

12-2021
TAX TYPE: AD VIOLATIONS
TAX YEAR: 2012
DATE SIGNED: 9-28-2012
COMMISSIONERS: B. JOHNSON, D. DIXON, M. CRAGUN
EXCUSED: M. JOHNSON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER

Petitioner,

v.

MOTOR VEHICLE ENFORCEMENT
DIVISION OF THE UTAH STATE
TAX COMMISSION,

Respondent.

INITIAL HEARING ORDER

Appeal No. 12-2021

Tax Type: Advertisement/Dealership Violations

Judge: Phan

Presiding:

Jane Phan, Administrative Judge

Appearances:

For Petitioner: REPRESENTATIVE FOR PETITIONER, By Telephone

For Respondent: RESPONDENT, Assistant Director, Motor Vehicle Enforcement Division

STATEMENT OF THE CASE

This matter came before the Commission for an Initial Hearing in accordance with Utah Code §59-1-502.5, on August 28, 2012. Petitioner (“Dealership”) is appealing a \$1,000 penalty imposed by Respondent (Division) for a violation under Utah Code §41-3-210 and Utah Admin. Rule R877-23V-7. This was the second Level III violation within twelve months.

APPLICABLE LAW

Utah Code §41-3-210 prohibits a motor vehicle dealer from conducting certain acts, as follows:

(1)The holder of any license issued under this chapter may not...

(b) intentionally publish, display, or circulate any advertising without identifying the seller as the licensee by including in the advertisement the full name under which the licensee is licensed or the licensee’s number assigned by the division;

...

(g) engage in a business respecting the selling or exchanging of new or new and used motor vehicles for which he is not licensed, including selling or exchanging a new motor vehicle for which the licensee does not have a franchise, but this Subsection (1)(g) does not apply to a special equipment dealer who sells a new special equipment motor vehicle with a gross vehicle weight of 12,000 or more pounds after installing special equipment on the motor vehicle;

...

(t) sell, display for sale, offer for sale, or exchange any new motor vehicle if the licensee does not: (i) have a new motor vehicle dealer's license under Section 41-2-202; and (ii) possess a franchise from the manufacturer of the new motor vehicle sold, displayed for sale, offered for sale, or exchanged by the licensee;

...

Utah Code §41-3-702 provides civil penalties for violations:

(1) The following are civil violations under this chapter and are in addition to criminal violations under this chapter: (c) Level III: . . . (ii) selling a new motor vehicle without holding the franchise; . . . (iv) selling from an unlicensed location; (vii) assisting an unlicensed dealer or salesperson in sales of motor vehicles; (viii) advertisement 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.

Utah Code §41-3-704 provides the Tax Commission with authority regarding the penalties as follows:

Upon making a record of its actions, and upon reasonable cause shown, the commission may waive, reduce, or compromise any of the civil penalties imposed by the division under this chapter.

The Commission has enacted, effective June 14, 2012, Utah Admin. Rule R877-23V-22 regarding reasonable cause for waiver. This rule provides in pertinent part:

(1) (b) A person seeking to reduce or compromise a penalty under Subsection (1)(a) shall: (i) demonstrate that there is reasonable cause to reduce or compromise the penalty; and (ii) recommend the amount by which the penalty should be reduced or compromised.

(2) A penalty that is reduced or compromised under Subsection (1) may not be reduced or compromised below the penalty imposed for a first offense for that violation.

(3) Reasonable cause to waive, reduce, or compromise a penalty imposed by the division under Title 41, Chapter 3 does not include: ignorance of the law; or (b) inability to pay a penalty imposed.

(4) Nothing in this rule prevents a person from appealing the appropriateness of a penalty imposed by the division under Title 41, Chapter 3.

DISCUSSION

The Division imposed the \$1,000 penalty against the Dealership for a violation under Utah Code §41-

3-210. This was imposed by letter from the Division dated July 23, 2012. In the letter the Division noted two different bases for the penalty under Utah Code §41-3-210. The Division cited Utah Code §41-3-210(1)(b), which prohibits advertisements that fail to include the full name of the dealership or dealership number. The Division also cited Utah Code §41-3-210(1)(g), which prohibits a dealership from selling a new motor vehicle for which the dealership does not have the franchise. The penalties are imposed under Utah Code 41-3-702, which provides a graduated schedule for a first offense, second offense or third or more offenses. In the letter the Division's representative stated that the dealership had published an advertisement for a MODEL OF VEHICLE for sale on WEBSITE and that the ad did not state the Dealership's name or number. Further, that the Dealership is not franchised to sell new vehicles. Because this was the second Level III violation in a twelve month period, the amount of the penalty was \$1000.

It was the Dealership's position that it had not posted the advertisement. The Dealership's representative, REPRESENTATIVE FOR PETITIONER, stated that NAME-2 was the one who owned the VEHICLE and he was the one who had posted the ad. NAME-1 stated that NAME-2 had brought the new VEHICLE to the Dealership and asked them to look at it because there was water in the break line. She stated that because he was a friend of her (X), who was the owner of the Dealership, they agreed to take a look at the VEHICLE. Then she stated that NAME-2 had become ill and had not been able to retrieve the vehicle from their sales lot. It was her contention that NAME-2 was the one who had placed the advertisement on WEBSITE listing this vehicle for sale. It was his name and telephone number on the advertisement. NAME-1 did not dispute that the VEHICLE was on the Dealership's sales lot for a period of time with the Dealerships own vehicles displayed for sale. She had also stated on the Petition for Redetermination form, "I had a few people ask about it when it was here. I did tell them a few stats on the unit but told them they would have to contact NAME-2 because it doesn't belong to us." According to NAME-1, the Dealership employed five salespersons in total.

The Division's representative provided the information that NAME-2 was licensed as a motor vehicle salesperson for the Dealership at the time the advertisement was posted and that the license had just recently been renewed by the Dealership in July. He also indicated that the telephone number for NAME-2 listed on the advertisement was the same number used on his licensing for the Dealership. He indicated that an investigator for the Division had called or text about the vehicle because there were a number of ads posted by NAME-2. When the investigator asked where he could take a look at the vehicle, NAME-2 directed him to the sales lot at the Dealership. The investigator then went to the Dealership's sales lot and the vehicle was on the sales lot with the other vehicles being sold by the Dealership.

The Division's representative asked about NAME-2's son and NAME-1 acknowledged that he was also a licensed salesperson for the Dealership. The Division's representative stated that he had spoken with

NAME-2 who confirmed that he was the owner of the vehicle and that it was his intent to see if there was a market for this type of vehicle. It was the Division's position that the Dealership is not allowed to have other people sell vehicles from the Dealership's lot in this manner.

Upon review of the information submitted and the law at issue, the Dealership represented that it did not publish the advertisement listing the VEHICLE, that the advertisement had been posted by NAME-2. There was no information from the Division to refute this point. The advertisement was tied to the Dealership by the fact that it had been placed by a licensed salesperson for the Dealership, the telephone number provided ties to his salesperson license for the dealership and the fact that the vehicle was displayed for sale at the Dealership's lot. Utah Code 41-3-210(1) (b) prohibits dealerships from intentionally publishing advertisements that fail to identify the seller by giving the full name of the dealership or license number. From the information presented, the Dealership did not publish this advertisement so there was no intent to publish and no violation of Utah Code 41-3-210(1) (b).

However, by allowing the vehicle to be displayed for sale on its lot with the Dealership's own vehicles, the Dealership violated Utah Code 41-3-210(g) engaging in a business respecting the sale of a new motor vehicle without having a franchise. Allowing the car to remain on the lot displayed for sale, providing information to prospective customers, even if they were also referred to NAME-2, is a violation of this provision.¹ Therefore, the \$1,000 penalty was properly imposed.

The Commission may then consider if there is reasonable cause for waiver of the penalty under Utah Code 41-3-704 and Utah Admin. Rule R877-23V-22. In this case the Dealership had indicated that the reason the VEHICLE was on its lot for a period of time was because NAME-2 had been ill and was unable to retrieve the vehicle. However, the information provided also indicated that NAME-2 son was a licensed salesperson for the business and no information was provided why he, or someone else from the Dealership could not have delivered the vehicle to NAME-2. Further, the vehicle was being displayed at the business with the Dealership's other vehicles that were being offered for sale. The Dealership was answering questions about the vehicle in addition to referring prospective purchasers to NAME-2. This may be a situation where the Dealership employees were unaware they were in violation of the law, but that is not basis for waiver of the penalty under Utah Admin. Rule R877-23V-22. Given the circumstances in this matter the penalty should be upheld.

Jane Phan
Administrative Law Judge

¹ The Dealership may also be in violation of Utah Code 41-3-210(t) which prohibits displaying for sale or offering for sale any new motor vehicle without a franchise.

DECISION AND ORDER

Based on the forgoing, the Dealership's appeal in this matter is denied. It is so ordered.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files 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 _____, 2012.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner