12-1254
TAX TYPE: AD. VIOLATION
TAX YEAR: 2012
DATE SIGNED: 7-27-2012
COMMISSIONERS: M. JOHNSON, D. DIXON, M. CRAGUN
EXCUSED: B. 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. 12-1254 Tax Type: Motor Vehicle Dealer Violation - Advertising Violation Judge: Chapman

Presiding:
Michael J. Cragun, Commissioner
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE FOR PETITIONER, General Manager, PETITIONER, (by telephone)
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General
RESPONDENT, Assistant Director, Motor Vehicle Enforcement Division

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 $5,000 that the Motor Vehicle Enforcement Division (the "Division") imposed in a letter dated April 25, 2012

(Division's "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 $5,000 because the dealer's offense "is a level III violation. It is your third offense in the last 12 months."

3. The dealer appealed the $5,000 fine 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 Division submitted two internet advertisements from the dealer's website at PETITIONER'S WEBSITE. Respondent's Exhibit 1. Each advertisement describes a used motor vehicle and includes a "List Price" and the dealer's "Internet Price" or "Special Price." One advertisement shows the "List Price" for a YEAR AND MODEL OF VEHICLE-1 to be $$$$$ and the dealer's "Internet Price" to be $$$$$. The other advertisement shows the "List Price" for a YEAR AND MODEL OF VEHICLE-2 to be $$$$$ and the dealer's "Special Price" to be $$$$$.

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 list price and a lower dealer's price results in "specific claims of savings," which is precluded by that subsection of Rule 7.

6. The dealer contends that these two advertisements do not violate Utah law. REPRESENTATIVE FOR PETITIONER contends that the advertisements are not intentionally misleading and, as a result, do not violate Utah Code Ann. §41-3-210(1)(a). REPRESENTATIVE FOR PETITIONER testified that the "List Prices" that the dealer included in its internet advertisements are prices that it obtained from Kelly Blue Book, a recognized source for used motor vehicle values. He admits that the advertisements at issue contain a "specific claim of savings" because they show the savings that a customer would get with the dealer's price over the Kelly Blue Book price. He contends, however,

that displaying Kelly Blue Book prices is neither misleading nor inaccurate and should not be considered an advertising violation. For these reasons, the dealer asks the Commission to overturn the Division's $5,000 fine in its entirety.

7. REPRESENTATIVE FOR PETITIONER testified that the "List Price" the dealer used in the advertisements was the "retail" price it obtained from Kelly Blue Book after "putting" a motor vehicle's vin number into a program that would produce a price. REPRESENTATIVE FOR PETITIONER admitted that the Kelly Blue Book price was a "moving" number that changes every week as the market changes. He further admitted that once the dealer had obtained a "List Price" for a motor vehicle advertisement from Kelly Blue Book, the dealer did not change the "List Price" in the advertisement each week because it was the dealer's hope to sell a used motor vehicle within 45 days of listing it.

8. In addition, REPRESENTATIVE FOR PETITIONER asks the Commission to consider that the dealer was not aware that the Division considered an advertisement containing both a list price and a dealer's price to be a violation of Utah law. REPRESENTATIVE FOR PETITIONER testified that the Division informed dealerships that such advertisements were violations of Utah law at the annual dealership training that occurred in CITY-1 on March 28, 2012. He states that the dealer did not have a representative at the March 28, 2012 training because the Division also holds another, later training session in REGION Utah, which he attended on May 9, 2012. Given these circumstances, REPRESENTATIVE FOR PETITIONER claims that the dealer was unaware that the Division considered its internet advertisements to be in violation of Utah law until the dealer received the April 25, 2012 Letter in which the Division imposed the $5,000 fine.

9. REPRESENTATIVE FOR PETITIONER also stated that it was his understanding that the Utah Automobile Dealers Association ("UADA") sent an email to Utah dealers informing them that listing two prices in a used motor vehicle advertisement would violate Utah law. REPRESENTATIVE FOR PETITIONER asks the Commission to consider that this email was not sent to him or other people at the

dealership who needed to get it because of personnel changes. He states that the email was sent to former employees and to OWNER.

10. In the alternative, should the Commission find that the internet advertisements at issue violated Utah law, REPRESENTATIVE FOR PETITIONER asks the Commission to find that the offense is not the dealer's third Level III offense within the prior 12 months for purposes of imposing a fine under Utah Code Ann. §41-3-702.

11. The Division submitted evidence to show that it imposed two previous fines on the dealer for Level III offenses within the 12 months prior to April 25, 2012, the date it imposed the $5,000 fine at issue. The Division submitted a June 13, 2011 letter in which it imposed a $250 fine on the dealer for a Level III offense for selling from an unlicensed location. Respondent's Exhibit 3. In this letter, the Division explained that it was imposing the fine because the dealer had vehicles on display on June 3 and June 4, 2011, at the (X) CITY-2, DURING THE EXPO. The Division also submitted a September 22, 2011 letter in which it imposed a $1,000 fine on the dealer for a second Level III offense for an advertising violation. Respondent's Exhibit 2. In this letter, the Division explained that the dealer had an advertisement in the NEWSPAPER on August 4, 2011 that had "was $....., now $..... pricing."

12. REPRESENTATIVE FOR PETITIONER admits that the dealer committed the Level III offense described in the September 22, 2011 letter, acknowledging that it was an advertising violation to have "was $....., now $..... pricing" in an advertisement. He contends, however, that this September 22, 2011 offense is not the same as the advertising violation at issue in this appeal because the September 2011 offense involved the improper use of "was $....., now $..... pricing" and the current offense does not. The dealer contends that the current offense is the first offense where the Division imposed a fine on it for an advertising violation involving advertisements that showed both a "List Price" and a dealer's price.

13. Furthermore, REPRESENTATIVE FOR PETITIONER contends that the offense described in the June 13, 2011 letter should not be considered an offense because the dealer was displaying, not "selling," the motor vehicles it had at the CITY-2 EXPO.

14. The Commission has no record of the dealer appealing either of the fines that the Division imposed in its June 13, 2011 and September 22, 2011 letters.

15. The Division contends that the internet advertisements at issue violated Rule 7(2)(d) because they show two prices that constitute "specific claims of savings," regardless of whether the higher "List Price" was obtained from Kelly Blue Book. RESPONDENT testified that the advertisements would have violated Rule 7(2)(d) even if the "List Price" in the advertisements had been identified as the "Kelly Blue Book Price." RESPONDENT testified that a used motor vehicle's value can vary because various sources provide various ranges of values for used motor vehicles. He stated that values obtained from industry sources such as Kelly Blue Book and NADA can also vary because they are based on variables such as mileage and condition and on whether you request a seller's price or a buyer's price from the source. For these reasons, the Division asks the Commission to find that the dealer's internet advertisements at issue constitute an "advertising violation" that is a Level III offense under Section 41-3-702(1)(c).

16. The Division also asks the Commission to find that the violation at issue in this appeal is the third Level III offense committed by the taxpayer in the prior 12 months and to sustain the $5,000 fine it has imposed.

17. RESPONDENT admitted that the violation at issue in this appeal (i.e., including two prices in a used motor vehicle advertisement) was discussed at the March 28 and May 9, 2012 meetings that REPRESENTATIVE FOR PETITIONER mentioned. RESPONDENT, however, pointed out that there was "not really" a time when the Division had not enforced the "two prices in a used motor vehicle advertisement" violation, specifically testifying that the Division had enforced it prior to the spring of 2012.

18. REPRESENTATIVE FOR PETITIONER testified that many of the representatives of dealerships who attended the May 9, 2012 meeting in CITY-3 were surprised that internet advertisements

for used motor vehicles could not contain two prices and, after the meeting, went back to their dealerships to fix the problem.

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:
> . . . .
> (iv) selling from an unlicensed location;
> . . . .
> (viii) advertising violation;
> . . . .
> (2) (a) The schedule of civil penalties for violations of Subsection (1) is:
> . . . .

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.

(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

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 a dealer 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 the advertisements that gave rise to this appeal. 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 "List Prices" 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 an advertisement leads a reasonable person to conclude 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 "List Price" and the lower dealer's price. This "specific claim of savings" would occur whether or not the higher price was obtained from a source recognized in the industry, such as Kelly Blue Book or NADA. Accordingly, the Division properly concluded that the dealer's use of two prices in its used motor vehicle 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 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. The violation should not be excused due to the dealer's claim that it was unaware that its internet advertisements violated Utah law. Remaining at issue is the amount of the fine that should be imposed for this Level III offense.

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." Evidence shows that the Division fined the dealer for two prior Level III offenses on June 13, 2011 and September 22, 2011. The actions that gave rise to the two fines in 2011 occurred within 12 months of April 25, 2012, the date on which the Division imposed a fine for the most recent Level III offense. The dealer argues that one of the fines in 2011 was improper because the dealer did not commit a violation of selling motor vehicles from an unlicensed location. However, no evidence exists in the Commission's records to show that the dealer appealed the fines imposed for either of the two Level III offenses that occurred in 2011. As a result, the actions concerning the two Level III offenses committed in 2011 are final and cannot now be appealed. Accordingly, the Commission finds that the Level III offense resulting from the dealer's internet advertisements is the third Level III offense committed by the dealer in the prior 12 months.

6. The dealer also argues that its most recent violation should be considered its first Level III offense for purposes of determining a penalty because its prior two Level III offenses involved different circumstances. Specifically, one of the prior Level III offenses involved selling motor vehicles from an unlicensed location, while the other involved an advertisement in a printed publication that used different language from that used in the dealer's internet advertisements. The fines imposed under Section 41-3-

702(2)(a)(iii) are based on the number of Level III offenses that have occurred within the prior 12 months. Section 41-3-702(1) lists different types of Level III offenses. Had the Legislature wanted the penalty to be based on the number of each type of Level III offenses that had been committed, it could have easily specified so. But, it did not. Section 41-3-702(2)(a)(iii) is best read to mean that a fine will be based on the number of *all* types of Level III offenses that have occurred within the past 12 months. Because the most recent offense is the dealer's third Level III violation of any sort within the past 12 months, the Division properly imposed a fine in the amount of $5,000. For these reasons, the Division's $5,000 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 $5,000 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
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. §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. §§59-1-601et seq. and 63G-4-401 et seq.