STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO

IN RE:

PETITION FOR DECLARATORY STATEMENT
BEFORE THE DEPARTMENT OF BUSINESS
AND PROFESSIONAL REGULATION,
DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO,

On behalf of TANTUS TOBACCO HOLDINGS, LLC,

Petitioner.

/  

ORDER DENYING PETITION FOR DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (hereinafter “Division”) issues this Order Denying Petition for Declaratory Statement pursuant to section 120.565, Florida Statutes.

PRELIMINARY STATEMENT

On February 15, 2011, Petitioner filed with the Division a Petition for Declaratory Statement on behalf of TANTUS TOBACCO HOLDINGS, LLC, thereby giving the Division ninety days to respond from the date of the petition. The Division renders its Findings of Fact on the basis of the information contained in the Petition for Declaratory Statement.

FINDINGS OF FACT

The following findings of fact are based on the information described in Petitioner's Petition for Declaratory Statement (hereinafter “the Petition”). The Division
takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this final order.

1. Tantus Tobacco Holdings, LLC, (hereinafter “TTH”) is a tobacco sales and marketing company and Kentucky based tobacco subjobber. TTH’s business model is based on outside sales representatives distributing point of sale advertising materials, carrying “promotional tobacco products” (“PTP”) in their vans and selling PTP to tobacco vendors at cost in an effort to stimulate purchases of various tobacco brands from resident distributors.

2. PTP’s are fully tax paid cigarettes purchased from licensed resident distributors in the state where the sales representative operates. The sales representative secures a receipt for all PTP purchases reflecting payment of all taxes by the distributor, documents the resale of the PTP to vendors by invoice evidencing no markup in sales price and the vendor’s sales tax number. The sales representative maintains this documentation in a file cabinet in the delivery van at all times.

3. Tantus Tobacco Holdings, LLC, proposes to implement this business model in the state of Florida and has filed a Petition for Declaratory Statement for official approval.

CONCLUSIONS OF LAW

1. The Division has jurisdiction over this matter pursuant to Sections 120.565, 210.10, Florida Statutes, and is responsible for the application and enforcement of Chapter 210, Florida Statutes, specifically Sections 210.01 and 210.015, Florida Statutes.
2. Petitioner TTH is substantially affected by the statutory provisions cited above and has standing to seek this declaratory statement.

3. Section 120.565, Florida Statutes, provides:

   (1) Any substantially affected person may seek a declaratory statement regarding an agency’s opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner’s particular set of circumstances.

   (2) The petition seeking a declaratory statement shall state with particularity the petitioner’s set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

4. Rule 28-105.001, F.A.C., provides:

   A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner’s particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

5. Rule 28-105.002(4)-(5), F.A.C., provides:

   (4) The statutory provisions(s), agency rule(s), or agency order(s) on which the declaratory statement is sought.

   (5) A description of how the statutes, rules, or orders may substantially affect the petitioner in the petitioner’s particular set of circumstances.

6. Petitioner has failed state with particularity the petitioner’s set of circumstances for which a declaratory statement is sought as required under Section 120.565(2). Specifically, inadequate information is given by petitioner as to TTH’s status as a subjobber; the employed “outside” sales representatives; the supplier of tobacco products to the TTH sales representatives; the amount and type of tobacco products being sold by TTH sales representatives.
7. Petitioner has failed to specify the statute, rule, or order that petitioner believes may apply to TTH's current circumstances. In the Petition for Declaratory Statement, petitioner requests a declaratory statement that "[p]rovides petitioner with all licensing, registration, and reporting obligations required by the state of Florida to conduct the limited commercial activities as stated above." Petitioner failed to specify as required under Section 120.565(2), Florida Statutes, and Rule 28-105.002(4), F.A.C.

For the above stated reasons it is hereby:

ORDERED that Petition for Declaratory Statement is DENIED.

Dated this ___ day of April, 2011.

John R. Powell, Director
Division of Alcoholic Beverages and Tobacco
1940 North Monroe Street
Tallahassee, Florida 32399-1020
RIGHT TO APPEAL

THIS DECLARATORY STATEMENT CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO 120.68, FLORIDA STATUTES, AND RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH SARAH L. WACHMAN, AGENCY CLERK FOR THE DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, WITHIN 30 DAYS OF THE RENDITION OF THIS DECLARATORY STATEMENT.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to G. George Bertram, Attorney for Petitioner, 200 Progress Drive, Suite 500, Russell Springs, KY 42642 on this 12th day of April, 2011.

Michael W. Ross
Chief Attorney.
In re: Petition of Tantus Tobacco Holdings, LLC for a Declaratory Statement

**PETITION FOR DECLARATORY STATEMENT**

Petitioners, Tantus Tobacco Holdings, LLC by and through their undersigned attorney and pursuant to Section 120.565, Florida Statutes, and Chapter 28-105, Florida Administrative Code, petition the State of Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco ("the division") for a declaratory statement, and in support thereof, say:

**Introduction**

Petitioner, Tantus Tobacco Holdings, LLC (hereinafter "TTH"), is a tobacco sales and marketing company and Kentucky based tobacco subjobber. The address of TTH's principal office, its telephone number and facsimile number are as follows:

200 Progress Drive, Suite 600
Russell Springs, KY 42642
(270)-866-8888
(270)-866-8871 (facsimile)

TTH employs outside sales reps who operate vans in Kentucky and several other States. The TTH business model is based on sales reps distributing point of sale advertising materials, carrying "promotional tobacco products" ("PTP") on their vans and selling PTP to retailers at cost in an effort to stimulate purchases of various tobacco brands from resident distributors. "PTP" are fully tax paid cigarettes and OTP the TTH sales reps purchase from licensed resident distributors in the State where the salesman is operating. The TTH sales reps secure a receipt for all PTP purchases reflecting payment of all taxes by the vendor/distributor, document their resale of PTP to retailers by invoice, reflecting no markup in the sales price and the retailer's state sales tax number and maintain this documentation in a file cabinet on their van at all times.

**Law on which a Declaratory Statement is Sought**

A declaratory statement is sought with respect to Sections 210.01 and 210.15, Florida Statutes.
Discussion

Section 210.15 Florida Statutes, requires the following:

(1)(a) Every person, firm, or corporation desiring to engage in business as a manufacturer, importer, exporter, distributing agent, or wholesale dealer of cigarettes within this state shall file with the division an application for a cigarette permit for each place of business located within this state or, in the absence of such place of business in this state, for wherever its principal place of business is located. Every application for a cigarette permit shall be made on forms furnished by the division and shall set forth the name under which the applicant transacts or intends to transact business, the location of the applicant's place of business within the state, if any, and such other information as the division may require. If the applicant has or intends to have more than one place of business dealing in cigarettes within this state, the application shall state the location of each place of business. If the applicant is an association, the application shall set forth the names and addresses of the persons constituting the association, and if a corporation, the names and addresses of the principal officers thereof and any other information prescribed by the division for the purpose of identification. The application shall be signed and verified by oath or affirmation by the owner, if a natural person, and in the case of an association or partnership, members or partners thereof, and in the case of a corporation, by an executive officer thereof or by any person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of this authority.

(b) Permits shall be issued only to persons of good moral character, who are not less than 18 years of age. Permits to corporations shall be issued only to corporations whose officers are of good moral character and not less than 18 years of age. There shall be no exemptions from the permit fees herein provided to any persons, association of persons, or corporation, any law to the contrary notwithstanding.

(c) No permit under this part or chapter 569 shall be issued, maintained, or renewed if the applicant, its officers, or any person or persons owning directly or indirectly, in the aggregate, more than 10 percent of the ownership interests in the applicant:

1. Has been finally adjudicated as owing $500 or more in delinquent cigarette taxes;
2. Had a permit revoked by the division within the previous 2 years;
3. Has been convicted of selling stolen or counterfeit cigarettes, receiving stolen cigarettes, or being involved in the counterfeiting of cigarettes;
4. Has been convicted within the past 5 years of any offense against the cigarette laws of this state or convicted in this state, any other state, or the United States during the past 5 years of any offense designated as a felony by such state or the United States, or to a corporation, any of whose officers have been so convicted. The term "convicted" shall include an adjudication of guilt on a plea of guilty or a plea of nolo contendere, or the forfeiture of a bond when charged with a crime;
5. Has imported, or caused to be imported, into the United States any cigarette in violation of 19 U.S.C. s. 1681a; or
6. Has imported, or caused to be imported, into the United States, or manufactured for sale or distribution in the United States, any cigarette that does not fully comply with the Federal Cigarette Labeling and Advertising Act (15 U.S.C. ss. 1331 et seq.).

(d) The division may refuse to issue a permit to any person, firm, or corporation whose permit under the cigarette law has been revoked, to any corporation an officer of which has had his or her permit under the cigarette law revoked, or to any person who is or has been an officer of a corporation whose permit has been revoked under the cigarette law. Any permit issued to a firm or corporation prohibited from obtaining such permit under the cigarette law may be revoked by the division.

(e) Prior to an application for a distributing agent, wholesale dealer, or exporter permit being approved, the applicant shall file a set of fingerprints on forms provided by the division. The applicant shall also file a set of fingerprints for any person or persons interested directly or indirectly with the applicant in the business for which the permit is being sought, when so required by the division. If the applicant or any person interested with the applicant, either directly or indirectly, in the business for which the permit is sought shall be such a person as is within the definition of persons to whom a permit shall be denied, then the application may be denied by the division. If the applicant is a partnership, all members of the partnership are required to file said fingerprints, or if a corporation, all principal officers of the corporation are required to file said fingerprints. The cigarette permit for a manufacturer, importer, distributing agent, wholesale dealer, or exporter shall be originally issued at a fee of $100, which sum is to cover the cost of the investigation required before issuing such permit.

(f) The cigarette permits issued under this section shall be renewed from year to year at an annual cost of $100, on or before July 1, upon making application to the division and upon payment of the annual renewal fee.

(g) Permitees, by acceptance of their permits, agree that their places of business or vehicles transporting cigarettes shall always be subject to be inspected and searched without a search warrant for the purpose of ascertaining that all provisions of this part are complied with by authorized employees of the division and also by sheriffs, deputy sheriffs, and police officers during business hours or during any other time such premises are occupied by the permittee or other persons. Retail cigarette dealers and manufacturers' representatives, by dealing in cigarettes, agree that their places of business or vehicles transporting cigarettes shall always be subject to inspection and search without a search warrant for the purpose of ascertaining that all provisions of this part are complied with by authorized employees of the division and also by sheriffs, deputy sheriffs, and police officers during business hours or other times when the premises are occupied by the retail dealer or manufacturers' representatives or other persons.

(h) No retail sales of cigarettes may be made at a location for which a wholesale dealer, distributing agent, or exporter permit has been issued. The excise tax on sales made to any traveling location, such as an itinerant store or industrial caterer, shall be paid into the General Revenue Fund unallocated. Cigarettes may be purchased for retail purposes only from a person holding a wholesale dealer permit. The invoice for the purchase of cigarettes must show the place of business for which the purchase is made and the cigarettes cannot be transferred to any other place of business for the purpose of resale.

(2) The division may not furnish stamps or approve the use of meter machines to evidence the payment of the taxes on cigarettes except to qualified wholesale dealers.
(3) Upon approval of the application, the division shall grant and issue to each applicant a cigarette permit for each place of business set forth in the application. Cigarette permits shall not be assignable and shall be valid only for the persons in whose names issued and for the transaction of business at the places designated therein and shall at all times be conspicuously displayed at the places for which issued.

(4) All permits of distributing agents, wholesale dealers, or exporters shall remain in force and effect until July 1 following their issuance, or until suspended or revoked for cause by the division, or surrendered by the permitholder.

(5) Whenever any permit issued under the provisions of this part is destroyed or lost, the holder thereof shall immediately make application for a duplicate permit on a form prescribed by the division, which application shall be filed with the division. The said application shall be under oath and shall state that the applicant is a holder of a valid permit which has been destroyed or lost as the case may be and that the said permit has not been suspended or revoked for cause by the division or surrendered by the permitholder.

(6) Applicants for a permit hereunder, by the acceptance of such permit, agree that their places of business covered by such permit shall always be subject to be inspected and searched without search warrant by the division or any of its authorized assistants and also by sheriffs, deputy sheriffs or police officers.

(7) The division shall promulgate suitable rules for carrying out the provisions of this section.

(8) Every person, firm, corporation, or business entity who deals in, or sells, stores, or operates as a wholesale dealer in, cigarettes, or who acts as a cigarette distributing agent or exporter in any manner whatsoever, and who does so without a cigarette permit as required by this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Section 210.15 Florida Statutes, requires the following:

210.01 Definitions.—When used in this part the following words shall have the meaning herein indicated:

(1) "Cigarette" means any roll for smoking, except one of which the tobacco is fully naturally fermented, without regard to the kind of tobacco or other substances used in the inner roll or the nature or composition of the material in which the roll is wrapped, which is made wholly or in part of tobacco irrespective of size or shape and whether such tobacco is flavored, adulterated or mixed with any other ingredient.

(2) "Persons" means any individual, copartnership, society, club, association, corporation, joint stock company, and any combination of individuals and also an executor, administrator, receiver, trustee or other fiduciary.

(3) "Sale" means any transfer, exchange or barter in any manner, or by any means whatever.

(4) "Retail sale" or "sale at retail" means a sale to a consumer or to any person for any purpose other than resale.

(5) "Dealer" means any wholesale dealer as hereinafter defined.

(6) "Wholesale dealer" means any person located inside or outside this state who sells cigarettes to retail dealers or other persons for purposes of resale only. Such term shall not
include any cigarette manufacturer, export warehouse proprietor, or importer with a valid permit under 26 U.S.C. s. 5712 if such person sells or distributes cigarettes in this state only to dealers who are agents and who hold valid and current permits under s. 210.15 or to any cigarette manufacturer, export warehouse proprietor, or importer who holds a valid and current permit under 26 U.S.C. s. 5712.

(7) "Retail dealer" means any person located inside or outside this state other than a wholesale dealer engaged in the business of selling cigarettes, including persons issued a permit pursuant to s. 569.003.

(8) "Package" means the individual package, box or other container in or from which retail sales of cigarettes are normally made or intended to be made.

(9) "Agent" means any person authorized by the Division of Alcoholic Beverages and Tobacco to purchase and affix adhesive or meter stamps under this part.

(10) "Division" means the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation.

(11) "Use" means the consuming, giving away or disposing, in any manner, of cigarettes.

(12) "First sale" means the first use or consumption of cigarettes within this state.

(13) "Operating ad valorem millage" means all millages other than those fixed for debt service.

(14) "Distributing agent" means every person, firm or corporation in this state who acts as an agent for any person, firm or corporation outside or inside the state by receiving cigarettes in interstate or intrastate commerce and storing such cigarettes subject to distribution or delivery upon order from said principal to wholesale dealers and other distributing agents inside or outside this state.

(15) "Place of business" means any place where cigarettes are sold or where cigarettes are stored or kept for the purpose of sale or consumption; or if cigarettes are sold from a vending machine the place in which the vending machine is located.

(16) "Manufacturer's representative" means a person who represents a manufacturer of cigarettes but who has no place of business in this state where cigarettes are stored. A manufacturer's representative is required to obtain any cigarettes required by her or him through a wholesale dealer in this state and to make such reports as may be required by the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation.

(17) "Exporter" means a person who transports tax-exempt cigarettes into this state under bond for delivery beyond the borders of this state. Each permit shall entitle the permittee to store such cigarettes under bond at one location in this state pending shipment beyond the borders of this state.

(18) "Unstamped package" or "unstamped cigarettes" means a package on which the surcharge and tax required by this part have not been paid, regardless of whether or not such package is stamped or marked with the indicia of any other taxing authority, or a package on which there has been affixed a counterfeit or fraudulent indicium or stamp.

(19) "Stamp" or "stamps" means the indicia required to be placed on cigarette packages which evidence payment of the surcharge on cigarettes under s. 210.011 and the tax on cigarettes under s. 210.02.

(20) "Importer" means any person with a valid permit under 26 U.S.C. s. 5712 who imports into the United States, directly or indirectly, a finished cigarette for sale or distribution.
(21) "Manufacturer" means any domestic person or entity with a valid permit under 26 U.S.C. s. 5712 that manufactures, fabricates, assembles, processes, or labels a finished cigarette.

(22) "Counterfeit cigarettes" means cigarettes that have false manufacturing labels, tobacco product packs with counterfeit tax stamps, or any combination thereof.

After reviewing Sections 210.01 and 210.15 of the Florida Statutes, it appears since the products are fully tax paid, that TTH sales reps will not need to be licensed by Florida DBPR to engage in these limited commercial activities and have no tax liability or reporting requirements of any kind.

Relief Requested

Petitioners respectfully request that the Division issue a declaratory statement that:

Provides petitioner with all licensing, registration, and reporting obligations required by the state of Florida to conduct the limited commercial activities as stated above.

Dated this 16th day of February 2011.

Respectfully submitted,

G. George Bertram
Attorney for Petitioner
200 Progress Drive, Suite 500
Russell Springs, KY 42642
(270)-858-4117
(270)-866-8273 (facsimile)