

**ILLINOIS INDEPENDENT  
TAX TRIBUNAL**

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<b>YANNI CONSULTING</b>	)	
<b>WHOLESALE &amp; RESALE, INC.,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>No. 14 TT 140</b>
	)	
<b>ILLINOIS DEPARTMENT OF</b>	)	
<b>REVENUE,</b>	)	
	)	
	)	<b>Judge Brian Barov</b>
	)	
<b>Respondent.</b>	)	

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**DEPARTMENT’S ANSWER TO PETITION**

NOW COME the Respondent, the Illinois Department of Revenue (the “Department”), by and through its attorney, Lisa Madigan, Illinois Attorney General, and for its Answer to Petitioner’s Petition (“Petition”), hereby states as follows:

**PARTIES**

1. Petitioner was an Illinois corporation located at 500 Quail Hollow Drive, Wheeling, Illinois 60090.

**ANSWER:** The Department admits the allegations contained in paragraph 1.

2. Petitioner is represented by Dale & Gensburg, P.C. and attorney Lane M. Gensburg, located at 200 West Adams Street, Suite 2425, Chicago, Illinois 60606, and can be reached at 312-263-2200 or lgensburg@dandgpc.com.

**ANSWER:** The Department admits the allegations contained in paragraph 2.

3. Petitioner’s account ID is 2870-4576.

**ANSWER:** The Department admits the allegations contained in paragraph 3.

4. The Department is an agency of the Executive Department of the State Government and is tasked with the enforcement and administration of Illinois tax laws. 20 ILCS 5/5-15.

**ANSWER:** The Department admits the allegations contained in paragraph 4.

## NOTICES

### Retailers Occupation/Use Tax

5. The Department issued a Notice of Tax Liability dated May 28, 2014 (the "NTL"), assessing Retailers Occupation Tax/Use Tax for the period October 2009 through January 2011, in the amount of \$128,142, as well as \$25,628 in late payment penalties and \$12,526.53 in interest. The NTL is attached hereto as **Exhibit A**.

**ANSWER:** The Department admits the existence, force and effect, at all relevant times of the document attached to the Petition as Exhibit A and referred to in paragraph 5 and state that such document speaks for itself.

## JURISDICTION

6. Petitioner brings this action pursuant to the Illinois Independent Tax Tribunal Act ("Tribunal Act"), 35 ILCS 1010/1-1 *et. seq.*

**ANSWER:** The Department admits the allegations contained in paragraph 6.

7. The Tribunal has jurisdiction over this matter pursuant to Sections 1-15, 1-45, and 1-50 of the Tribunal Act because Petitioner timely filed this petition with 60 days of the NTL.

**ANSWER:** The Department admits the allegations contained in paragraph 7.

## BACKGROUND

8. Petitioner operated an event planning business. The majority of Petitioner's revenues were generated from consulting fees (providing services) versus the sale of tangible personal property (primarily flowers). Petitioner also received rental fees from the rent of certain personal property to clients to use in the events. Petitioner's invoices separately stated consulting fees, rental fees and fees from sale of tangible personal property.

**ANSWER:** The Department denies the allegations contained in paragraph 8.

9. The Department audited Petitioner's books and records for the period at issue.

**ANSWER:** The Department admits the allegations contained in paragraph 9.

10. The ROT audit liability contained in the NTL is based on the Department disallowing deductions claimed on the Petitioner's ST-1 Sales and Use Tax Returns for rental fees and consulting fees. The Department also assessed Petitioner Use tax on certain purchases made by Petitioner during the taxable period for consumable supplies with respect to which purchases Petitioner was not charged sales tax and did not self-assess itself Use tax.

**ANSWER:** The Department admits the allegations contained in paragraph 10.

## COUNT I

### **Petitioner was a Serviceman and not a Retailer**

11. Petitioner realleges and incorporates by reference the allegations made in paragraphs 1 through 10, inclusive, hereinabove, as and for this paragraph 11.

**ANSWER:** The Department repeats and incorporates its answers to paragraphs 1-10 as if fully set forth herein.

12. Petitioner qualified as a Serviceman as defined in the Service Occupation Tax Act (the "Act") (35 ILCS 115/1 *et seq.*) in that its sale of tangible personal property was incident to the sale of services. As a Serviceman subject to the Act, Petitioner was liable to pay a service occupation tax based solely on the sale of tangible personal property. Petitioner's fees from the sale of consulting services and rental revenues were not taxable under the Act.

**ANSWER:** Although paragraph 12 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 12.

13. Petitioner further submits that it qualified as a "*De Minimus*" Serviceman because Petitioner's annual aggregate cost of the tangible personal property transferred incident to the sale of services was less than 35% of the Petitioner's annual total gross receipts from all sales of services. As a *De Minimus* Serviceman, Petitioner had the option of charging sales tax on the cost of the tangible personal property sold or on the sales price of the tangible personal property, so long as the sales price was not less than the cost of the tangible personal property.

**ANSWER:** Although paragraph 13 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 13.

14. Petitioner, in conformity with the Act, charged sales tax on the selling price of the tangible personal property it sold (i.e., primarily flowers). As a Serviceman, Petitioner was not subject to service occupation tax on the sale of consulting services or on rental fees.

**ANSWER:** The Department denies the allegations contained in paragraph 14.

15. The Department erroneously treated Petitioner as a retailer subject to the Retailer's Occupation Tax Act, and, therefore–!erroneously charged sales tax on Petitioner's sale of services and rental fees in addition to the sale of tangible personal property.

**ANSWER:** Although paragraph 15 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 15.

WHEREFORE, the Department prays:

- A) That Judgment be entered against the Petitioner and in favor of the Department in this matter;
- B) That the Department's Notice of Tax Liability be determined to be correct.
- C) That this Tribunal grant such other additional relief it deems just and proper

## **COUNT II**

### **The Department is Estopped from Taking the Position that Petitioner was a Retailer Subject to the Retail Occupation Tax Act**

16. Petitioner realleges and incorporates by reference the allegations made in Paragraphs 1 through 15 inclusive, hereinabove as and for this Paragraph 16.

**ANSWER:** The Department repeats and incorporates its answers to paragraphs 1-15 as if fully set forth herein.

17. The Department conducted an earlier Sale/Use Tax Audit of Petitioner for the period July 2007 through September 2009 (the "First Audit"). In the First Audit, the Department took the position, as is its position in the Second Audit that is the subject of this Petition, that Petitioner was a retailer subject to the Retailer's Occupation Tax Act and that all its revenues, including fees from consulting services and from rental were subject to Sales Tax.

**ANSWER:** The Department admits the allegations contained in paragraph 17.

18. Petitioner protested the proposed liability in the First Audit, initiating an administrative case, Docket No. 11-ST-0579. That case was resolved prior to hearing on the basis that Petitioner was a serviceman and not a retailer with the agreed tax liability being based on the difference between Petitioner's costs of goods sold for the audit period and its sales of flowers.

**ANSWER:** Paragraph 18 is not an allegation of material fact because the prior audit and its ultimate disposition are irrelevant to this matter. As such, it does not require an answer pursuant to Tribunal Rule 86 Ill.Adm.Code §5000.310(b).

19. In settling the First Audit on the basis that Petitioner was a serviceman and not a retailer, the Department is estopped from taking the position in the Second Audit that is the subject of the instant Petition that Petitioner was a retailer as opposed to a serviceman.

**ANSWER:** Although paragraph 19 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 19.

### COUNT III

**The Department's disallowance of Petitioner's deductions for consulting services and rental fees based on the lack of substantiation is inequitable and violates fundamental fairness.**

20. Petitioner realleges and incorporates by this reference the allegations made in paragraphs 1 through 19, inclusive, hereinabove, as and for this paragraph 20.

**ANSWER:** The Department repeats and incorporates its answers to paragraphs 1-19 as if fully set forth herein.

21. To the extent that the Department is disallowing Petitioner's deductions for consulting and rental fees on the basis that Petitioner failed to substantiate those deductions through books and records, Petitioner submits that such position by the Department is inequitable and contrary to fundamental fairness in that the Department was aware that Petitioner's records were largely destroyed or rendered illegible through flooding and therefore could not be produced to the auditor. The Department was also aware that in the First Audit, all of the deductions for consulting and rental fees were substantiated and further aware that Petitioner maintained a complete set of books and records. Having conceded that Petitioner had substantiated all claimed deductions for consulting and rental fees in the First Audit, the Department should have deemed as substantiated Petitioner's deduction of consulting or rental fees in the Second Audit subject to the instant petition. Any contention by the Department that Petitioner failed to substantiate deductions for consulting or rental fees, knowing that Petitioner lost the majority of its records for the audit period due to flooding, is inequitable and impermissible.

**ANSWER:** Paragraph 21 is not an allegation of material fact but a statement of Petitioner's belief or position and as such does not require an answer pursuant to Tribunal Rule 86 Ill.Adm.Code §5000.310(b).

WHEREFORE, the Department prays:

- A) That Judgment be entered against the Petitioner and in favor of the Department in this matter;
- B) That the Department's Notices of Tax Liability be determined to be correct.
- C) That this Tribunal grant such other additional relief it deems just and proper.

**Count IV**

**The Department Overstated the Use Tax Owed by Petitioner on Consumable Supplies.**

22. Petitioner realleges and incorporates by this reference the allegations made in paragraphs 1 through 15, inclusive, hereinabove as and for this paragraph 22.

**ANSWER:** The Department repeats and incorporates its answers to paragraphs 1-15 as if fully set forth herein.

23. The Department mischaracterized certain purchases as consumable supplies subject to Use Tax, thereby overstating Petitioner's Use Tax liability.

**ANSWER:** The Department denies the allegations contained in paragraph 23.

WHEREFORE, the Department prays:

- A) That Judgment be entered against the Petitioner and in favor of the Department in this matter on Count IV in this matter;
- B) That the Department's Notice(s) of Tax Liability be determined to be correct.
- C) That this Tribunal grant such other additional relief it deems just and proper

**COUNT V**

**All Failure to Pay Penalties should be Abated for Reasonable Cause**

24. Petitioner realleges and incorporates by this reference the allegations made in paragraphs 1 through 15, inclusive, hereinabove as and for this paragraph 24.
25. Illinois law provides that failure to file and pay penalties do not apply if a taxpayer shows that his failure to file or pay tax at the required time was due to reasonable cause. 35 ILCS 735/3-8.

**ANSWER:** The Department admits the existence, force and effect, at all relevant times of the statutory provision set forth or referred to in paragraph 25 and state such provision speaks for itself.

26. The most important factor to be considered in making a determination to abate a penalty is the extent to which the taxpayer makes a good faith effort to determine its proper tax liability and to file and pay its proper tax liability in a timely fashion. 86 Ill. Admin. Code §700.400(b).

**ANSWER:** The Department admits the existence, force and effect, at all relevant times of the regulation set forth or referred to in paragraph 26 and state such regulation speaks for itself.

27. A taxpayer will be considered to have made a good faith effort to determine and pay its proper tax liability if it exercised ordinary business care and prudence in doing so. 86 Ill. Admin. Code §700.400(b).

**ANSWER:** The Department admits the existence, force and effect, at all relevant times of the regulation set forth or referred to in paragraph 27 and state such regulation speaks for itself.

28. Petitioner's failure to timely pay its ROT/Use Tax liabilities pertaining to audit period was due to reasonable cause warranting abatement of the late filing and late payment penalties.

**ANSWER:** Although paragraph 28 is not an allegation of material fact but a legal conclusion, the Department denies the allegations/legal conclusions contained in paragraph 28.

WHEREFORE, the Department prays:

- A) That Judgment be entered against the Petitioner and in favor of the Department on Count V;
- B) That the Department's Notice(s) of Tax Liability be determined to be correct.
- C) That this Tribunal grant such other additional relief it deems just and proper.

Illinois Department of Revenue  
100 West Randolph Street, 7-900  
Chicago, IL. 60601  
(312) 814-6697; FAX (312) 814-4344

Respectfully submitted,



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Michael Coveny  
Special Assistant Attorney General

**CERTIFICATE OF SERVICE**

I, Michael Coveny, an attorney for the Illinois Department of Revenue, state that I served a copy of the attached Department's Answer to Petitioner's Petition upon:

Lane M. Gensburg  
Dale & Gensburg, P.C.  
200 West Adams Street  
Suite 2425  
Chicago, IL 60606

By email attachment to [lgensburg@dandgpc.com](mailto:lgensburg@dandgpc.com) on October 22, 2014.