

20-2

TAX TYPE: ADVERTISEMENT VIOLATIONS

TAX YEAR: 2019

DATE SIGNED: 3/27/2020

COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. ROCKWELL, L. WALTERS

GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER,</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>MOTOR VEHICLE ENFORCEMENT DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="text-align: center;">Respondent.</p>	<p style="text-align: center;">INITIAL HEARING ORDER</p> <p>Appeal No. 20-2</p> <p>Account No. #####</p> <p>Tax Type: Advertisement Violations</p> <p>Tax Year: 2019</p> <p>Judge: Nielson-Larios</p>
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Presiding:

Aimee Nielson-Larios, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE FOR PETITIONER, Representative, by telephone
For Respondent: RESPONDENT, Assistant Director, Motor Vehicle Enforcement Division,
in person

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on January 28, 2020, for an Initial Hearing in accordance with Utah Code Ann. § 59-1-502.5. Petitioner (“Dealership”) is appealing a \$\$\$\$ civil penalty that Respondent (“Division”) imposed in accordance with Utah Code Ann. § 41-3-702(1)(c)(viii) for a Level III advertising violation. The Division imposed this penalty through a letter dated December 20, 2019, in which the Division informed the Dealership of the following in part:

Your dealership . . . has been found in violation of Utah Code Annotated 41-3-702 and rule R877-23v-7(n). Your dealership listed a “Free” (X) cooler with purchase, which you cannot advertise the word “Free”. . . .

APPLICABLE LAW

Utah Code Ann. § 41-3-210(1)(a), (c) states the following:

(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;

[or]

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

....

Utah Code Ann. § 41-3-702 states the following in 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: \$\$\$\$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 before the commission of the current offense may be considered.

....

Utah Admin. Code R877-23V-7(2)(n) (2009-present) states the following:

(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.

....

(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.

....

Utah Code Ann. § 41-3-704 states the following:

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. Code R877-23V-22 states the following:¹

- (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.

DISCUSSION

The Dealership placed an advertisement that states in part, “FREE (X) COOLER WITH PURCHASE!” and “You can get a new **TYPE OF VEHICLE for low as 0% APR**, and we’ll throw in a **FREE (X) cooler. . . .**”

The Dealership’s representative explained the following at the hearing. The Dealership received the language of an administrative rule about advertising from its advertising agency. The Dealership’s representative did not have the administrative rule number, but he assumed the advertising agency received the information from the Tax Commission. He thought the Dealership followed the language correctly in its use of the term “free” in its advertising. The Dealership has had no issues in the past and intended to meet the requirements of the regulatory language. During the hearing, the Dealership’s representative realized the Dealership received language from the wrong version of R877-23V-7, and he explained that the Dealership made an accidental mistake in its advertisement because of that incorrect language.

¹ Subsections (1) and (2) of R877-23V-22 apply to “a penalty imposed . . . 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.” For that situation, Subsection (1)(a) explains that “reasonable cause . . . may include [that type of] penalty” and Subsection (2) limits the amount by which that type of penalty may be reduced. The language of Subsections (1) and (2) does not apply to the factual situation of this appeal.

It became apparent at the hearing that the advertising agency had provided the Dealership with the language found in R877-23V-7(15) (2008), which is a prior version of the rule.² At the time of the hearing, the prior language found in R877-23V-7(15) (2008) was also located on the tax.utah.gov website, on the webpage of <https://mved.utah.gov/business/advertising-laws>. During the hearing, neither party appeared to have been aware of the incorrect information on the website. The Dealership's representative did not know from where the advertising agency had received the incorrect language it provided the Dealership. It was undisputed that based on the terms offered, the use of "free" in the Dealership's advertisement meets the prior version of R877-23V-7.

The Division's representative explained the following at the hearing. The Dealership violated Utah Code Ann. § 41-3-210(1)(a), (c) because the Dealership violated the current version of Utah Admin. Code R877-23V-7(2)(n) (2009-present). Under the current version of R877-23V-7(2)(n), "'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." "Free" may not be used when an item is given based on a purchase, but "free" may be used when an item is given not based on a purchase, such as "free hot dogs." An advertising violation is a Level III civil violation under Utah Code Ann. § 41-3-702. The advertising violation at issue was the Dealership's first offense within the last 12 months. The Division imposed a \$\$\$\$ civil penalty in accordance with § 41-3-702(2)(a)(iii). The Division's representative explained that all dealerships must abide by the new version of the rule. Any dealership may give the Division a copy of an advertisement for the Division to review before the dealership places it, and any dealership may call the Division with questions about an advertisement.

After reviewing the facts and the parties' arguments, the Dealership has violated the current version of R877-23V-7(2)(n) by using "free" in its advertisement when a vehicle purchase is required;

² Utah Admin. Code R877-23V-7(15) (2008) states the following:

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.

....

(15) Free. "Free" may be used in advertising only when the advertiser is offering an unconditional gift. If receipt of the merchandise or service is conditional on a purchase the following conditions must be satisfied:

- (a) The normal price of the merchandise or service to be purchased may not have been increased nor its quantity reduced;
- (b) The advertiser must disclose this condition clearly and conspicuously together with the offer and not by placing an asterisk or symbol next to the word "free" and then referring to the condition in a footnote; and
- (c) The offer must be temporary. For purposes of this subsection, "temporary" means that the offer is made for no more than 30 days during any 12-month period.

....

therefore, the Dealership has violated § 41-3-210. Based on the violation of § 41-3-210, the Division correctly imposed a \$\$\$\$ civil penalty in accordance with § 41-3-702(2)(a)(iii).

However, there are sufficient reasons for the Commission to waive the \$\$\$\$ civil penalty in accordance with § 41-3-704. The Dealership tried to meet the advertising requirements of R877-23V-7 before placing the advertisement by reviewing information about the use of “free” from its advertising agency. However, the advertising agency provided the Dealership with incorrect language from a prior version of R877-23V-7(2)(n). Furthermore, that same incorrect language was also on the tax.utah.gov website. The tax.utah.gov website could have been the source of the incorrect language the advertising agency received and then provided to the Dealership. Thus, the error on the part of the Tax Commission in not updating its website might have contributed to the error made by the Dealership in this matter. Reasonable cause has been shown for a waiver of the penalty based on a combination of these factors.³

Aimee Nielson-Larios
Administrative Law Judge

³ In general, reasonable cause is not shown by “ignorance of the law.” *See* R877-23V-22(3)(b). However, ignorance of the law does not preclude a waiver of a penalty based on other factors.

DECISION AND ORDER

Based on the foregoing, the Commission waives the \$\$\$\$ civil penalty assessed on December 20, 2019. 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, or emailed, 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

or emailed to:
taxappeals@utah.gov

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2020.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Rebecca L. Rockwell
Commissioner

Lawrence C. Walters
Commissioner

Notice of Payment Requirement: Any balance due as a result of this order must be paid within thirty (30) days of the date of this order, or a late payment penalty could be applied.