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March 26, 2007

Director, Regulations and Rulings Division
Alcohol and Tobacco Tax and Trade Bureau
1310 G Street NW
Suite 200
Washington, DC 20220

Re: Commonwealth Brands, Inc.'s Comments in Response to Notice No. 65: Tax Classification of Cigars and Cigarettes

Dear Director:

I am the Chief Executive Officer of Commonwealth Brands, Inc. ("Commonwealth"). Commonwealth submits the following comments on the Alcohol and Tobacco Tax and Trade Bureau's ("TTB") Notice of Proposed Rulemaking No. 65 (71 Fed. Reg. 62506), proposing changes to the regulations that govern the classification and labeling of cigars and cigarettes for federal excise tax purposes.

Commonwealth manufactures and sells cigarettes in the United States, providing high quality products at discount prices. Commonwealth was the first tobacco company that had *not* been sued by any State to join the Master Settlement Agreement. It has been making the MSA's substantial annual payments and observing its marketing and advertising restrictions since November 1998. It is the fourth largest cigarette manufacturer in the country, with a market share of about 3.7 percent. It has over 700 employees in the United States, in its manufacturing facility in Reidsville, North Carolina, its headquarters in Bowling Green, Kentucky, and its nationwide sales and distribution force.

Commonwealth wholeheartedly supports TTB's initiative, in the proposed regulations, to ensure that products sold as cigarettes are classified as cigarettes and taxed as cigarettes. For a number of years, sellers of so-called "little cigars" – products that are labeled and taxed as cigars – have advertised and marketed their products to consumers as cigarettes. These so-called "little cigar" products have an unfair advantage over products classified as cigarettes because they are

subject to considerably lower federal and (in many states) state excise taxes than cigarettes. They also escape the obligation to make the MSA or MSA-related escrow payments imposed on cigarettes, and they are subject to different labeling requirements. This problem, as the proposed rulemaking and the submissions by States and other manufacturers notes, has increased substantially in recent years.

Commonwealth respectfully suggests, however, that TTB clarify the proposed regulations in the following ways, in order to resolve any possible ambiguity and to ensure that all cigarettes masquerading as "little cigars" are encompassed by the regulations:

First, Commonwealth requests that the proposed regulations be clarified to remove any possible doubt that if a product wrapped in a "substance containing tobacco" contains a cellulose acetate or other cigarette type integrated filter, it will be classified as a cigarette even if it contains no more than 3.0 percent by weight of total reducing sugars, and without regard to whether it meets any other indicia set forth in the regulations. The most common and most important feature indicating that a "little cigar" that is actually a cigarette is the inclusion of a filter, which indicates that the smoke from the product, unlike a true cigar, is meant to be inhaled. Although Commonwealth understands that the intent of the proposed regulations as drafted is to classify any product with a cigarette-like filter as a cigarette, Commonwealth believes that the following clarification to proposed 27 C.F.R. §§ 40.12, 41.12, 44.12, and 45.12 would remove any possible ambiguity on this point:

(a) .....
(2) *Cigarette Classification Precedence.* A tobacco product consisting of a roll of tobacco wrapped in a substance containing tobacco is classified as a cigarette rather than a cigar if it meets any one of the criteria listed in paragraph (b)(2) and (b)(3) of this section.
(b) *Classification of Cigarettes.* A tobacco product is classified as a cigarette if:
(1) It consists of a roll of tobacco wrapped in paper or any substance not containing tobacco; or
(2) It consists of a roll of tobacco that contains more than 3.0 percent by weight of total reducing sugars and that is wrapped in a substance containing tobacco; or
(3) It consists of a roll of tobacco wrapped in a substance containing tobacco; and (without regard to its total reducing sugar content) it meets any one of the following criteria –
(i) It is put up in a package that bears a product designation or tax classification specified in § [40][41][44][45].214 or
(ii) It has a typical cigarette size and shape or
(iii) It has a cellulose acetate or other cigarette-type integrated filter or
(iv) It is put up in a traditional cigarette type package that does not bear all of the notice requirements for cigars specified in § [40][41][44][45].214 or

(v) It has a filler primarily consisting of flue-cured, burley, oriental, or unfermented tobaccos or has a filler material yielding the smoking characteristics of any of those tobaccos.

Second, Commonwealth requests that two additional factors be added to the criteria for classifying a product wrapped in a "substance containing tobacco" as a cigarette under proposed 27 C.F.R. §§ 40.12(b)(3), 41.12(b)(3), 44.12(b)(3), and 45.12(b)(3): The product will also be classified as a cigarette if it is sold in packs containing twenty or twenty-five sticks, and the product will be classified as a cigarette if it is available for sale in cartons of ten packs. Very often "little cigars" marketed to consumers as cigarettes are sold, like cigarettes, in packs of twenty or twenty-five and cartons of ten packs. Including these criteria are in the proposed regulations will ensure that such product does not escape the correct classification.

Third, Commonwealth requests clarification that a product sold with a *non*-integrated filter meant to permit smoke to be inhaled will be classified is a cigarette, in order to prevent sellers of so-called "little cigars" from avoiding the intent of the proposed regulations, which currently address only "integrated" filters. That clarification could be accomplished by changing the description of filter contained in proposed 27 C.F.R. §§ 40.12(b)(3)(ii), 41.12(b)(3)(ii), 44.12(b)(3)(ii), and 45.12(b)(3)(ii) as follows, to reflect that a product wrapped in a substance containing tobacco is classified as a cigarette if it "has a cellulose acetate or other cigarette-type integrated filter, or a non-integrated filter intended to permit the user to inhale the smoke in a manner typical of a cigarette is sold or provided with the product or sold or provided for use with it."

Fourth, Commonwealth requests that the definition of "substance containing tobacco" in proposed 27 C.F.R. §§ 40.11, 41.11, 44.11, and 45.11 be altered to reflect that the substance must contain 75 percent or more by weight of tobacco leaf or other fibrous material from the plant *Nicotiana tabacum* or the plant *Nicotiana rustica.* The definition of "substance not containing tobacco would likewise need to be altered to reflect that it contains less than 75 percent or more by weight of tobacco leaf or other fibrous material from the plant *Nicotiana tabacum* or the plant *Nicotiana rustica.* Seventy-five percent was the standard for a substance containing tobacco originally proposed by a number of States, and the higher standard will help ensure that sellers not evade the intent of the regulations and continue to sell cigarettes masquerading as little cigars.

Fifth, Commonwealth requests that the definitions contained in proposed 27 C.F.R. §§ 40.11, 41.11, 44.11, and 45.11 be clarified to ensure that a product will only be automatically classified as a cigar because it is wrapped in leaf tobacco if it is wrapped in 100 percent natural tobacco leaf in the leaf's unaltered natural form. That will ensure that there is no possible ambiguity a seller could claim regarding whether reconstituted tobacco made of 100 percent "leaf tobacco" might qualify it for automatic "little cigar" status. Commonwealth suggests that any potential ambiguity could be removed by adding a definition that "leaf tobacco" as used the proposed regulations means "100 percent natural tobacco leaf in its unaltered natural form," and

altering the definition of "substance containing tobacco" to reflect that it consists of "[r]econstituted tobacco sheet or any other material other than 100 percent natural tobacco leaf in its unaltered natural form ...."

Sixth, Commonwealth requests that the enforcement provisions in the proposed regulations be strengthened. The current proposal, for self-executing manufacturer "certification" under penalty of perjury, presents issues of effectiveness, particularly with unscrupulous sellers that could continue to certify their cigarette products as "little cigars" to take advantage of favorable tax, MSA, and labeling treatment. Commonwealth respectfully suggests that an advance certification process before a product may be sold as a little cigar or cigar, or at the very least public disclosure of products and their classification, so that the individual states may take appropriate enforcement action, will help ensure that falsely classified "little cigar" products are not offered to the public and sold in unfair competition with cigarette products.

Seventh, Commonwealth respectfully requests that the regulation become effective immediately. Delay will unnecessarily prolong the inequity faced by cigarette sellers from cigarettes masquerading as "little cigars," and little cigar manufacturers have had ample notice of the proposed regulations through the rulemaking process. Nor will the proposed regulations impose any requirement on "little cigar" manufacturers that they alter their manufacturing process; only the classification of their product will change.

Commonwealth appreciates TTB's efforts in connection with this important issue and appreciates the opportunity to comment on the proposed regulations.

Sincerely,

John C. Poling, II CEO
Commonwealth Brands, Inc.