10-0880
MOTOR VEHICLE
TAX YEAR: 2010
SIGNED: 11-17-2011
COMMISSIONERS: R. JOHNSON, M. JOHNSON,
CONCURRENCE: M. CRAGUN
DISSENT: D. DIXON

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, vs. MOTOR VEHICLE ENFORCEMENT DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION** Appeal No. 10-0880 Account No. ##### Tax Type: Violation – Unlicensed Salespersons Tax Year: 2010 Judge: Marshall

Presiding:

R. Bruce Johnson, Commission Chair
Michael J. Cragun, Commissioner
Jan Marshall, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP. 1
PETITIONER REP. 2
For Respondent: RESPONDENT REP. 1, Assistant Attorney General
RESPONDENT REP. 2, Director, Motor Vehicle Enforcement
RESPONDENT REP. 3, Assistant Director, Motor Vehicle Enforcement
RESPONDENT REP. 4, Investigator, Motor Vehicle Enforcement
RESPONDENT REP. 5, Investigator, Motor Vehicle Enforcement

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on DATE AND DATE 10, 2011, in accordance with Utah Code Ann. §59-1-501 and §63G-4-201 et al.

Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The Petitioner ("Dealership") participated in a SHOW at the VENUE on DATE AND DATE.
2. The Respondent ("Division") received complaints in the past about unlicensed dealers/salespeople at SHOWS. As a result, RESPONDENT REP. 2, along with other investigators from the Division, went to the SHOW undercover.
3. The Division determined there were three unlicensed individuals acting as salespeople on behalf of the Dealership at the SHOW; SALESPERSON 1, SALESPERSON 2, and SALESPERSON 3. On March 8, 2010, the Division issued a letter to the Dealership assessing fines totaling $$$$$. (Exhibit R-1).
4. The Division provided a list of individuals holding a valid salesperson license under the Dealership on DATE AND DATE. There were twenty-one licensed salespeople, and two licensed owners on the list. PETITIONER REP. 2, SALESPERSON 2, and SALESPERSON 3 did not appear on the list. (Exhibit R-2).
5. The parties stipulated that SALESPERSON 3 was acting as a salesperson at the SHOW, and was unlicensed. RESPONDENT REP. 4, an investigator with the Division, testified that he observed SALESPERSON 3 sitting at a table with a couple, filling out paperwork, and it appeared they were buying a VEHICLE. RESPONDENT REP. 4 testified that SALESPERSON 3 stated he could sell a certain trailer at a specified price, and that when asked, SALESPERSON 3 said he was a salesperson.
6. SALESPERSON 1 works in the Dealership's service department. He testified he was at the SHOW in case there were any mechanical problems. He stated that he will answer questions for potential customers so they do not get upset, but that he refers them to a salesperson.
7. RESPONDENT REP. 2 testified that he spoke with PETITIONER REP. 2 regarding a VEHICLE 1. He stated there was a photo of a 2009 model on a display board, and that PETITIONER REP. 2 told him there were 2010 models available, but it would have to be drop shipped from out of state. RESPONDENT REP. 2 stated the Dealership does not have a franchise to sell VEHICLE 1 in Utah. RESPONDENT REP. 2 testified he

believed PETITIONER REP. 2 was trying to sell him the VEHICLE 1. He testified that PETITIONER REP. 2 did not provide him with a business card or a price for the VEHICLE 1.

8. RESPONDENT REP. 2 testified he also spoke with SALESPERSON 2 regarding several VEHICLES at the show. He stated SALESPERSON 2 represented himself as a salesperson, provided prices, and gave him brochures with photographs. Further, SALESPERSON 2 stated he would "throw in" a hitch and an anti-sway bar if RESPONDENT REP. 2 purchased a VEHICLE that day.

9. PETITIONER REP. 1 testified that he called the Division prior to the SHOW, spoke with RESPONDENT REP. 2, and was told he did not need to license salespeople being brought in for the show unless they were being paid a commission. He stated that based on his conversation with RESPONDENT REP. 2, he licensed out-of-state salespeople, but did not license his service people or the individuals he had hired to hand out brochures.

10. PETITIONER REP. 1 testified that he instructs his employees who are not salespeople to take a customer to the VEHICLE they are interested in, and go get a salesperson. He stated he does not license those people who answer phones or work in the service department.

11. RESPONDENT REP. 3 testified he was unsure why RESPONDENT REP. 2, or anyone who worked for the Division, would have told PETITIONER REP. 1 that only individuals who were paid on commission were required to be licensed because it is contrary to statute. RESPONDENT REP. 3 opined that if an individual is going to be involved in showing vehicles and discussing options, they would need to be licensed.

12. The Division stated the penalties were assessed as three separate offenses, rather than a single offense, based on the guidance given in the Brent Brown case, which held each unlicensed salesperson constituted an offense.[1]

APPLICABLE LAW

Utah Code Ann. §41-3-201 requires certain licenses for the sale of motor vehicles, as follows in pertinent part:

[1] *Brent Brown Dealerships v. Tax Com'n, Motor Vehicle Enforcement Div.*, 193 P.3d 296 (Utah App. 2006).

(2) A person may not act as any of the following without having procured a license issued by the administrator:
  (a) a dealer…
  (c) a salesperson…

"Dealer" and "Salesperson: are defined in Utah Code Ann. §41-3-102, below:

(8) (a) "Dealer" means a person:
  (i) whose business in whole or in part involves selling new, used, or new and used motor vehicles or off-highway vehicles; and
  (ii) who sells, displays for sale, or offers for sale or exchange three or more new motor vehicles or off-highway vehicles in any 12-month period…

(25) "Salesperson" means an individual who for a salary, commission, or compensation of any kind, is employed either directly, indirectly, regularly, or occasionally by any new motor vehicle dealer or used motor vehicle dealer to sell, purchase, or exchange or to negotiate for the sale, purchase, or exchange of motor vehicles.

Utah Code Ann. §41-3-210 places certain requirements, and prohibits certain activities by holders of licenses issued under the Motor Vehicle Business Regulation Act, as follows in pertinent part:

(1) The holder of any license issued under this chapter may not…
  (m) as anyone other than a salesperson 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.

Civil penalties are imposed for violations of the Motor Vehicle Business Regulation Act under Utah Code Ann. §41-3-702, 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 salesperson in sales of motor vehicles…
    (x) encouraging or conspiring with unlicensed persons to solicit for prospective purchasers

(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.

CONCLUSIONS OF LAW

A. SALESPERSON 3 and SALESPERSON 2 were acting as salespersons in violation of Utah Code Ann. §41-3-210(1)(m) and §41-3-210(6). "Salesperson" is defined in Subsection (25) of Utah Code Ann. §41-3-102 as, "an individual who for a salary, commission, or compensation of any kind, is employed either directly, indirectly, regularly, or occasionally by any new motor vehicle dealer or used motor vehicle dealer to sell, purchase, or exchange or to negotiate for the sale, purchase, or exchange of motor vehicles." The parties stipulated that SALESPERSON 3 was acting as a salesperson at the SHOW, and was observed by one of the Division's investigators preparing paperwork in connection with the purchase of an VEHICLE. SALESPERSON 2 represented himself as a salesperson, provided prices, and gave RESPONDENT REP. 2 brochures. In addition, he told RESPONDENT REP. 2 he would "throw in" a hitch and an anti-sway bar if RESPONDENT REP. 2 purchased an VEHICLE that day. SALESPERSON 2 was trying to negotiate a sale with RESPONDENT REP. 2.

B. PETITIONER REP. 2 was not acting as a "salesperson" in violation of Utah Code Ann. §41-3-210 (1)(m) and §41-3-210(6). "Salesperson" is defined in Subsection (25) of Utah Code Ann. §41-3-102 as, "an individual who for a salary, commission, or compensation of any kind, is employed either directly, indirectly, regularly, or occasionally by any new motor vehicle dealer or used motor vehicle dealer to sell, purchase, or exchange or to negotiate for the sale, purchase, or exchange of motor vehicles." PETITIONER REP. 2 works in the service department of the Dealership, and was present at the SHOW in case there were mechanical problems. He engaged RESPONDENT REP. 2 in discussion of a VEHICLE 1, telling him that the photo was of a 2009 model, but a 2010 model was available from out of state. However, PETITIONER REP. 2 did not provide RESPONDENT REP. 2 with a business card, or a price for the VEHICLE 1. It appears the exchange was only informational, and did not involve an element of negotiation for the sale of a vehicle.

C. SALESPERSON 2 and SALESPERSON 3 acting as unlicensed salespersons are separate offenses. Utah Code Ann. §41-3-702(1)(c)(vii) makes "assisting an unlicensed dealer or salesperson in sales of motor vehicles", and "encouraging or conspiring with an unlicensed salesperson to solicit for prospective purchasers" a Level III violation, subject to civil penalties. In *Brent Brown Dealerships v. Tax Com'n, Motor Vehicle Enforcement Div.*, 193 P.3d 296, 300 (Utah App. 2006), the Court of Appeals found that each

unlicensed salesperson constituted an offense for which a penalty should be imposed. The Court's ruling was based on the plain language of the statute, which refers to the singular "unlicensed dealer" or "salesperson" in contrast to the plural use of the word "sales".

D. Penalties should be sustained in the amount of $$$$$ for the two offenses. Utah Code Ann. §41-3-702(2)(a)(iii) provides that penalties for a Level III violation are "$250 for the first offense, $1,000 for the second offense, and $5,000 for the third and subsequent offenses." Subsection (2)(b) limits the imposition of penalties as follows, "[w]hen 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." The question is whether an offense that occurs at the same SHOW would be considered "prior offenses" for purposes of imposing a higher penalty. The purpose of the statute is to impose an increased penalty for each offense, but places a twelve month limitation on the look-back period. The Court in *Brent Brown* determined that each unlicensed salesperson is a separate offense, and further noted that to determine the dealership "had committed one continuing 'offense' subject to a mere fine of $250 would have rendered these precise terms 'inoperable.'" *See* Id. In this case there were two separate offenses, and though they occurred at the same SHOW, the Dealership has not proven the graduated penalties set forth in Utah Code Ann. §41-3-702(2)(a)(iii) were intended only to "notify" the dealership of a violation with a small first-time penalty, or that "prior offenses" must be separated by time.

_____
Jan Marshall
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission finds there were two separate offenses, and sustains penalties in the amount of $$$$$

. It is so ordered.

DATED this _____day of _____, 2011.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

CONCURRENCE

I concur with the majority that PETITIONER employed two unlicensed salespersons at the DATE AND DATE SHOW at VENUE and that the statute requires the imposition of the escalating fines. Nevertheless, I find the $$$$$ total fine excessive in this instance. Based on the facts presented, I believe the more appropriate penalty in this case is two $250 fines for a total of $500. I respectfully request that the Utah State Legislature grant the Tax Commission the same authority under the Motor Vehicle Regulation Act (Utah Code Title 41, Chapter 3) that it currently has under the General Taxation Policies to "upon reasonable cause . . . waive, reduce, or compromise . . . penalties" (see Utah Code 59-1-402(13)).

Michael J. Cragun
Commissioner

COMMISSIONER DIXON DISSENTS

The Majority cites the Utah Court of Appeals case *Brent Brown Dealerships vs. the Tax Commission*, Case No. 20050333-CA 2006 UT App. 261 *(June 22, 2006).* There are some notable differences between the case before the Commission and the *Brent Brown* decision by the Utah Supreme Court. These are shown in the table below.

***Brent Brown* Utah Supreme Court Decision**	**Case before the Commission**
The MVED officer found that at least fifty-one sales people had sold 306 vehicles over a period of twenty months without licenses.	No evidence presented that any vehicles were sold by the three individuals in question. Assessed penalties were based on one day.

MVED first recommended an assessment of penalties of $1.1 million ($1,168,000). This was calculated by the MVED officer determining that an "offense" under the statute occurred every time an unlicensed salesperson sold a vehicle. As written in the Court decision: "MVED later reduced the fine to $135,000 determining that an "offense" occurred when an unlicensed salesperson sold at least one vehicle during the relevant time period, from June 2002 to DATE AND DATE 2004 (a 20 month period). Thus, MVED decided that offenses should not be counted according to the number of cars sold, but rather by the number of unlicensed salespeople who had made sales of one or more cars. Unlicensed salespeople who had not sold any vehicles during the relevant time period were not counted in the total fine." ¶6 beginning on page two.	No evidence presented that any vehicles were sold by the three individuals in question. Assessed penalties were based on one day.
The final fine of $135,000 fine represented thirty-five of the original 51 under investigation.	The imposed fine represented three of the three under investigation
In ¶12 on page five of *Brent Brown* the Court found that an offense occurred each time an unlicensed salesperson sold one or more cars. In paragraph ¶19, page eight, the Court decision says: "…the Commission correctly narrowed the definition of "offense" to include only the number of unlicensed salespeople who sold at least one car, and by not counting unlicensed sales people who had not sold any vehicles, the Commission properly imposed the penalty scheme adopted by the legislature."	No evidence presented that any vehicles were sold by the three individuals in question.
In ¶20, page eight, the Court writes: "And the Commission concluded that *Brent Brown*'s	The Petitioner testified he contacted MVED for direction. The Petitioner had licensed salespeople

significant non-compliance was not merely the failure of a single employee, to file the appropriate paperwork. Rather, it appears there was not a basic process for licensing new sales people as evidenced by the at least fifty-one unlicensed salespeople who sold 306 vehicles over a period of twenty months."	at the event. The Petitioner testified he had not licensed those he understood from MVED did not need to be licensed. No evidence presented that any vehicles were sold by the three individuals in question.
The Court stated "…the fine was not calculated based on the number of vehicles sold, but rather on the number of unlicensed salespeople who may have sold several vehicles each."	No evidence presented that any vehicles were sold by the three individuals in question.

Unlike the *Brent Brown* case, in the case before the Commission, we have no evidence that the three individuals for whom the penalties were levied sold any vehicles only that they made contacts and "appeared" to be completing paperwork. Based on the differing fact scenarios it is questionable whether the *Brent Brown* case applies to the case before us. Furthermore, as was clearly noted and supported by the Supreme Court in the *Brent Brown* decision, the Division could have chosen to exercise its discretion and charge fewer violations than the evidence might support.

Finally, Utah Code Section 41-3-702(2)(a)(iii) provides that the fines for a dealership for this class of violation--assisting an unlicensed salesperson--are "$250 for the first offense, $1,000 for the second offense, and $5,000 for the third and subsequent offenses." At first blush, it might appear that this language requires increasing fine amounts for each of multiple violations. However, a more reasoned analysis requires attention to the entire statute, which goes on to provide that "[w]hen 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." Utah Code Ann. §41-3-702(2)(b)(emphasis added). Under this language, imposing increasing violations for each offense is appropriate only if it is reasonable to conclude that the violations are separated by time.

Because I differ from the majority on a question of statutory interpretation, I look to established principles of statutory construction. A long-held rule of Utah law is that it is improper to interpret a statute in a way that would render any part of the statute meaningless or surplusage. *Downey State Bank v. Major-Blakeney Corp.*, 578 P.2d 1286, 1288 (Utah 1978). The majority's view

that the twin references to "prior" in Utah Code Ann. §41-3-702(2)(b) merely set the time of a 12-month look back period has the effect of rendering the first use of the word "prior" in the phrase "prior offenses" useless. If the Legislature had intended to merely set the time of a look back period, it could have done so by directing the Commission to consider "offenses" rather than "prior offenses." But the Legislature did not do that. It added the first "prior" to modify which offenses could be considered when increasing fine amounts. I decline to follow the majority in rendering the first use of the word "prior" in Utah Code Ann. §41-3-702(2)(b) into surplusage.

In this case, the only evidence regarding the timing of the offending individuals' actions is that all three were present at the time of the Division's single visit to an SHOW. For that reason, this case is distinguishable from the facts in *Brent Brown*, in which it was clear that the multiple unlicensed salespersons were hired and worked as unlicensed salespersons at different times over a period of 20 months. *See Brent Brown*, 2006 UT App. 261 at ¶6. I respectfully disagree with the Majority's use of part of a statute without giving credence to all of it. When three offenses occur at the same time, any one or two of them could be considered "prior offenses." Accordingly, I would impose two fines of $250 each rather than increasing the fine amount for two violations that occurred at the same time.

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D'Arcy Dixon Pignanelli
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. §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 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 et seq. and §63G-4-401 et seq.