

13-285
TAX TYPE: AD VIOLATION
TAX YEAR: 2012
DATE SIGNED: 10-1-2013
COMMISSIONERS: B. JOHNSON, M. CRAGUN, R. PERO
PARTIAL CONCURRENCE AND PARTIAL DISSENT: D. DIXON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

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| <p>PETITIONER, Petitioner, vs. MOTOR VEHICLE ENFORCEMENT DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.</p> | <p>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</p> <p>Appeal No. 13-285</p> <p>Account No. ##### Tax Type: Advertisement Violations</p> <p>Judge: Phan</p> |
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Presiding:

Robert Pero, Commissioner
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: OWNER, 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 June 6, 2013, in accordance with Utah Code §63G-4-201 et seq. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. Petitioner (“Dealership”) is appealing a civil penalty or fine in the amount of \$1000 assessed by Respondent (“Division”) by letter dated December 17, 2012,¹ for

¹ Division’s Exhibit 1.

advertisements in violation of Utah Rule R877-23V-7. In the letter the Division noted several vehicles advertised on WEBSITE and several violations.

2. Regarding the violations, the December 17, 2012 letter stated the following:

The ads offered a “free” ACCESSORY-1 or ACCESSORY-2 with purchase. “Free” may only be used when you are offering an unconditional gift. When you are selling a new motor vehicle and you are offering a discount you must reference Manufacturer’s Suggested Retail Price. Some of your ads offered a discount and didn’t state the Manufacturer’s Suggested Retail Price. You must include the year of the vehicles in your ads. Your dealer is also advertising that you are open on Saturday and Sunday. Utah law does not allow a dealership to sell motor vehicles on consecutive days of Saturday and Sunday. You can sell on one or the other but not both. Your ads are indicating that you are open both days with special sales prices different for each day.

3. Although there were multiple violations with the advertisements pulled on December 17, 2012, the Division assessed one Level III violation. The Dealership had a previous Level III violation occurring March 2012. Because this was a second Level III violation in the last twelve months the amount of the fine was \$1,000, based on Utah Code §41-3-702. The March 2012 Level III violation was not an advertisement violation, but instead had been assessed because the Dealership had offered TYPE OF VEHICLE-1 for sale at an unlicensed location.

4. At the hearing, the Division submitted copies of the four on-line advertisements which it had pulled on December 17, 2012, posted by the Dealership on WEBSITE.² The Division representative testified at the hearing that each advertisement contained multiple violations. The first ad was for a MODEL OF VEHICLE-1 and indicated that the dealership was open on both Saturday and Sunday. It listed a free ACCESSORY-1 with purchase. The year of the vehicle was not listed. The second advertisement listed a MODEL OF VEHICLE-2. This ad listed a free ACCESSORY-2 with purchase, that the business was open on Saturday and Sunday and the year of the vehicle was not provided. The third advertisement was for MODEL OF VEHICLE-3 and it also listed the Saturday and Sunday hours. It listed the price but not the make and model. The fourth advertisement was for a MODEL OF VEHICLE-4 with the same Saturday and Sunday hours and no year listed for the vehicle.

5. The Dealership sells DIFFERENT TYPES OF VEHICLES. The owner of the Dealership testified that much of the product sold is sized for (X). She also testified that some of the products she purchases for resale do not have a manufacturer’s suggested retail price or MSRP, so she is not able to list the MSRP in the advertisements.

² Division’s Exhibit 1.

6. The owner did not dispute that the ads had indicated a “free” ACCESSORY-1 or ACCESSORY-2 with purchase. She did not dispute that there were ads stating the business would be open on both the Saturday and Sunday before HOLIDAY as well as advertisements indicated the business was open on Sunday by appointment. She stated that despite the ads, however, the business did not open on Sunday generally.

7. The owner also testified that this was a small business with only one employee. The business had been operating for eight years. She testified that she was not aware that her advertisements were in violation of the law. She indicated that for her small business the amount of the fine, at \$1,000, was significant and asked for leniency. She pointed out that the amount of the fine would have been no different for a large automobile dealership than for her small TYPE OF VEHICLE-2 business.

8. She acknowledged that there had been the prior Level III violation, but pointed out that it did not have anything to do with advertisement violations, so did not provide notice to her of advertising requirements. She explained that at the time of the first violation she was trying to open a second location and had a trailer with VEHICLES-2 parked at that second location before obtaining a license.

APPLICABLE LAW

Utah Code §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...
- ...
- (11) (a) Except as provided in Subsection (11)(c), or in cases of undue hardship or emergency as provided by rule by the division, a dealer or salesperson licensed under this chapter may not, on consecutive days of Saturday and Sunday, sell, offer for sale, lease, or offer for lease a motor vehicle.
 - (b) Each day a motor vehicle is sold, offered for sale, leased, or offered for lease in violation of Subsection (11)(a) and each motor vehicle sold, offered for sale, leased, or offered for lease in violation of Subsection (11)(a) shall constitute a separate offense.

The Commission has issued further guidance on misleading advertisements in Administrative Rule R877-23V-7, below 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.

- (c) (i) (A) Price. When the price or payment for a motor vehicle is quoted, the motor vehicle shall be clearly identified as to make, year, model and if new or used. Except as provided in Subsection (c)(i)(B), the advertised price must include charges that the customer must pay for the motor vehicle, including freight or destination charges, dealer preparation, and dealer handling.
- (d) Savings and Discount Claims. Because the intrinsic value of a used motor 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 \$.....”
 - (i) The word “wholesale” may not be used in retail motor vehicle advertising.
 - (ii) When a motor vehicle advertisement contains an offer of a discount on a new motor vehicle, the amount of the discount must be stated by reference to the manufacturer’s suggested retail price of the motor vehicle.
- (n) Free. “Free” may be used in advertising only when the advertiser is offering a gift that is not conditional on the purchase of any property or service.

A penalty is imposed for a civil violation of the Utah Motor Vehicle Business Regulation Act in accordance with Utah Code §41-3-702, as follows in pertinent part:

The following are civil violations under this chapter and are in addition to criminal violations under this chapter:...

- (c) Level III: . . .
 - (viii) advertising violation. . .
- (1) (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.

The civil fines or penalties imposed under Utah Code §41-3-702 may be waived or reduced pursuant to Utah Code §41-3-704 which provides:

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.

Utah Admin. Rule R877-23V-22 has been enacted regarding reasonable cause for waiver of the fines. This rule provides:

- (1)(a) Reasonable cause to reduce or compromise a penalty imposed by the division under Title 41, Chapter 3 may include a penalty imposed under Section 41-3-702 for a second or subsequent offense that is issued for a violation that

occurred before the division notifies the party of the penalty for the initial offense.

(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: (a) 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.

CONCLUSIONS OF LAW

1. As was noted by the Division at the hearing, the advertisements contained multiple violations under the provisions of Utah Admin. Rule R877-23V-7. It was the Division's position that the Division is required to enforce the statute and impose the penalty under Utah Code §41-3-702. There was no information presented at the hearing to refute the Division's position that the advertisements violated Utah Admin. Rule R877-23V-7 and Utah Code §41-3-210. Therefore, it was proper for the Division to impose a civil penalty against the dealership.

2. An advertisement violation is a Level III offense under Utah Code §41-3-702. That section provides for a graduated penalty for a first offense, second offense or third offense in a twelve month period. The Dealership had a prior Level III offense within the twelve month period. Although the prior offense was not the same type of offense as the advertisement violations at issue in this matter, as a prior Level III offense the penalty must be imposed as a second violation based on the provisions of Section 702,³ which results in the \$1,000 penalty amount. The statute bases the amount of the penalty on the level of offense and the number of offenses that have occurred during a twelve month period. There is no consideration given in the statute to base the amount of the penalty on the size of the business.

3. Although the \$1,000 penalty was properly imposed by the Division, the Commission may consider if there is reasonable cause to waive, reduce or compromise the penalty under Utah Code §41-3-704. The Commission has recently adopted Utah Admin. Rule R877-23V-22 regarding reasonable cause for reduction of the penalty. The Commission should

³ This was an issue previously addressed by the Commission in Findings of Fact, Conclusions of Law, Final Decision, Appeal No. 12-1254 (July 27, 2012). This decision may be reviewed at tax.utah.gov/commission-office/decisions.

consider based on the information presented at the hearing whether there is reasonable cause for waiver or reduction under those provisions. The owner of the dealership had argued that she was not aware the advertisements were in violation of the law. She also had pointed out that because her prior Level III violation did not involve advertisements, it did not put her on notice to correct the problem to avoid incurring a second violation. However, there were multiple advertisements and multiple violations per ad and the penalty had been assessed as one violation, which kept the violation to a single \$1,000 penalty. She also argued that the penalty was a lot of money for the small business and the fine would be the same for her small business as for much larger dealerships that could afford to pay the amount. Utah Admin. Rule R877-23V-22(3) provides specifically that ignorance of the law and inability to pay the penalty do not constitute reasonable cause. Because her requests for waiver center on ignorance of the law and financial hardship, under the express terms of Utah Admin. Rule R877-23V-22(3) the Commission may not waive, reduce or compromise this penalty.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission denies this appeal. It is so ordered.

DATED this _____ day of _____, 2013.

R. Bruce Johnson
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

PARTIAL CONCURRENCE PARTIAL DISSENT

I concur that the penalty for improper advertising was properly imposed, and further that it was properly imposed as a second violation; however I respectfully dissent on the amount of penalty that should be imposed.

Utah Code 41-3-70 Civil Penalty for Violation, which as the majority writes, bases the amount of the penalty on the level of offense and the number of offenses that have occurred during a twelve month period. However, Utah Code 41-3-704 Penalty Waiver, states the commission may waive, reduce, or compromise any of the civil penalties imposed by the division under this chapter upon making a record of its actions, and upon reasonable cause shown. Finally, Utah Administrative Rule R877-23V-22 provides that “reasonable cause to waive, reduce, or compromise a penalty does not include: (a) ignorance of the law; or (b) inability to pay a penalty imposed.”

In terms of Utah Code 41-3-70, I have already concurred that the penalty for improper advertising was properly imposed, and further that it was properly imposed as a second violation. In terms of Utah Code 41-3-704, as a commission we can waive, reduce or compromise any of the penalty for reasonable cause shown, but by Tax Commission rule R877-23V-22 ignorance of the law or inability to pay the penalty cannot be considered, but the taxpayer did not claim hardship or an inability to pay.

The taxpayer raised an issue of an equitable penalty. She pointed out that an automobile dealership with multiple salespeople selling vehicles at a higher value would receive the same \$1,000 penalty as she did with her business with one employee selling VEHICLES at a lower value. She stated the impact of a \$1,000 penalty would be significant to her, but may not even be felt by a dealership selling a higher value of inventory.

When looking at reasonable cause shown under Utah Code 41-3-704, the Taxpayer has placed forward an argument that to my knowledge has not been raised in previous appeals and the argument warrants consideration. If the purpose of penalties is to get compliance then it seems reasonable the penalty can fit the circumstances. I hold the Taxpayer’s request for consideration of the appropriate amount of a penalty to impose has merit and warrants exercise of the Commission’s discretion.

Based on the testimony I find there is reasonable cause to reduce the penalty. As the penalty cannot be reduced below the penalty imposed for a first offense for that violation, I would reduce the penalty to \$\$\$\$.

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.