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NEW CAR DEALERS POLICY AND APPEALS BOARD

STATE OF CALIFORNIA

In the Matter of )  
)  
POMONA VALLEY DATSUN, INC., )  
)  
Appellant, )  
)  
v. )  
)  
DEPARTMENT OF MOTOR VEHICLES, )  
)  
Respondent. )

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Appeal No. A-31-72

Filed: March 16, 1973

Time and Place of Hearing:

February 7, 1973, 1:30 p.m.  
Room 1122, State Building  
107 South Broadway  
Los Angeles, California

For Appellant:

Ronald E. Pettis  
Attorney at Law  
Hennigan, Butterwick & Clepper  
4000 Tenth Street  
Riverside, CA 92501

For Respondent:

R. R. Rauschert  
Legal Adviser  
By: Alan Mateer  
Staff Counsel  
Department of Motor Vehicles  
2415 First Avenue  
Sacramento, CA 95818

FINAL ORDER

Pomona Valley Datsun, Inc., hereinafter referred to as  
"appellant", appealed to this board from a decision of the  
Director of Motor Vehicles suspending for a period of 30 days

the dealer's license to buy and sell automobiles. Execution of the 30-day suspension was stayed in its entirety and appellant was placed on probation to the Department of Motor Vehicles for two years during which time appellant is to obey all the laws of the State of California and all rules and regulations of the Department of Motor Vehicles governing the exercise of appellant's privileges as a licensee.

Proceeding via the Administrative Procedure Act (Section 11500 et seq. Government Code), the Director found that appellant: (1) failed in 7 instances to give written notice to the department before the end of the third business day after transferring an interest in certain vehicles, thereby violating Section 5901 Vehicle Code;<sup>1/</sup> (2) failed in 8 instances to mail or deliver to the department the reports of sale, together with other documents and fees, required to register certain vehicles within the 20-day period allowed by law, thereby violating Section 4456 and Section 5753; (3) failed in 5 instances to mail or deliver to the department the reports of sale, together with other documents and fees, required to register certain vehicles within the 30-day period allowed by law, thereby violating Section 4456 and Section 5753; and (4) included as an added cost to the selling price of 22 vehicles additional fees in excess of the fees due and paid to the state,

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<sup>1/</sup> All references are to the Vehicle Code unless otherwise indicated.

thereby violating Section 11713(g).

The Director further found that appellant refunded the additional registration fees to the customers after the investigation by the department.

Appellant's appeal notice and opening brief raise issues concerning the absence of any finding by the department of wrongful intent on the part of the dealer and the appropriateness of the penalty. In oral argument before this board, appellant's attack upon the decision of the Director of Motor Vehicles followed a course dissimilar from that reflected in the notice or brief.

As we understand the thrust of appellant's oral argument concerning untimely notices of sale and untimely reports of sale, it calls into question the appropriateness of the manner in which the department determines, for finding violations of Section 5901 and Section 4456, the date of sale of a vehicle. Regarding the finding that appellant overcharged customers vehicle license fees, appellant's argument is three-fold: one, there was actually an underpayment to the department rather than an overcharge to the customers; two, the department did not prove the correct amount of fees; and, three, appellant actually reimbursed the overcharged customers by crediting the customers' accounts at the dealership with the amount of the overcharge. We turn first to the issues raised in oral argument and conclude with the issues raised in opening brief.

MAY THE DEPARTMENT RELY ON THE DATE OF SALE ENTERED BY THE DEALER ON THE NOTICE OF SALE AND REPORT OF SALE FOR DETERMINING THE UNTIMELINESS OF THE SUBMISSION OF THOSE DOCUMENTS TO THE DEPARTMENT?

Appellant points to Section 5901 and correctly states that the sale of a motor vehicle occurs when the purchaser passes consideration to the seller and takes physical possession or delivery of the vehicle. Appellant argues that this statutory definition should control the date of sale rather than the date entered by the dealer and next argues that the department, in relying upon the date of sale entered by the dealer, is creating an unauthorized presumption of the correctness of that date.

In our view, it is entirely proper for the department to rely on the date of sale entered by the dealer on the notice of sale and report of sale. The entry by the dealer of a certain date of sale creates a permissible inference that such date is the true date of sale. "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." (Section 600(b) Evidence Code.) Is it not logical and reasonable to deduce that a licensed automobile dealer would avoid subjecting himself to both criminal and administrative sanctions (filing a false document - Section 20) by submitting to his licensor correct information on a document that the law requires? We firmly believe that such a deduction is permissible.

We have failed to find in the administrative record sufficient evidence to dispel the inference that the date of sale entered by appellant was the actual date of sale. At one point, counsel for appellant suggested via cross-examination of a departmental witness that the delivery date of a vehicle (Item No. 4) was later than the date of sale shown on the notice of sale. However, the witness had no personal knowledge of either the date of sale or the actual date of delivery (R.T. 5:7-15) and the matter was not pursued. If the true date of sale was other than that shown on the documents submitted by the dealer, facts in support thereof should have been brought forth by appellant at the administrative hearing.

DID THE DIRECTOR ERR IN FINDING THAT APPELLANT INCLUDED AS AN ADDED COST TO THE SELLING PRICE OF A VEHICLE, AN AMOUNT FOR LICENSING OR TRANSFER OF TITLE OF THE VEHICLE, WHICH AMOUNT WAS NOT DUE THE STATE, THEREBY VIOLATING SECTION 11713(g)?

According to appellant, its salesman, when selling a vehicle, included the cost of dealer installed accessories in the license fee computation but when the deal came to the "front office", the license fees were recalculated and the employee so doing, following instructions from the department during 1969 or 1970, used only the base price of the car as fixed by the manufacturer. The amount of fees as recalculated was sent to the department and, because the cost of dealer-installed accessories were not included in the computation, appellant contends that the department was "...probably underpaid

two or three dollars in many cases, rather than the customer being overcharged." (R.T. 15:28 to R.T. 17:22.) Appellant conceded that it had collected more for vehicle license fees than was forwarded to the department. (R.T. 19:4-7.)

The evidence is confusing as to what formula the dealer's staff used for computing vehicle license fees but, the underpayment theory is not supported by the record. Appellant's only attempt to substantiate the underpayment theory was with reference to the Herron vehicle. (R.T. 28:18 to R.T. 29:14.) The market value of that vehicle for license fee purposes was computed at \$2,073.72. Appellant also showed that the selling price was \$2,140.90. Thus, the market value entered on the document submitted to the department was actually \$65.18 less than the cost of the vehicle to the buyer. These facts fail to support appellant's underpayment theory because the buyer's cost has no relevancy in computing license fees (Section 10753 Revenue and Taxation Code). Appellant, not having shown the correct market value for license fee purposes, failed to show that the Herron transaction resulted in an underpayment.

Appellant complains that the department did not prove its case in that it did not prove the correct amount of license fees due in each instance. Appellant's complaint is ill-founded. The department introduced into evidence, without objection, copies of the master file reference copy of the certificate of ownership in each instance wherein a charge of excessive

license fees was made. These records reflected the amount of the license fee as computed by the department and appellant attempted no rebuttal of this evidence. If the department erred, the facts required to show error were readily available to appellant.

Appellant next argues that any amounts collected from customers and not submitted to the department were returned by crediting the customer's account. This argument has no bearing on whether or not Section 11713(g) has been violated. It goes only to the issue of penalty; discussion thereof will be postponed until we reach the penalty phase.

As previously indicated, in opening brief appellant contends "...that in addition to the findings of certain violations of the Vehicle Code Sections 4456, 5753, 5901 and 11713(g), that some finding of fraud or wrongful intent in dealing with the public is required before a dealer's license, certificate, and special plates can be suspended pursuant to Vehicle Code Section 11705..." As authority for this proposition, appellant cites *Merrill v. Department of Motor Vehicles*, 71 Cal. 2d 907, and recites language of the court pointing out that the statutory scheme governing the licensing of dealers has as its primary concern, "...that the public be protected from unscrupulous and irresponsible persons in the sale of vehicles subject to registration under the code."

We rejected this argument in *Diener Motors v. Department of Motor Vehicles*, A-15-71. We said: "...we do not believe the *Merrill* case either requires or authorizes us to consider the

dealer's character, reputation or state of mind when deciding whether there was or was not a violation of Section 11713(g) Vehicle Code." We continue to hold that the Merrill case merely precludes the department from imposing upon an applicant for a dealer's license standards of conduct, or other requirements, not related to the applicant's honesty, fair dealing and freedom from deceit under the requirement that the applicant be a "bona fide" dealer and that the holding in the Merrill case has no bearing whatever on the proper interpretation of Section 11713(g).

IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH HIS FINDINGS?

Appellant characterizes the stayed 30-day suspended sentence and two years' probation as an "abuse of discretion" on the part of the Director of Motor Vehicles. We reject this characterization in its entirety.

An abuse of discretion is the exercise of discretion exceeding the bounds of reason, all circumstances before it being considered, or its exercise to an end or purpose not justified by and clearly against reason. (Schaub's Inc. v. Department of Alcoholic Beverage Control, 153 Cal.App.2d 858; Primm v. Primm, 46 Cal. 690.) Where reasonable men may differ over the appropriateness of an administrative penalty, there can be no abuse of discretion. (Manjares v. Newton, 64 Cal.2d 365; Delta Rent-a-Car Systems v. City of Beverly

Hills, 1 Cal.App.3d 784; Johnston et al. v. Rapp, 103 Cal.App. 2d 202; Harris v. Alcoholic Beverage Control Appeals Board, 62 Cal.2d 589). Where, as here, there are a substantial number of violations of the law governing the conduct of the licensed business, some involving the handling of funds belonging to others than the licensee, and the administrative sanction does not require, in the absence of further wrongful conduct, a cessation of the licensed business, reasonable men would not all agree that the penalty was too severe.

Our rejection of appellant's "abuse of discretion" argument does not, however, dispose of the penalty issue. As we pointed out in Bill Ellis Ford v. Department of Motor Vehicles, A-2-69, and followed in subsequent cases, the Legislature did not intend that this board be bound by the "abuse of discretion" rule. We, therefore, are required to review the facts of the case and, in the exercise of our independent judgment, determine whether or not the penalty fixed by the director is commensurate with such facts.

We have on numerous occasions emphasized the importance of meeting the time requirements fixed by statute for filing certain documents with the department (Bill Ellis Ford v. DMV, supra; Fletcher Chevrolet, Inc. v. DMV, A-4-69; Coberly Ford v. DMV, A-25-72). In Coberly, we reviewed the legislative history of the statutory scheme for recordation of interest in motor vehicles

and pointed out the potential for harm to the public from untimely reporting to the department of transfers of interests in motor vehicles. We said commencing at page 6:

"The potential for buyer frustration, inconvenience and legal entanglement, both criminal and civil, that may arise from delinquent reporting to the Department of Motor Vehicles on the part of dealers is too obvious to require elaboration. Having a highly mobile, expensive and readily marketable item of property with no indicia of ownership other than mere possession is simply incompatible with sound business practices. The Legislature and the Department of Motor Vehicles, the administrative agency vested with the duty of registering vehicles (14,444,245 vehicles in 1971) have taken steps to provide a workable means of recording interests in vehicles and enforcing such requirements."

Furthermore, we added:

"When one considers the several hazards a dealer exposes his business to, to say nothing of the welfare of his customers, when he fails to meet departmental reporting requirements, one wonders how a dealer can regard such requirements other than as the most important aspect of his business operation."

We are cognizant of the fact that appellant sent two of its office staff, Cheryl Codner and Lorraine Frick, to a training program for the purpose of educating them in the calculating of license fees. The training was for a period of eight weeks and appellant paid the costs. Commendable as this may be, obviously the desired result was not achieved. The course commenced during February 1971 and the sales giving rise to the finding of overcharges of license fees occurred from February 13, 1971 to and including June 23, 1971. The training failed to remove the differences concerning calculation of license fees that existed between the persons attending the

course and Martin Sparks, an employee of appellant who processed "DMV work" at the time the overcharges occurred. Sparks continued to handle the work in a manner that he felt was correct although his method differed from that taught Codner and Frick. (R.T. 31:19 to R.T. 32:7).

Any misinformation Sparks may have received from his contacts with the department could have been dispelled had there been proper follow-up by the dealership when Codner and Frick completed the course. Notwithstanding the fact that two persons from the dealership attended the course for the purpose of learning license fee computation, Sparks was left responsible for calculating such fees until one of the employees that attended the course was assigned this responsibility several months after the course was completed (R.T. 40:18-23). Furthermore, the knowledge gained by Codner and Frick apparently was not passed on to the sales staff (R.T. 43:15-17).

These and other facts cause us to believe that appellant's president did not, as he testified, "...do everything humanly possible" to properly instruct and train employees. He did not check the Registration Manual issued by the department when he found a difference of opinion existing among employees concerning the calculation of fees (R.T. 51:16-19). He did not read the instructions in the Dealer's Handbook, a booklet issued by the department for the convenience of dealers, concerning the calculation of fees (R.T. 52:2-5). It becomes

abundantly clear that appellant's president viewed casually the dealership's responsibility to the department and to customers, as far as calculating license fees is concerned.

We believe a reasonably prudent businessman would have been more cognizant of and more concerned over the hazards involved in deviations from statutory requirements concerning the conduct of his licensed business and, to avoid such hazards, would have made sure that the knowledge gained by those attending the school was passed on to others in need of such knowledge. This was not done but, under the penalty imposed by the director and affirmed by us, appellant has the opportunity to remedy any defects that may still exist in its procedures. The penalty does not require the dealership to shut its doors providing its officers, agents and employees obey all laws and regulations governing the licensed business. This certainly cannot be said to impose an unreasonable or additional burden.

It should go without saying that crediting a customer's account by a debtor-dealer without immediately paying the customer-creditor the amount of the credit is a far cry from making a prompt refund of the amount admittedly due the customer as evidenced by the credit to the customer's account on the debtor-dealer's books. Proof of prompt refund of a mistaken overcharge may be entitled to great weight as evidence

in mitigation of violation of Section 11713(g). Raising a credit on the debtor-dealer's books, without notification to the customer, is merely an admission of knowledge by the dealer of the violation. It is questionable whether this evidence places the licensee in a better or worse position than the licensee who has overcharged but whose books do not show that the overcharge was known to the licensee. Certainly the admission is absent in the latter situation.

Also, it should be apparent to dealers that some customers may never return to their doors. In any event, having violated the law by overcharging the customer, the licensee has absolutely no right to continue to use the overcharged amount in its business on the assumption the customer may return to the licensee for service or goods to offset the debt. The licensee must, upon discovering its erroneous overcharge, take immediate steps to refund the money it unlawfully extracted from its customer if it hopes to show mitigation in regard to penalty. (Any language to the contrary in *Ralph Williams Ford v. Department of Motor Vehicles*, A-5-69, is hereby disapproved.) Appellant's showing in this regard is lacking.

We observe, further, that if data furnished by the department, or language in the statutes, creates ambiguity as to the amount of fees due, the licensee should establish a trust

account of the funds involved, separate from its own funds, and promptly advise both the customer and the department of its action and the reasons therefor. Appellant advised no one of its position in this regard until a review of the dealership's operation by the department. We further note that Sparks testified: "Well, once, several years ago at a meeting, they [Department of Motor Vehicles] made it clear that it was our duty to return the money to the customers." (R.T. 38:26-28.)

The money collected from the customer belongs to either the state or the customer, not the licensee, and the licensee, once aware of any ambiguity or conflict, has no right to convert the money to its own use as the proof here indicates was the case.

The decision of the Director of Motor Vehicles is hereby affirmed in its entirety.

This Final Order shall become effective March 30, 1973.

GILBERT D. ASHCOM

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AUDREY B. JONES

ROBERT B. KUTZ

JOHN ONESIAN

ROBERT A. SMITH

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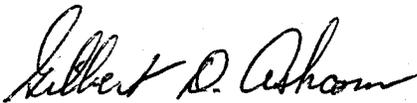
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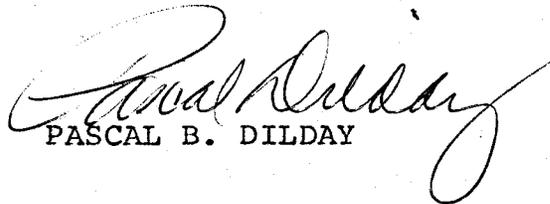
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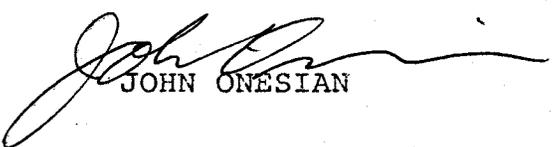
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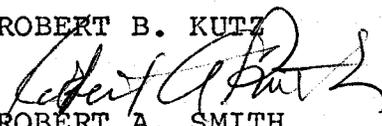
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A-31-72