

FILED	
Department of Business and Professional Regulation	
Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	12/12/2012
File #	2012-07798

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,

DS 2012-046

On behalf of HOME ROLLED, INC.,

Petitioner.

DECLARATORY STATEMENT

This Declaratory Statement is rendered by the Director of the Division of Alcoholic Beverages and Tobacco (hereinafter "Division") pursuant to § 120.565, Florida Statutes.

ISSUE PRESENTED

On June 4, 2012, Petitioner filed with the Division a Petition for Declaratory Statement on behalf of HOME ROLLED, INC., 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") and an email exchange clarifying fact(s) about the whole leaf tobacco with stem intact. 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. Home Rolled Inc., (hereinafter "Petitioner") is a business which intends to operate in Florida. Petitioner's business model utilizes an online business of importing and re-selling whole leaf tobacco with the stem intact to end consumers for processing and use. The Petitioner has stated that the whole leaf tobacco with stem intact is not processed or adulterated in any manner. In other words, the whole leaf tobacco with stem intact, when sold to the consumer for personal use is in the same condition as when harvested.

2. Petitioner also plans to sell machines for crushing the tobacco and rolling or stuffing cigarettes for personal use.

3. Petitioner proposes to implement this business model in the state of Florida and has filed a Petition for Declaratory Statement to determine whether the tobacco leaves will be subject to the taxes and surcharges on Tobacco Products by the State of Florida and whether Petitioner will need to be licensed as a Distributor, Retailer, Retail Tobacco Products Dealer, or some combination thereof.

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 is substantially affected by the statutory provisions cited below and has standing to seek this declaratory statement.

3. § 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. § 210.25, Florida Statutes, provides:

Definitions. As used in this part:

- (1) "Business" means any trade, occupation, activity, or enterprise engaged in for the purpose of selling or distributing tobacco products in this state.
- (4) "Distributor" means:
 - (a) Any person engaged in the business of selling tobacco products in this state who brings or causes to be brought, into this state from outside the state any tobacco products for sale;
 - (c) Any person engaged in the business of selling tobacco outside this state who ships or transports tobacco products to retailers in this state to be sold by those retailers.
- (8) "Retailer" means any person engaged in the business of selling tobacco products to ultimate consumers
- (11) "Tobacco products" means loose tobacco suitable for smoking; snuff; snuff flour; cavendish; plug and twist tobacco; fine cuts and other chewing tobaccos; shorts; refuse scraps; clippings, cuttings, and sweepings of tobacco, and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing; but "tobacco products" does not include cigarettes, as defined by § 210.01(1), or cigars.

5. § 210.276, Florida Statutes, provides:

(1) A surcharge is levied upon all tobacco products in this state and upon any person engaged in business as a distributor of tobacco products at the rate of 60 percent of the wholesale sales price. The surcharge shall be levied at the time the distributor:

(a) Brings or causes to be brought into this state from without the state tobacco products for sale;

(c) Ships or transports tobacco products to retailers in this state, to be sold by those retailers. A surcharge may not be levied on tobacco products shipped or transported outside this state for sale or use outside this state.

(2) A surcharge is imposed upon the use or storage by consumers of tobacco products in this state and upon such consumers at the rate of 60 percent of the wholesale sales price. The surcharge imposed by this subsection does not apply if the surcharge imposed by subsection (1) on such tobacco products has been paid. This surcharge does not apply to the use or storage of tobacco products in quantities of less than 1 pound in the possession of any one consumer.

(4) No surcharge shall be imposed by this section upon tobacco products not within the taxing power of the state under the Commerce Clause of the United States Constitution.

6. § 210.30, Florida Statutes, provides:

(1) A tax is hereby imposed upon all tobacco products in this state and upon any person engaged in business as a distributor thereof at the rate of 25 percent of the wholesale price of such tobacco products. Such tax shall be imposed at the time the distributor:

(a) Brings or causes to be brought into this state from without the state tobacco products for sale;

(c) Ships or transports tobacco products to retailers in this state, to be sold by those retailers.

(2) A tax is hereby imposed upon the use or storage by consumers of tobacco products in this state and upon such consumers at the rate of 25 percent of the cost of such tobacco products. The tax imposed by this subsection shall not apply if the tax imposed by subsection (1) on

such tobacco products has been paid. This tax shall not apply to the use or storage of tobacco products in quantities of less than 1 pound in the possession of any one consumer.

- (4) No tax shall be imposed by this part upon tobacco products not within the taxing power of state under the Commerce Clause of the United States Constitution.

7. § 569.002, Florida Statutes, provides: As used in this chapter, the term

- (1) "Dealer" is synonymous with the term "retail tobacco products dealer."
- (3) "Permit" is synonymous with the term "retail tobacco products dealer permit."
- (4) "Retail tobacco products dealer" means the holder of a retail tobacco products dealer permit.
- (6) "Tobacco products" includes loose tobacco leaves, and products made from tobacco leaves, in whole or in part, and cigarette wrappers, which can be used for smoking, sniffing, or chewing.

8. § 569.003, Florida Statutes, provides

- (1) (a) Each person, firm, association, or corporation that seeks to deal, at retail, in tobacco products within this state, or to allow a tobacco products vending machine to be located on its premises in this state, must obtain a retail tobacco products dealer permit for each place of business or the premises where tobacco products are sold. Each retail dealer owning, leasing, furnishing, or operating vending machines through which tobacco products are sold must obtain a permit for each machine and shall post the permit in a conspicuous place on or near the machine; however, if the dealer has more than one vending machine at a single location or if tobacco products are sold both over the counter and through a vending machine at a single location, the dealer need obtain only one permit for that location.

9. 61A-10.082, Florida Administrative Code, provides:

- (1) A tobacco products wholesale dealer permit is required by any entity acting as a distributor as defined in Section 210.25(4), F.S. 2005.

10. 61A-10.083, Florida Administrative Code, provides:

- (1) For this section the term retail tobacco products dealer shall refer to the definition provided by Section 569.0029(4), F.S. For this section the term tobacco products shall refer to the definition provided by Section 569.002(6), F.S. A tobacco products retail dealer permit is required to sell cigarettes and tobacco products at retail.

11. Chapter 210, Florida Statutes, sets out the taxing regime upon tobacco products within the State of Florida. Part I of Chapter 210 (§§ 210.01-210.22) is titled Tax on Cigarettes. Part 2 of Chapter 210 (§§ 210.25-210.75) is titled Tax on Tobacco Products Other Than Cigarettes or Cigars.

12. Whole "raw" tobacco leaves with the stem intact, which have not been fermented or otherwise treated in any way do not fall within the definition of "Tobacco products" as found in § 210.25(11), Florida Statutes. Whole "raw" tobacco leaves with the stem intact, which have not been fermented or otherwise treated in any way do not fall within the definition of "Tobacco products", therefore they are not subject to the surcharges set forth within Part II of Chapter 210.

13. Petitioner's purported business would require licensure as a retail tobacco products dealer under § 569.003(1)(a), Florida Statutes, since, from the facts given by Petitioner, sales would be made to the ultimate consumers. However, insufficient facts are available to determine the proper premises to be licensed for Petitioner. More specific data would be needed concerning Petitioner's business model and operations to determine the proper premises to hold the retail tobacco products dealer license.

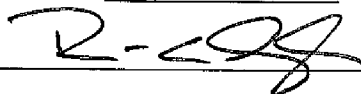
14. The conclusion reached herein specifically makes no assumptions as to any machine that may be used by the consumer in processing the tobacco leaves and notes that the Alcohol and Tobacco Tax and Trade Bureau, on October 4, 2012, issued a

TTB Public Guidance document which in regards to such machines stated in part, "The machine is designed to produce products only in personal use quantities."

For the above stated reasons it is hereby:

ORDERED that Petition for Declaratory Statement is **GRANTED**.

Dated this 6 day of December, 2012.

A handwritten signature in black ink, appearing to read "R-ADG", is written over a horizontal line.

R. Allen Douglas, 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 BRANDY NICHOLS, 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 Samuel A. Rubert, P.A., Attorney for Petitioner, 3225 Franklin Avenue, Suite C-101, Coconut Grove, FL 33133 on this 7 day of December, 2012.



Michael W. Ross
Chief Attorney.

DBPR Agency Clerk
Division of Alcoholic Beverages & Tobacco
1940 N. Monroe Street, Suite 92
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PETITION FOR DECLARATORY STATEMENT
BEFORE THE FLORIDA DIVISION OF ALCOHOLIC BEVERAGES AND
TOBACCO

Petitioner, Home Rolled, Inc., hereby requests a declaratory statement from the Florida Division of Alcoholic Beverages and Tobacco, and states:

Petitioner's Name and Address:

Name: HOME ROLLED, INC.

Address: 134 Arrowhead Circle
Jupiter, Florida 33458

Telephone: (561) 748-7675

Email: mmelehan@gmail.com

DS 2012-046

Petitioner's Attorney's Name and Address:

Name: Samuel A. Rubert

Address: Samuel A. Rubert, P.A.
3225 Franklin Avenue, Suite C-101
Coconut Grove, FL 33133

Telephone: (305) 804-5141

Facsimile: (888) 344-1798

Email: srubert@rubertlaw.com

Statutory Provisions, Agency Rule(s), or Agency Order(s)
on Which the Declaratory Statement is Sought

210.25 Definitions. As used in this part:

(1) "Business" means any trade, occupation, activity, or enterprise engaged in for the purpose of selling or distributing tobacco products in this state.

(4) "Distributor" means:

(a) Any person engaged in the business of selling tobacco products in this state who brings, or causes to be brought, into this state from outside the state any tobacco products for sale;

(c) Any person engaged in the business of selling tobacco outside this state who ships or transports tobacco products to retailers in this state to be sold by those retailers.

(8) "Retailer" means any person engaged in the business of selling tobacco products to ultimate consumers.

(11) "Tobacco products" means loose tobacco suitable for smoking; snuff; snuff flour; cavendish; plug and twist tobacco; fine cuts and other chewing tobaccos; shorts; refuse scraps; clippings, cuttings, and sweepings of tobacco, and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing; but "tobacco products" does not include cigarettes, as defined by s.210.01(1), or cigars.

210.276 Surcharge on tobacco products.

(1) A surcharge is levied upon all tobacco products in this state and upon any person engaged in business as a distributor of tobacco products at the rate of 60 percent of the wholesale sales price. The surcharge shall be levied at the time the distributor:

(a) Brings or causes to be brought into this state from without the state tobacco products for sale;

(c) Ships or transports tobacco products to retailers in this state, to be sold by those retailers. A surcharge may not be levied on tobacco products shipped or transported outside this state for sale or use outside this state.

(2) A surcharge is imposed upon the use or storage by consumers of tobacco products in this state and upon such consumers at the rate of 60 percent of the wholesale sales price. The surcharge imposed by this subsection does not apply if the surcharge imposed by subsection (1) on such tobacco products has been paid. This surcharge does not apply to the use or storage of tobacco products in quantities of less than 1 pound in the possession of any one consumer.

(4) No surcharge shall be imposed by this section upon tobacco products not within the taxing power of the state under the Commerce Clause of the United States Constitution.

210.30 Tax on tobacco products; exemptions.

(1) A tax is hereby imposed upon all tobacco products in this state and upon any person engaged in business as a distributor thereof at the rate of 25 percent of the wholesale sales price of such tobacco products. Such tax shall be imposed at the time the distributor:

(a) Brings or causes to be brought into this state from without the state tobacco products for sale;

(c) Ships or transports tobacco products to retailers in this state, to be sold by those retailers.

(2) A tax is hereby imposed upon the use or storage by consumers of tobacco products in this state and upon such consumers at the rate of 25 percent of the cost of such tobacco products. The tax imposed by this subsection shall not apply if the tax imposed by subsection (1) on such tobacco products has been paid. This tax shall not apply to the use or storage of tobacco products in quantities of less than 1 pound in the possession of any one consumer.

(4) No tax shall be imposed by this part upon tobacco products not within the taxing power of the state under the Commerce Clause of the United States Constitution.

569.002 Definitions. As used in this chapter, the term:

- (1) "Dealer" is synonymous with the term "retail tobacco products dealer."
- (3) "Permit" is synonymous with the term "retail tobacco products dealer permit."
- (4) "Retail tobacco products dealer" means the holder of a retail tobacco products dealer permit.
- (6) "Tobacco products" includes loose tobacco leaves, and products made from tobacco leaves, in whole or in part, and cigarette wrappers, which can be used for smoking, sniffing, or chewing.

569.003 Retail tobacco products dealer permits; application; qualifications; fees; renewal; duplicates.

(1)(a) Each person, firm, association, or corporation that seeks to deal, at retail, in tobacco products within this state, or to allow a tobacco products vending machine to be located on its premises in this state, must obtain a retail tobacco products dealer permit for each place of business or the premises where tobacco products are sold. Each retail dealer owning, leasing, furnishing, or operating vending machines through which tobacco products are sold must obtain a permit for each machine and shall post the permit in a conspicuous place on or near the machine; however, if the dealer has more than one vending machine at a single location or if tobacco products are sold both over the counter and through a vending machine at a single location, the dealer need obtain only one permit for that location.

61A-10.082 Application for a Tobacco Products Wholesale Dealer Permit.

(1) A tobacco products wholesale dealer permit is required by any entity acting as a distributor as defined in Section 210.25(4), F.S. 2005.

61A-10.083 Application for Retail Dealer Permit, Cigarette and Tobacco Products.

(1) For this section the term retail tobacco products dealer shall refer to the definition provided by Section 569.002(4), F.S. For this section the term tobacco products shall refer to the definition provided by Section 569.002(6), F.S. A tobacco products retail dealer permit is required to sell cigarettes and tobacco products at retail.

Description of How the Statutes and Agency Rules may Substantially Affect the Petitioner in the Petitioner's Particular Set of Circumstances

Petitioner, Home Rolled, Inc. ("HR") intends to enter into an online business of importing and re-selling whole leaf tobacco, stem intact, to end consumers for processing and use. Because the product being imported and sold is unprocessed, the business will also sell machines for crushing the tobacco and rolling or stuffing cigarettes for personal use. HR is trying to determine if the tobacco leaves will be subject to the taxes and surcharge imposed on Tobacco Products by the State of Florida; whether HR will need to be licensed as a Distributor, Retailer, Retail Tobacco Products Dealer, or some combination thereof.

Florida Statutes Ch. 210 defines Tobacco Products as "loose tobacco suitable for smoking; snuff; snuff flour; cavendish; plug and twist tobacco; fine cuts and other chewing tobaccos; shorts; refuse scraps; clippings, cuttings, and sweepings of tobacco, and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing." Fla. Stat. Sec. 210.25(11). Fla. Stat. Secs. 210.276 and 210.30 provide for the imposition of taxes, the rate of taxation, and any exceptions to taxation on Tobacco Products as defined in Fla. Stat. Sec. 210.21(11). The product that HR intends to sell is a loose tobacco leaf with the stem intact, which in its physical state at the time of sale and transfer to the customer are **not**, without further processing, suitable for smoking, sniffing, or chewing. Therefore, HR believes that it does not deal in Tobacco Products subject to taxation under Florida Statutes Ch. 210.

Florida Statutes Ch. 569 provides for the licensure of Tobacco Products retailers and wholesalers. Fla. Stat. Sec. 569.002(4) defines Tobacco Products as, "loose tobacco leaves, and products made from tobacco leaves, in whole or in part, and cigarette wrappers, which can be used for smoking, sniffing, or chewing." Fla. Stat. Sec. 569.003 requires that, "Each ... corporation that seeks to deal, at retail, in tobacco products within this state, ... must obtain a retail tobacco products dealer permit for each place of business or the premises where tobacco products are sold." Because Fla. Stat. Sec. 569.002(4) includes leaf tobacco in its definition of Tobacco Products, HR believes it may be required to obtain a retail tobacco products dealer permit. However, because it will be an online business, HR is not sure at what location it needs to obtain a permit.

Petitioner requests clarification regarding whether the agricultural commodity it sells is subject to taxation under Florida Statutes Ch. 210. Petitioner also request clarification about whether it must be permitted as a retail tobacco products dealer, and if so, at what location it must obtain its permit(s).

Respectfully submitted this 31st day of May, 2012,

SAMUEL A. RUBERT, P.A.

Attorney for Petitioner
3225 Franklin Avenue, Suite C-101
Coconut Grove, FL 33133
Tel: (305) 804-5141
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