

12-1252
ADVERTISEMENT VIOLATIONS
SIGNED: 07-27-2012
COMMISSIONERS: M JOHNSON, D. DIXON, M. CRAGUN
EXCUSED: R. JOHNSON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,

Petitioner,

v.

MOTOR VEHICLE ENFORCEMENT DIVISION
OF THE UTAH STATE TAX COMMISSION,

Respondent.

**FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND FINAL DECISION**

Appeal No. 12-1252

Tax Type: Motor Vehicle Dealer Violation -
Advertising Violation

Judge: Chapman

Presiding:

D'Arcy Dixon Pignanelli, Commissioner
Kerry R. Chapman, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP., Attorney
For Respondent: RESPONDENT REP. 1, Assistant Attorney General
RESPONDENT REP. 2, Assistant Director, MVED

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on July 10, 2012.

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

FINDINGS OF FACT

1. This matter concerns a civil penalty issued under the Utah Motor Vehicle Business Regulations Act.

2. PETITIONER (the "Petitioner" or "dealer") is appealing a fine in the amount of \$250 that the Motor Vehicle Enforcement Division (the "Division") imposed in a letter dated April 25, 2012 (Division's

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“Letter”). Respondent’s Exhibit 1. In the Letter, the Division informed the dealer that it was imposing the fine for the following reasons:

On your dealership’s website, used vehicles are being listed with two prices, which implies you are selling the vehicle at a discounted price. Only one price can be posted in advertising for used vehicles. Specific claims of savings may not be used.

The Division imposed a fine in the amount of \$250, explaining in its Letter that the dealer’s offense “is a level III violation. It is your first offense in the last 12 months.”

3. The dealer appealed the fine at issue to the Tax Commission. The Tax Commission issued its Initial Hearing Order in this matter on June 1, 2012, and the dealer timely requested a Formal Hearing.

4. The dealer advertises used motor vehicles for sale on its website at WEBSITE The Division submitted two internet advertisements from the dealer’s website as evidence. Respondent’s Exhibits 2 and 3. Each advertisement describes a used motor vehicle and includes a “Kelly Blue Book Price” and a “Bottom Line Price.” One advertisement shows the Kelly Blue Book Price for a 2010 Chevrolet Cobalt LT Sedan to be \$\$\$\$\$ and the dealer’s bottom line price to be \$\$\$\$\$. The other advertisement shows the Kelly Blue Book Price for a 1999 Chevrolet Cavalier Sedan to be \$\$\$\$\$ and the dealer’s bottom line price to be \$\$\$\$\$.

5. The Division contends that these advertisements violate Utah Admin. Rule R877-23V-7(2)(d) (“Rule 7”) because the dealer’s use of a higher Kelly Blue Book Price and a lower dealer’s price results in “specific claims of savings,” which that subsection precludes.

6. The dealer contends that these two advertisements do not violate Utah law. PETITIONER REP. contends that the advertisements are neither misleading nor inaccurate and, as a result, do not violate Utah Code Ann. §41-3-210(1)(a). PETITIONER REP. contends that listing a motor vehicle’s Kelly Blue Book Price next to the dealer’s sales price is neither misleading nor inaccurate because Kelly Blue Book is a standard source of used motor vehicle prices that is generally recognized not only by the motor vehicle

industry, but also by courts. PETITIONER REP. explained that standard sources of used motor vehicle prices include Kelly Blue Book, as well as NADA and Edmunds. Because Kelly Blue Book is a standard source of used motor vehicle prices, the dealer contends that it is not misleading or inaccurate to list a price from this source in its advertisements.

7. PETITIONER REP. also contends that Rule 7(2)(d) provides that “**specific** claims of savings may not be used in an advertisement” (emphasis added). He pointed out that the dealer did not use the term “savings.” He states that listing a Kelly Blue Book price next to the dealer’s price is not a “specific claim of savings.” Instead, he contends that when the dealer listed the Kelly Blue Book price next to the dealer’s price, the dealer was merely giving customers a respected source to consider and was not giving them a price to rely on.

8. For the Division, RESPONDENT REP. 2 testified that it is difficult to establish a value for a used motor vehicle. He states that there are various sources that provide various ranges of values for used motor vehicles. He also testified that the dealer’s internet advertisements in this case do not provide an “active” link on the Kelly Blue Book price to show how that price was calculated. He also states that a Kelly Blue Book price itself can be different because it is based on variables such as mileage, condition, and whether you request a seller’s price or a buyer’s price. Furthermore, the Division contends that Kelly Blue Book prices are generally used in the eastern United States, while NADA prices are generally used in the western United States.

9. PETITIONER REP. stated that he does not know what variables were used when the dealer calculated the Kelly Blue Book price that it used in its advertisements, but characterized the dealer’s listing of the Kelly Blue Book price as the beginning of a dialogue between the customer and the dealer.

10. The Division states that the rules in Rule 7, including the rule at issue in this appeal that precludes “specific claims of savings,” were adopted based on input or request from the motor vehicle industry.

RESPONDENT REP. 2 stated that listing a dealer's price and another higher price in an advertisement shows a savings and, thus, is a "specific claim of savings" that is not allowed under Utah law. The Division contends that the rule is violated regardless of whether the dealer identifies the higher price in the advertisement as a Kelly Blue Book price or as a price obtained from another recognized source of used motor vehicle prices. Because a Kelly Blue Book price can vary depending on the variables used to calculate it and because prices vary from source to source, the Division states that listing any price in an advertisement that is higher than the dealer's price is impermissible because it leads a customer to think that it is getting a "good deal" based on prices that may or may not be correct. The Division contends that listing a higher price beside the lower dealer's price should be disallowed not only because it is difficult to know what the higher price means, but also because a reasonable person sees the difference between the two prices as a savings.

11. RESPONDENT REP. 2 testified that the Division provides training to Utah motor vehicle dealers every year. He stated that in April 2012, he spoke to about 120 representatives from Utah dealerships and gave examples of actions that are not allowed, including the circumstances at issue in this appeal. He stated that the Division waited until after this meeting to issue fines to dealers who were still using advertisements for used motor vehicles that listed a higher price next to the lower dealer's price.

12. The dealer has had no other Level III violations, as described in Utah Code Ann. §41-3-702(1), within the 12 months prior to April 25, 2012, the date the Division imposed the \$250 fine at issue in this appeal.

APPLICABLE LAW

1. Utah Code Ann. §41-3-210 prohibits a motor vehicle dealer from conducting certain acts, as follows in pertinent part:

- (1) 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, or furnished by a licensee;

....

(c) violate this chapter or the rules made by the administrator;

....

2. Utah Admin. Rule R877-23V-7 (“Rule 7”)¹ provides guidance in determining whether an advertisement is misleading pursuant to Section 41-3-210(1)(a), 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.

....

(d) Savings and Discount Claims. Because the intrinsic value of a used vehicle is difficult to establish, specific claims of savings may not be used in an advertisement. This includes statements such as, “Was priced at \$....., now priced at \$.....

....

3. A penalty is imposed for a civil violation of the Utah Motor Vehicle Business Regulation Act in accordance with UCA §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.

....

¹ The version of Rule 7 cited in this decision is the one that existed on April 25, 2012, when the penalty at issue was imposed. Rule 7 was amended on June 14, 2012. The changes, however, have no effect on the decision in this case.

CONCLUSIONS OF LAW

1. Section 41-3-210(1)(a) precludes a dealer from publishing, displaying, or circulating advertisements that are misleading or inaccurate. To provide guidance in determining whether advertisements are misleading or inaccurate, the Commission, with input from the Utah motor vehicle industry, has adopted Rule 7 to provide examples of advertisements that will be considered misleading or inaccurate for purposes of Section 41-3-210(1)(a).

2. Rule 7(2)(d) precludes dealers from using advertisements with “savings and discount claims.” This subsection provides that “specific claims of savings may not be used in an advertisement” and provides an example, specifically noting that “[t]his includes statements such as ‘Was priced at \$....., now priced at \$.....’” The dealer did not use the statement “Was priced at \$....., now priced at \$.....” in its advertisements. Nevertheless, the use of the word “includes” before this specific example indicates that other statements of “specific claims of savings” are also disallowed.

3. The dealer’s use of the higher Kelly Blue Book price next to the lower dealer’s price in its used motor vehicle advertisements is a “specific claim of savings” that is precluded under Rule 7(2)(d). The use of these two prices in the dealer’s advertisements leads a reasonable person to include that a customer purchasing a motor vehicle at the dealer’s lower price would be receiving a “specific” savings, specifically a savings equal to the difference between the higher Kelly Blue Book price and the lower dealer’s price. This “specific claim of savings” would occur whether or not the higher price was identified as being obtained from a source recognized in the industry, such as Kelly Blue Book, NADA, or Edmund’s. Accordingly, the Division properly concluded that the dealer’s advertisements violated Rule 7(2)(d) and Section 41-3-210(1)(a).

4. Section 41-3-702(1)(c)(viii) provides that an “advertising violation” is a Level III offense for purposes of imposing civil penalties. The dealer’s internet advertisements at issue in this appeal violated Rule

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7(2)(d) and Section 41-3-210(1)(a) and, as a result, are a Level III “advertising violation” for purposes of Section 41-3-702.

5. Section 41-3-702(2)(a)(iii) provides that the penalties for a Level III offense are “\$250 for the first offense, \$1,000 for the second offense, and \$5,000 for the third and subsequent offenses.” Section 41-3-702(2)(b) provides 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.” The dealer committed no prior Level III offenses within the 12 months prior to April 25, 2012, the date the Division imposed the \$250 fine at issue in this appeal. Accordingly, the Division properly determined that the advertising violation at issue in this appeal was the dealer’s first Level III offense within the prior 12 months, and it properly imposed a fine in the amount of \$250. For these reasons, the Division’s \$250 fine should be sustained.

Kerry Chapman
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division’s imposition of the \$250 fine to PETITIONER. It is so ordered.

DATED this _____ day of _____, 2012.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D’Arcy Dixon Pignanelli

Michael J. Cragun

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Commissioner

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.