15-385
TAX TYPE: ADVERTISING VIOLATION
TAX YEAR: 2015
DATE SIGNED: 6-26-2015
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. PERO
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. 15-385 Tax Type: Motor Vehicle Dealer Violation - Advertising Violation Dealer No. ##### Judge: Chapman

Presiding:
Robert P. Pero, Commissioner
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE FOR PETITIONER, General Manager and Partner (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 17, 2015. 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 penalty in the amount of $250 that the Motor Vehicle Enforcement Division (the "Division") imposed in a letter dated March 3, 2015

(Division's "Letter").[1] In the Letter, the Division informed the dealer that it was imposing the penalty for the following reasons:

> You dealership, PETITIONER, dealer #####, has been found in violation of Utah Rule R877-23V-7. Your dealership had several vehicles advertised on your website that did not adequately disclose a salvage/branded title. Salvage or branded titles must be disclosed directly after the year, make and model of the vehicle. A salvage or branded title cannot be listed amongst or after the options of the vehicle. Also just the word "branded" is not sufficient disclosure, several of the cars only said "branded" in the ad. You must disclose as "branded title" or "salvage title". . . .

In the Letter, the Division informed the dealer that it was imposing a penalty in the amount of $250 because the offense "is a level III violation" and because "[t]his is your first offense in the last 12 months."

3. The dealer timely appealed the $250 penalty. Originally, this matter was scheduled for a March 25, 2015 Initial Hearing. Because the dealer did not appear at the Initial Hearing, the Commission issued an Order of Default on April 7, 2015. On April 23, 2015, the dealer timely requested to proceed to a Formal Hearing.

4. The Division contends that the dealer has published advertisements that violate Utah Admin. Rule R877-23V-7(2)(bb) ("Rule 7"), which requires that "[a]n advertisement must disclose a salvage or branded title as prominently as the description of the advertised motor vehicle." As evidence, the Division submitted advertisements for five vehicles that appeared on the dealer's website at WEBSITE on February 27, 2015.[2] At the top of each advertisement page is a photograph of the vehicle (on the left side) and 13 lines of information about the vehicle (on the right side). At the bottom of each page is a list of "Vehicle Equipment." In the middle of each page (under the photograph) is a paragraph written by the dealer that begins with a description of the vehicle and some its features, after which appears either the term "Branded Title" (in three of the advertisements) or the word "Branded" (in two of the advertisements).

5. In the first three advertisements, the term "Branded Title" appears after a description of the vehicle and some of its features, specifically in the advertisements for a YEAR, MAKE, AND

1 Respondent's Exhibit 1.
2 Respondent's Exhibit 1.

MODEL-1, a YEAR, MAKE, AND MODEL-2, and a YEAR, MAKE, AND MODEL-3. As an example, in the advertisement for the YEAR, MAKE, AND MODEL-1, the paragraph in the middle of the advertisement reads, as follows in pertinent part:

> YEAR, MAKE, AND MODEL-1, Technology 2.3L, 4Cyl, AWD, SUV, Heated Leather Seats, Navigation, System Cruise Control, Power Seats Sunroof, Bluetooth, Branded Title. Do you want to drive the car of your DREAMS for the payment you can afford. PETITIONER WEBSITE is the place for you. Well, [w]e specialize in high quality pre-owned clear title & branded title vehicles, and we do it RIGHT. . . .

In addition, later in the paragraphs for these three advertisements, the dealer includes a sentence where it states that one of its specialties is "branded title vehicles." The advertisements for these three vehicles disclose the term "Branded Title" as prominently as the descriptions of the advertised motor vehicles.

6. The fourth advertisement page is for a YEAR, MAKE, AND MODEL-4. In the paragraph in the middle of this advertisement page, the word "Branded" appears after the description of the vehicle and some of its features, as follows in pertinent part:

> YEAR, MAKE, AND MODEL-4, 2.4L 4Cyl, FWD, Sedan, BLk/Blk, CVT Transmission, Bluetooth, Branded. Do you want to drive the car you've always dreamt of but couldn't quite afford? Well, with PETITIONER WEBSITE, you can. We specialize in high quality pre-owned vehicles, and we do it right. . . .

In this paragraph, the word "branded," but not the term "branded title," appears immediately after the description of the vehicle and a long list of features. The term "branded title," however, does not appear anywhere on the advertisement page for this vehicle. Furthermore, relatively close to the beginning of the paragraphs for the first three advertisements described above, the dealer states that one of its specialties is "branded title vehicles." This statement does not appear anywhere on the advertisement for the YEAR, MAKE, AND MODEL-4. The advertisement for the YEAR, MAKE, AND MODEL-4 *does not* disclose the term "Branded Title" as prominently as the description of the advertised motor vehicle.

7. The fifth advertisement page is for a YEAR, MAKE, AND MODEL-5. In the paragraph in the middle of this advertisement, the word "Branded" appears after the description of the vehicle and a long list of its features, as follows in pertinent part:

> YEAR, MAKE, AND MODEL-5, 5.7 LITTER (sic) HEMI, 4WD, and NAVI, 11K MILES, Air ride suspension, Blk/Blk Heated steering wheel, Power windows, Power door locks, Auto seat adjustment, Rear Heated Control Seats, Hands Free phone, Adaptive Cruise Control, Sunroof, Back up Camera, Wheel Control to package, CD, Branded. Won't last long! Best color! There are used SUVs, and then there are SUVs like this well-taken care of YEAR, MAKE, AND MODEL-5. This luxury vehicle has it all, from a posh interior to a wealth of superb features. If you want a creampuff with style, this is it. Road Track calls the MODEL-5 a vehicle with a pleasing, quiet cabin and a handsome exterior. This plush MODEL-5, with grippy 4WD, will handle anything mother nature decides to throw at you during one of her bad days at work or at play. Do you want to drive the vehicle you've always dreamt of but couldn't quite afford? Well, with PETITIONER WEBSITE, you CAN. We specialize in high quality pre-owned clean title & branded title vehicles, and we do it right. . . .

In this paragraph, the word "branded," but not the term "branded title," appears immediately after the description of the vehicle and a long list of features. The term "branded title" does not appear until much later in the paragraph where the dealer states that one of its specialties is "branded title vehicles." This statement, however, occurs in the latter half of a paragraph that is much longer than any of the other paragraphs found in the dealer's other four advertisements. The advertisement for the YEAR, MAKE, AND MODEL-5 *does not* disclose the term "Branded Title" as prominently as the description of the advertised motor vehicle.

8. At the hearing, the Division initially indicated that for each of the five advertisements to be in compliance with Rule 7(2)(bb), the term "branded title" should have appeared after the vehicle's year, make, and model in the 13 lines of information located on the upper right-hand side of the advertisement. The dealer explained that it created the advertisements with software from Dealer Center, which is used by dealers nationwide. The dealer contends that the software does not allow it to list "branded title" among the lines of information found in the upper right-hand side of the advertisement because this portion of the page is "automatically populated." After hearing about the dealer's inability to list "branded title" on this portion of the page, the Division stated that it would be satisfied if "branded title" appeared after the year, make, and model of the vehicle in the paragraph in the middle of the page. The Division, however, reiterated its position that disclosing the term "branded title" after describing both

the vehicle's year, make, and model *and* some of its features is not prominent enough to satisfy Rule 7(2)(bb).

9. The dealer explained that a customer must go through other pages on its website before it accesses the five advertisement pages submitted by the Division. The dealer explains that the first page a customer sees upon visiting its website is its "homepage," on which the dealer describes its business and states that it specializes in selling vehicles purchased from insurance companies and which have branded titles. The dealer also indicated that the homepage informs a customer that he or she can save thousands of dollars by purchasing such vehicles. The Division did not refute the dealer's characterization of the information that appears on its homepage. RESPONDENT, who testified on behalf of the Division, stated that he had not seen the dealer's homepage.

10. The dealer also stated that its homepage contains five tabs that a customer can "click" to get to other pages on its website. Two of these tabs are identified as "Inventory" and "About Us." The dealer stated that if a customer clicks the "Inventory" tab, he or she is able to view a page with photographs of all vehicles in the dealer's inventory. By clicking on these various photographs, the customer can access the advertisement pages for the individual vehicles that the Division proffered as evidence. The dealer also stated that if a customer clicks on the "About Us" tab, he or she can read more information about branded titles. The Division again did not refute this characterization of the dealer's website.

11. The dealer opened its business around MONTH AND YEAR and created its website soon afterwards. The dealer stated that it changed its "generic" homepage in December 2014 to inform customers that it specializes in selling branded title vehicles. The dealer explained that its homepage has been "pretty much the same" since December 2014, which would include the February 27, 2015 date on which the Division viewed the five advertisement pages at issue. The dealer explained that it is a relatively small dealership with perhaps 35 vehicles in inventory at any one time. The dealer admitted that

it also sells vehicles without branded titles, but indicated that it usually obtains these vehicles as customer trade-ins.

12. The dealer contends that the language of Rule 7(2)(bb) does not support the Division's position that the disclosure of a branded title must occur immediately after the vehicle's year, make, and model is described but before any vehicle features are described. The dealer states that the rule instead provides for the disclosure to be as prominent "as the description of the advertised motor vehicle." The dealer contends that in each advertisement at issue, it has disclosed the vehicle's branded title as prominently as the description of the vehicle. The dealer stated that it reads the rule as requiring the branded title information not to be disclosed in small print or to be "hidden." The dealer believes that because its website emphasizes that it sells branded title vehicles and because of the disclosure it made in each of the individual advertisements at issue, it has satisfied the requirement of Rule 7(2)(bb). For these reasons, the dealer asks the Commission not to accept the Division's "interpretation" of the rule and not to impose the $250 penalty.

13. The dealer also expressed frustration that it was not contacted about the Division's concerns with its advertisements before it imposed a penalty. The dealer stated that it does not have any intention to deceive customers and that it received no information in the dealer courses to suggest that its advertisements would be considered noncompliant with Utah law. The Division clarified that it does not conduct these courses. The dealer also asked the Commission to consider that it is only contesting the penalty because it believes that it is has complied with the rule as written, not as "interpreted" by the Division. The dealer admits that since this issue has arisen, it has changed its advertisement pages so that the term "branded title" appears in the middle paragraph immediately after the year, make, and model of the vehicle, even though it does not believe that it is necessary under rule's current language.

14. The dealer also submitted 13 advertisements for branded title vehicles that it found on the WEBSITE-2 website on March 12, 2015.[3] These advertisements are for vehicles offered for sale by a

3 Petitioner's Exhibit 1.

number of various other dealers. The dealer contends that none of these 13 advertisements disclose the vehicles' branded titles as prominently as it has disclosed its vehicles' branded titles in the five advertisements at issue. The Division, however, countered that it has imposed penalties on other dealers for publishing advertisements on which they did not disclose a branded title as prominently as the description of the advertised vehicle.

15. The Division also asked the Commission to consider that Rule 7(2)(bb) was adopted to ensure that a customer knows that a vehicle has a branded title before he or she goes to the trouble of driving to the dealership to see the vehicle. The Division contends that the disclosure of a vehicle's branded title must be displayed prominently in an advertisement in order to protect the public. The Division also asks the Commission to consider that the last two of the five advertisements it submitted disclose that the vehicles are "branded," not that they have "branded titles." The Division contends that use of the word "branded" alone could confuse a customer. For these reasons, the Division asks the Commission to sustain its determination that the dealer's advertisements do not comply with Rule 7(2)(bb).

16. The Division also asks the Commission to consider that the $250 penalty it imposed is for a "first offense" of an advertising violation, even though it found five advertisements that it believes to be noncompliant with the rule. The Division stated that it does not consider the dealer's actions to be criminal, intentional, or even negligent. However, it indicated that it attempts to treat all dealers equally. For these reasons, the Division asks the Commission to sustain the $250 penalty it imposed.

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") 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.
> . . . .
> (bb) An advertisement must disclose a salvage or branded title as prominently as the description of the advertised motor vehicle.

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.
> . . . .

4. UCA §59-1-1417(1) provides that the burden of proof is generally upon the petitioner in proceedings before the Commission, with limited exceptions that are not applicable to 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)(bb) requires a dealer to use advertisements in which it discloses "a salvage or branded title as prominently as the description of the advertised motor vehicle." This language does not expressly state that the disclosure of the branded title must occur after the year, make, and model of the vehicle. Nevertheless, the language clearly provides that the branded title disclosure must be as prominent as the description of the advertised vehicle. As a result, the Commission must examine each of the five advertisements at issue and determine if the dealer has disclosed each vehicle's branded title as prominently as the description of the vehicle. If the Commission determines that the dealer has failed to do this for any one of the five advertisements, the dealer will have violated Rule 7(2)(bb) and will be subject to the appropriate civil penalty.

3. Three of the advertisements are nearly identical in how they disclose the vehicles' branded titles, specifically the advertisements for the YEAR, MAKE, AND MODEL-1, the YEAR, MAKE, AND MODEL-2, and the YEAR, MAKE, AND MODEL- 3 (as described in Finding of Fact #5). On each of the these advertisements, the dealer disclosed that the vehicle had a "Branded Title" in the paragraph in the middle of the page after the dealer had described the vehicle's year, make, and model and some of its features. The Commission finds that these disclosures are as prominent as the descriptions of these three advertised motor vehicles. Contrary to the Division's position, Rule 7(2)(bb) does not require that the disclosure of a salvage or branded title must occur immediately after the description of the vehicle's year, make, and model and not after some of its features are also listed. As a result, these three advertisements are in compliance with Rule 7(2)(bb) and do not violate Section 41-3-210(1)(a).[4]

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4 The Division stated that its position has been accepted in other Commission decisions. Although the Division did not refer to any specific decision at the hearing, the Commission's website has three decisions on it that address the relatively new Rule 7(2)(bb) (which was adopted in 2009). Copies of these and other selected Commission decisions may be viewed in a redacted format on the Commission's website at. http://www.tax.utah.gov/commission-office/decisions.

The first of these three decision is *USTC Appeal No. 09-2525* (Findings of Fact, Conclusions of Law, and Final Decision Nov. 3, 2010), in which the Commission considered two internet advertisements in which the term "branded title" first appeared near the end of the seller's lengthy notes about the vehicles. Clearly, the positioning of the branded title disclosure in each of those two advertisements is not as prominent as the description of the vehicle. Nevertheless, it is noted that the Division argued in that case that the disclosure of a branded title should appear after the year, make, and model of the vehicle.

4. The fourth advertisement at issue is for the YEAR, MAKE, AND MODEL- 4 (as described in Finding of Fact #6). The term "branded title" does not appear in the advertisement page for this vehicle at all. Use of the word "branded" in the advertisement is insufficient to disclose a branded title, regardless of whether the dealer states on another page of its website that it specializes in branded title vehicles. Unlike the paragraphs in the middle of the other four advertisements at issue, this advertisement's paragraph contains no mention that one of the dealer's specialties is "branded title vehicles." The Commission finds that this advertisement does not disclose the vehicle's branded title as

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Although the Commission sustained the penalty at issue in that case, it did not expressly state that the disclosure must appear immediately after the year, make, and model of a vehicle in order to comply with the rule.

Instead, the Commission stated that "[a] reasonable interpretation of the statute and rule would be to place the branded title disclosure at the beginning of the custom description, similar to the Dealership's advertisement for the YEAR, MAKE, AND MODEL." The advertisement for the YEAR, MAKE, AND MODEL−read, as follows: "YEAR, MAKE, AND MODEL – CLEAN TITLE – SUNROOF – 6 DISC CHANGER – CRUISE CONTROL. COME TEST DRIVE TODAY. . . ." Admittedly, the "clean title" description comes immediately after the vehicle's year, make, and model. However, the Commission specifically ruled in *Appeal No. 09-2525* that the disclosure must come at the "beginning of the custom description" and be "similar" to the advertisement for the YEAR, MAKE, AND MODEL. In the instant case, there is no question that the dealer's first three advertisements disclose the branded titles at the beginning of the dealer's custom descriptions and not in the middle or at the end of these paragraphs. These three advertisements are similar enough to the advertisement in *Appeal No. 09-2525* for the YEAR, MAKE, AND MODEL to comply with the rule.

The second decision is *USTC Appeal No. 12-381* (Initial Hearing Order Feb. 29, 2012), in which the Commission considered five advertisements for vehicles with branded titles that the dealer in that case had advertised on the "NAME website." In that case, each advertisement disclosed the vehicle's "branded title" near the bottom of the advertisement page and not in the paragraph or note written by that dealer. Accordingly, the disclosures in the *Appeal No. 12-381* advertisements are less prominent than the disclosures in these three of the advertisements at issue in the instant case. Furthermore, in *Appeal No. 12-381*, the Commission again never stated that the disclosure of a branded title must occur immediately after the description of the vehicle's year, make, and model and before any features are described.

The third decision is *USTC Appeal No. 14-130* (Initial Hearing Order Feb. 21, 2014), in which the Commission considered three advertisements in which the dealer in that case disclosed a "rebuilt title" or "rebuilt/reconstructed title" after listing other information about the vehicles. However, these advertisements had other violations because they did not list the dealer's name or dealer number. The Commission sustained the penalty the Division imposed in that case, but did not address whether a branded title must be disclosed in an advertisement immediately after the description of the vehicle's year, make, and model.

prominently as the description of the advertised vehicle. Accordingly, this advertisement does not comply with Rule 7(2)(bb) and, thus, is a violation of Section 41-3-210(1)(a).[5]

5. Because the Commission has found that the dealer's fourth advertisement, as discussed in the prior paragraph, is a violation of Section 41-3-201(1)(a), the dealer is subject to the appropriate civil penalty regardless of whether the fifth advertisement is in compliance with Rule 7(2)(bb) or not. The Commission, nevertheless, will explain why it does not consider the fifth advertisement to be in compliance with the rule.

6. The fifth advertisement is for the YEAR, MAKE, AND MODEL-5 (as described in Finding of Fact #7). For this advertisement, the term "branded title" does not appear until much later in the paragraph where the dealer states that one of its specialties is "branded title vehicles." This statement, however, occurs in the latter half of a paragraph that is much longer than any of the paragraphs found in the dealer's other four advertisements and, as a result, is not prominent. Admittedly, this advertisement uses the word "branded" after the description of the vehicle and after a much longer list of features than seen in the dealer's other four advertisements. Not only is the use of the word "branded" alone insufficient to comply with the rule, but the placement of the word after such a long list of features is not prominent. The Commission finds that this advertisement does not disclose the vehicle's branded title as prominently as the description of the advertised motor vehicle. Accordingly, this advertisement does not comply with Rule 7(2)(bb) and, thus, is also a violation of Section 41-3-210(1)(a).

7. Section 41-3-702(1)(c)(viii) provides that an "advertising violation" is a Level III offense for purposes of imposing civil penalties. Two of the dealer's advertisements, specifically the fourth and fifth advertisements discussed earlier, do not comply with Rule 7(2)(bb) and, thus, are advertising violations. Accordingly, the dealer's advertising violations are considered Level III offenses.

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5 The dealer has submitted 13 advertisements published by other dealers, and some of these may not be in compliance with Rule 7(2)(bb). However, the fact that other dealers may also publish advertisements that do not comply with the rule does not excuse the dealer from publishing a noncompliant advertisement. The Division has imposed fines on other dealers for publishing advertisements that do not comply with the Rule 7(2)(bb).

8. 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 Division indicates that the dealer did not have any other offenses within the past 12 months and that it considered the advertisements at issue to be a single offense, not separate offenses for purposes of this statute. Accordingly, the Commission finds that the Level III offense resulting from the dealer's two advertising violations is the first Level III offense committed by the dealer in the prior 12 months. The penalty for the first Level III offense within the past 12 months is $250. For these reasons, the Division's $250 penalty is appropriate and should be sustained.

_____
Kerry Chapman
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the $250 penalty that the Division imposed upon PETITIONER, Dealer No. #####. It is so ordered.

DATED this _____ day of _____, 2015.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
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.