORS – XM SATELLITE RADIO – 6 DISC CD CHANGER – IPOD/USB/AUX INPUT – LEATHER HEATED AND COOLED SEATS – PANORAMIC ROOF – BLUETOOTH CONNECTIVITY – ONSTAR – BOSE SURROUND SOUND AUDIO SYSTEM – POWER WINDOWS, SEATS & DOOR LOCKS – PLUS ALOT MORE! SEE OUR INVENTORY AT PETITIONER WEBSITE OR CALL US AT #####. [sic]

5. The Division also submitted an advertisement that was placed online by the Dealership for a 2008 Honda Accord. The Division pointed out that the “Vehicle Description” section for the ad reads in part,

(PORTION REMOVED)

2008 HONDA ACCORD EX – CLEAN TITLE – SUNROOF – 6 DISC CHANGER – CRUISE CONTROL COME TEST DRIVE TODAY...

6. The Dealership’s representative provided copies of the advertisements at issue, with his handwritten notes. (Exhibits P-1 and P-2). The notes indicate that the “Vehicle Options” section is a list of pre-selected options to be chosen from, and that “branded title” is not an available option. His notes further indicate that the area for “Seller Notes” is the only place on the advertisement where he can put a custom description.

APPLICABLE LAW

Utah Code Ann. §41-1a-1004(3) requires that an advertisement for the sale of a vehicle with a branded title disclose that fact, as follows:

- (a) An advertisement for the sale of a vehicle for which a salvage certificate or branded title has been issued shall disclose that a salvage certificate or branded title has been issued for the vehicle.
- (b) The advertisement disclosure under Subsection (3)(a) shall:
 - (i) be displayed at least as prominently as the description of the advertised vehicle is displayed; and
 - (ii) use the words “salvage certificate” or “branded title” in the advertisement.

Under Utah Code Ann. §41-3-210(1), “[t]he 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.”

The Commission has promulgated Utah Admin. Rule R877-23V-7, to provide additional guidance on misleading advertising, as follows in pertinent part:

- (2) 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.
 - (bb) An advertisement must disclose a salvage or branded title as prominently as the description of the advertised vehicle.

A penalty is imposed for a civil violation of the Utah Motor Vehicle Business Regulation Act in accordance with Utah Code Ann. §41-3-702, as follows in pertinent part:

- (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

The Dealership's representative acknowledged that this was a second violation, and stated that the first violation occurred within five days of a change in the law requiring advertisements to include that a title is branded. He opined that the law is not aimed at protecting the public, and stated that he is one of the top 50 used dealers, and has never had a customer complain that he hid the fact that a vehicle had a branded title. The Dealership's representative believes that the law is the result of other used car dealers trying to negatively impact his dealership because it is so successful.

The Dealership's representative further argued that he believes he has complied with the law as the phrase "branded title" is included in his advertisements. He argued that the statute is not clear, and that the Division is being very subjective. The Dealership's representative testified that the Dealership has changed their advertisements to read, "We specialize in high quality branded title vehicles..." He stated that there are certain advertising situations where it is impossible to disclose the branded title, and asked for clarification and additional guidance on what he needs to place in his advertisements to not be in violation.

The Division's representative stated that Utah Code Ann. §41-1a-1004(3) requires that an advertisement for the sale of a vehicle with a branded title disclose that a branded title has been issued for the vehicle "at least as prominently as the description of the advertised vehicle is displayed." For the Division, RESPONDENT REP. 2 stated that though he is not aware of a definition for "description" of a vehicle, in his opinion, the year/make/model of a vehicle is its description, and everything else is an option. He stated that the Division would welcome direction from the Commission on this issue. RESONDENT REP. 2 testified that the prominence of the fact that a vehicle has a branded title is important for the protection of consumers. RESONDENT REP. 2 pointed out that in the advertisement for the 2008 Cadillac, the phrase "branded title" is six lines up from the bottom of the page, and in the smallest font size on the advertisement. He argued that the Taxpayer could have included the phrase "branded title" in the advertisements at issue with the same prominence as "clean title" was included in the advertisement for the 2008 Honda Accord.

CONCLUSIONS OF LAW

The advertisements do not disclose the fact that the vehicles have branded titles as prominently as the descriptions of the advertised vehicles in violation of Utah Code Ann. §41-1a-1004(3), §41-3-210(1), and Administrative Rule R877-23V-7. The Dealership's disclosure is in the smallest font used in the advertisement, and is buried towards the end of a body of text that describes the options and features of the vehicle. The Commission recognizes that with some online advertisements there is a pre-set list of options that are selected, and the only area where a Dealership can put a custom description is in the "Seller Notes" or "Seller's Comments". A reasonable interpretation of the statute and rule would be to place the branded title disclosure at the beginning of the custom description, similar to the Dealership's advertisement for the 2008 Honda Accord.

Utah Code Ann. §41-3-702 imposes a fine for violations of the Utah Motor Vehicle Business Regulation Act. An advertising violation is a Level III violation that is subject to a fine of \$\$\$\$\$ for the first offense, \$\$\$\$\$ for the second offense, and \$\$\$\$\$ for the third and subsequent offenses. As this is the Dealership's second offense in a twelve month period, the Division's imposition of a \$\$\$\$\$ fine was appropriate.

Jan Marshall
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing the Commission sustains the fine in the amount of \$\$\$\$\$. It is so ordered.

DATED this _____ day of _____, 2010.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
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. Sec. 63G-4-302. 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

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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 Sec. 59-1-601 et seq. and 63G-4-401 et seq.

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