10-1097
MOTOR VEHICLE ADVERTISEMENT VIOLATION
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 – DEALERSHIP 1, Petitioner, vs. MOTOR VEHICLE ENFORCEMENT DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**INITIAL HEARING ORDER** Appeal No. 10-1097 Account No. ##### Tax Type: Advertisement Violation Audit Period: 2010 Judge: Jensen

Presiding:
Clinton Jensen, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER, Taxpayer
For Respondent: RESPONDENT REP. 1, from the Motor Vehicle Enforcement Division
RESPONDENT REP. 2, from the Motor Vehicle Enforcement Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing on November 10, 2010 in accordance with Utah Code Ann. §59-1-502.5.

On March 8, 2010, The Motor Vehicle Enforcement Division of the Utah State Tax Commission (the "Division") assessed a $$$$$ fine against the above-named Petitioner, (the "Taxpayer), on the basis of the Taxpayer's actions in allegedly assisting three unlicensed persons to be present on a dealer display space and contact prospective customers in violation of Utah Code Ann. Section 41-3-210.

APPLICABLE LAW

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. Utah Code Ann. §41-3-210(6).

The holder of any license issued under this chapter may not . . . as anyone other than a salesperson licensed under this chapter, be present on a dealer display space and contact prospective customers to promote the sale of the dealer's vehicles. Utah Code Ann. §41-3-210(1)(m).

A person may not act as a salesperson without having procured a license issued by the motor vehicle enforcement administrator. Utah Code Ann. §41-3-201(2).

Assisting an unlicensed dealer or salesperson in sales of motor vehicles is a Level III civil violation of the Motor Vehicle Business Regulation Act. Utah Code Ann. §41-3-702(1)(c)(vii).

The schedule of Level III civil penalties for violations of Section 41-3-702(1) is $250 for the first offense, $1,000 for the second offense, and $5,000 for the third and subsequent offenses. Utah Code Ann. §41-3-702(2)(a)(iii).

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. Utah Code Ann. §41-3-702(2)(b).

DISCUSSION

The Taxpayer explained that it hired various persons, including the three individuals identified by the Division, to act as "liners" or "greeters" at an SHOW at the VENUE on DATE. The Taxpayer understood that there was no problem with non-licensed employees to contact customers and bring them into the Taxpayer's booth as long as the liners or greeters turned the customers over to licensed salespersons to finalize the sale and create any contracts. The Division presented evidence that at least three persons acted as liners or greeters. While the number of greeters or liners may have exceeded three, the Division did not impose fines for more than the three persons it identified as assisting in offering the Taxpayer's vehicles for sale at the time of the Division's visit to the SHOW.

The Taxpayer does not dispute that it had unlicensed persons in its employ and likewise does not dispute that those unlicensed persons contacted customers to promote sale of the dealer's vehicles. This is a violation of Utah Code Ann. Sections 41-3-210(1)(m) and 41-3-210(6). However, the Taxpayer argues that the fine imposed under the increasing fine mechanism of Utah Code Section 41-3-702(2)(a)(iii) is too large considering that any actions for which it was guilty stems from a single event in which the Taxpayer misunderstood the law.

The appellate courts in Utah have had occasion to consider the treatment of multiple offenses under Utah Code Section 41-3-702(2)(a)(iii). In *Brent Brown Dealerships v. Tax Comm'n*, 2006 UT App 261, the Utah Court of Appeals considered the statutory language imposing a fine for "[a]ssisting an

unlicensed dealer or salesperson in sales" in Section 41-3-702(1)(c)(vii). The court ruled that the use of singular "unlicensed dealer" or "salesperson" contrasted with the plural use of the word "sales" meant that assisting each unlicensed dealer or salesperson would be a separate offense under Section 41-3-702(1)(c)(vii), while multiple "sales" by an unlicensed dealer or salesperson do not create additional offenses. *Brent Brown*, 2006 UT App 261 at ¶12.

Applying the decision of the court in *Brent Brown* to the facts of this case, it is clear that the Taxpayer in this case employed three unlicensed salespersons. Under Utah law, it is equally clear that there should be three fines levied for assisting three unlicensed salespersons.

Having determined that the Division correctly imposed three separate fines, it is necessary to consider the amounts of those fines. Utah Code Section 41-3-702(2)(a)(iii) provides that the fines for the class of violation for 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. Utah Code Ann. §41-3-702(2)(a)(iii). As the dissenting opinion points out, the statute 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. Sec 41-3-702(2)(b). However, the references to "prior offenses" and "12 months prior" merely refer to the timing of the look back period for prior offenses rather than requiring a showing that one or more offenses occurred before another. There cannot be multiple "first" offenses, even if those offenses occur at the same time.

In the case now before the Commission, the Taxpayer employed three salespersons at an SHOW. This supports three fines of $$$$$ for the first offense, $$$$$ for the second, and $$$$$ for the third. On that basis, there is good cause to uphold the fines as imposed by the Division.

DECISION AND ORDER

On the basis of the foregoing the Commission sustains the Division's imposition of three fines totaling $$$$$ for the Taxpayer's violations at an SHOW on February 20-21, 2010. 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 _____, 2011.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

CONCURRENCE

I concur with the majority that DEALERSHIP 1 employed three unlicensed salespersons at the DATE SHOW at VENUE and that the statute requires the imposition of the escalating fines. Nevertheless, I find the $$$$$ total fine excessive in this instance. Based on the facts presented, I believe the more appropriate penalty in this case is three $$$$$ fines for a total of $$$$$. 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 cars were sold by the three liners/greeters in question. *Brent Brown* does not address liners or greeters.

	Assessed penalties were based on a two-day event.
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 February 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 was presented that any vehicles were sold by the three liners/greeters in question. Assessed penalties were based on a two day-event.
The final fine of $135,000 represented thirty-five of the original 51 under investigation.	The imposed fine represented three of the three individuals investigated. The Division stated there could have been more.
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 ¶ 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 cars were sold by the three liners/greeters in question.

In ¶20, page eight, the decision states: "And the Commission concluded that *Brent Brown*'s 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."	No evidence presented that any cars were sold by the three liners/greeters 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 cars were sold by the three liners/greeters in question.

Unlike the *Brent Brown* case, in this case we have no evidence that the individuals for whom the penalties were levied sold any vehicles, only that they made contacts and as liners and greeters. 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 liners'/greeters' 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 three fines of $$$$$ each rather than increasing the fine amount for three violations that occurred at the same time.

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D'Arcy Dixon Pignanelli
Commissioner