

IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

YANNI CONSULTING WHOLESALE & )  
RESALE, INC. )  
 )  
Petitioner, )  
 )  
 )  
v. )  
 )  
ILLINOIS DEPARTMENT OF REVENUE, )  
 )  
Defendant. )

No.

RECEIVED  
JUL 24 2014  
BY: 14 11 140

**PETITION**

Petitioner, Yanni Consulting Wholesale & Resale, Inc. (“Petitioner”), by and through its attorneys, Dale & Gensburg, P.C., complains of the Defendant, the Illinois Department of Revenue (“Department”) and alleges as follows:

**PARTIES**

1. Petitioner was an Illinois corporation located at 500 Quail Hollow Drive, Wheeling, Illinois 60090.
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.
3. Petitioner’s Illinois Business Tax number was 2870-4576.
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.

## 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**.

## JURISDICTION

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

7. This Tribunal has jurisdiction over this matter pursuant to Sections 1-45 and 1-50 of the Tribunal Act because Petitioner timely filed this petition within 60 days of the date of the NTL.

## 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.

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

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.

### **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.

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.

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.

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.

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.

WHEREFORE, Petitioner prays that the Tribunal:

- (a) enters judgment in favor of Petitioner and against Department and cancels the NTL;
- (b) enjoins the Department from taking any action to assess, lien, levy, offset, or in any other way prosecute and collect the amount due on the NTL; and
- (c) grants Petitioner such other and further relief as the Tribunal deems appropriate under the circumstances.

**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.

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.

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.

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.

WHEREFORE, Petitioner prays that the Tribunal:

- (a) enters judgment in favor of Petitioner and against Department and cancels the NTL;
- (b) enjoins the Department from taking any action to assess, lien, levy, offset, or in any other way prosecute and collect the amount due on the NTL; and
- (c) grants Petitioner such other and further relief as the Tribunal deems appropriate under the circumstances.

### 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 reference the allegations made in paragraphs 1 through 19, inclusive, hereinabove, as and for this paragraph 20.

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.

WHEREFORE, Petitioner prays that the Tribunal:

- (a) enters judgment in favor of Petitioner and against Department and cancels the NTL;
- (b) enjoins the Department from taking any action to assess, lien, levy, offset, or in any other way prosecute and collect the amount due on the NTL; and
- (c) grants Petitioner such other and further relief as the Tribunal deems appropriate under the circumstances.

#### COUNT IV

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

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

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

WHEREFORE, Petitioner prays that the Tribunal:

- (a) enters judgment in favor of Petitioner and against Department and cancels the NTL;

- (b) enjoins the Department from taking any action to assess, lien, levy, offset, or in any other way prosecute and collect the amount due on the NTL; and
- (c) grants Petitioner such other and further relief as the Tribunal deems appropriate under the circumstances.

### COUNT V

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

24. Petitioner realleges and incorporates by reference the allegations made in paragraphs 1 through 23, 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.

26. The most important factor to be considered in making a determination to abate a late payment 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).

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

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.

WHEREFORE, Petitioner prays that the Tribunal enter an order that:

- (a) finds and declares that all late filing and late payment penalties should be abated for reasonable cause;
- (b) enjoins the Department from taking any action to assess, lien, levy, offset, or in any other way prosecute and collect the amount of the failure to file and failure to pay penalties contained in the NTLs; and
- (c) grants such other and further relief as the Tribunal deems appropriate under the circumstances.

Respectfully submitted,

YANNI CONSULTING WHOLESAL E &  
RESALE, INC., Petitioner

By:



\_\_\_\_\_  
One of Petitioner's Attorneys

Lane M. Gensburg  
Dale & Gensburg, P.C.  
200 West Adams Street, Suite 2425  
Chicago, Illinois 60606  
312-263-2200  
[lgensburg@dandgpc.com](mailto:lgensburg@dandgpc.com)

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# Notice of Tax Liability

for Form EDA-105-R, ROT Audit Report

RECEIVED

JUN 02 2014



DALE & GENSBURG, P.C

May 28, 2014



Letter ID: CNXXX16563992XX5

Account ID: 2870-4576

#BWNKMGV  
#CNXX X165 6399 2XX5#  
YANNI CONSULTING WHOLESALE & RESALE INC  
ATTN: LANE GENSBURG  
200 W ADAMS ST STE 2425  
CHICAGO IL 60606-5251

We have audited your account for the reporting periods October 01, 2009, through January 31, 2011. As a result we have assessed the amounts shown below.

	<u>Liability</u>	<u>Payments/Credit</u>	<u>Unpaid Balance</u>
Tax	128,142.00	0.00	128,142.00
Late Payment Penalty Increase	25,628.00	0.00	25,628.00
Interest	12,526.53	0.00	12,526.53
<b>Assessment Total</b>	<b>\$166,296.53</b>	<b>\$0.00</b>	<b>\$166,296.53</b>

If you agree, pay the assessment total as soon as possible to minimize additional penalty and interest. Mail a copy of this notice and your payment with the voucher on the enclosed Taxpayer Statement. By including a copy of this notice, your payment will be properly applied to the audit liability.

If you do not agree, you may contest this notice by following the instructions listed below.

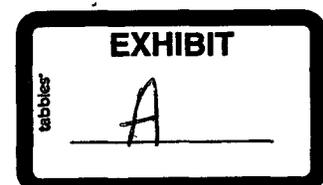
- If the amount of this tax liability, exclusive of penalty and interest, is more than \$15,000, or if no tax liability is assessed but the total penalties and interest is more than \$15,000, file a petition with the Illinois Independent Tax Tribunal within 60 days of this notice. Your petition must be in accordance with the rules of practice and procedure provided by the Tribunal (35 ILCS 1010/1-1, *et seq.*).
- In all other cases that do not fall within the jurisdiction of the Illinois Independent Tax Tribunal, file a protest with us, the Illinois Department of Revenue, and request an administrative hearing within 60 days of the date of this notice, which is July 28, 2014. Submit your protest on Form AH-4, Protest and Request for Administrative Hearing with the Illinois Department of Revenue (available on our website at [tax.illinois.gov](http://tax.illinois.gov)). Mail form AH-4 along with a copy of this notice to the address on the form. If you do not file a protest within the time allowed, you will waive your right to a hearing, and this liability will become final. An administrative hearing is a formal legal proceeding conducted pursuant to the rules adopted by the Department and is presided over by an administrative law judge. A protest of this notice does not preserve your rights under any other notice.
- Instead of filing a petition with the Illinois Independent Tax Tribunal or a protest with us, the Illinois Department of Revenue, you may instead, under Sections 2a and 2a.1 of the State Officers and Employees Money Disposition Act (30 ILCS 230/2a, 230/2a.1), pay the total liability under protest using Form RR-374, Notice of Payment Under Protest (available on our website at [tax.illinois.gov](http://tax.illinois.gov)), and file a complaint with the circuit court for a review of our determination.

If you do not protest this notice or pay the assessment total in full, we may take collection action against you for the balance due, which may include levy of your wages and bank accounts, filing of a tax lien, or other action to satisfy your liability.

If you have questions, write or call us weekdays between 8:00 a.m. and 4:00 p.m. Our contact information is listed below.

BUREAU OF AUDITS  
TECHNICAL REVIEW SECTION  
ILLINOIS DEPARTMENT OF REVENUE  
PO BOX 19012  
SPRINGFIELD IL 62794-9012

217 785-6579



## Penalties and Fees

For detailed information on penalties and rates in effect for specific periods on or after January 1, 1994, see Publication 103.

- 1 **Late-filing or Nonfiling penalty** - You owe this penalty if you do not file a return by the due date, including any extended due date, or you file a return that is not processable and you do not correct it within 30 days of the date we notify you.
- 2 **Late-payment penalty for underpayment of estimated or quarter-monthly tax** - You owe this penalty if you were required to make estimated or quarter-monthly tax payments and failed to do so, or if you failed to pay the required amount by the payment due date.
- 3 **Late-payment penalty for regular tax payments** - You owe this penalty if you did not pay the tax you owed by the original due date of the return.
- 4 **Negligence penalty** - You owe this penalty if, in preparing a return or amended return, you do not make a reasonable attempt to comply with the provisions of any tax act, including showing careless, reckless, or intentional disregard for the law or regulations.
- 5 **Fraud penalty** - You owe this penalty if any part of a deficiency is due to fraud.
- 6 **Cost of collection fee** - You owe this fee if you do not pay the total amount you owe within 30 days after a bill has been issued.
- 7 **Bad check penalty** - You owe this penalty if you send a remittance to the Department that is not honored by your financial institution.
- 8 **Audit penalty** - You owe this penalty if you did not pay the tax you owed before the start of an audit or investigation.

### Are penalties ever abated?

If you were unable to either timely pay the required amount of estimated or quarter-monthly payments, pay the tax you owed by the due date, or file your tax return by the extended due date because of a casualty, disaster, or other similar circumstance, you may request a waiver of penalties due to reasonable cause. To request this waiver, send us a detailed explanation of the cause of the delay and any documentation you have to support your request. Reasonable cause will be determined on a case-by-case basis according to our rules and regulations.

### How is interest figured?

Interest is calculated on your tax from the day after the original due date of your return through the date you pay the tax (for certain tax periods interest may also accrue on penalties). Interest accrues at simple rates established by the Internal Revenue Service. See Publication 103 for more information.

## Bankruptcy Information

If you are currently under the protection of the Federal Bankruptcy Court, contact us and provide the bankruptcy number and the bankruptcy court. The bankruptcy automatic stay does not change the fact that you are required to file tax returns.

## Taxpayer Bill of Rights

- You have the right to call the Department of Revenue for help in resolving tax problems.
- You have the right to privacy and confidentiality under most tax laws.
- You have the right to respond, within specified time periods, to Department notices by asking questions, paying the amount due, or providing proof to refute the Department's findings.
- You have the right to appeal Department decisions, in many instances, within specified time periods, by asking for Department review, by filing a petition with the Illinois Independent Tax Tribunal, or by filing a complaint in circuit court.
- If you have overpaid your taxes, you have the right to a credit (or, in some cases, a refund) of that overpayment.
- For more information about these rights and other Department procedures, you may contact us. Our contact information is on the front of this notice.

# Taxpayer Statement



May 28, 2014

TDD 1 800 544-5304



Letter ID: CNXXX12775449285

#BWNKMGV  
#CNXX X127 7544 9285#  
YANNI CONSULTING WHOLESALE & RESALE INC  
ATTN: LANE GENSBURG  
200 W ADAMS ST STE 2425  
CHICAGO IL 60606-5251

Account ID: 2870-4576

Total amount due: \$225,001.05

This statement lists our most recent information about your unpaid balance, available credits, or returns you have not filed. A payment voucher is included so you may pay the balance due.

## Sales/Use Tax & E911 Surcharge

Account ID: 2870-4576

Period	Tax	Penalty	Interest	Other	Payments/Credits	Balance
30-Jun-2009	36,504.00	6,803.00	8,804.76	-	(3,147.36)	48,964.40
30-Sep-2009	10,903.00	1,552.00	929.12	-	(3,644.00)	9,740.12
31-Jan-2011	128,142.00	25,628.00	12,526.53	-	-	166,296.53

• \$166,296.53 of this amount is subject to protest.

SOA

Retain this portion for your records.

P-000283

Fold and detach on perforation. Return bottom portion with your payment.

## Taxpayer Statement (R-12/08) (136)



Letter ID: CNXXX12775449285  
YANNI CONSULTING WHOLESALE & RESALE II

Total amount due: \$225,001.05

Write the amount you are paying below.

\$ \_\_\_\_\_

Write your Account ID on your check.

Mail this voucher and your payment to:  
ILLINOIS DEPARTMENT OF REVENUE  
PO BOX 19006  
SPRINGFIELD IL 62794-9006

\$166,296.53 is subject to protest.

Do not pay any Income Tax liability that you intend to protest.

IN THE ILLINOIS INDEPENDENT TAX TRIBUNAL

YANNI CONSULTING WHOLESALE &	)	
RESALE, INC.	)	
	)	
Petitioner,	)	
	)	
	)	No.
v.	)	
	)	
ILLINOIS DEPARTMENT OF REVENUE,	)	
	)	
Defendants.	)	

**CERTIFICATE OF SERVICE**

TO: Illinois Department of Revenue  
Office of Legal Services  
100 W. Randolph Street, 7-900  
Chicago, IL 60601

I, Anne J. Kim, an attorney, certify that I caused a copy of the attached Petition before the Illinois Independent Tax Tribunal to be served upon the Illinois Department of Revenue at the address set forth above, by hand delivery before the hour of 5 p.m. on Thursday, June 24, 2014.



Anne J. Kim

Lane M. Gensburg  
Dale & Gensburg, P.C.  
200 West Adams Street, Suite 2425  
Chicago, Illinois 60606  
312-263-2200  
[lgensburg@dandgpc.com](mailto:lgensburg@dandgpc.com)