

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Leonard Gaines :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of  
Personal Income Tax :  
under Article 22 of the Tax Law  
for the Years 1966 - 1970. :

State of New York

County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of November, 1980, he served the within notice of Decision by certified mail upon Leonard Gaines, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leonard Gaines  
225 E. 73rd St.  
New York, NY 10021

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
28th day of November, 1980.

Deborah A. Bank

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

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Personal Income Tax :

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for the Years 1966 - 1970. :

State of New York

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Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of November, 1980, he served the within notice of Decision by certified mail upon Robert S. Fink the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Robert S. Fink  
Kostelanetz & Ritholz  
80 Pine St.  
New York, NY

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
28th day of November, 1980.

Rebecca A. Bank

J. Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

November 28, 1980

Leonard Gaines  
225 E. 73rd St.  
New York, NY 10021

Dear Mr. Gaines:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Robert S. Fink  
Kostelanetz & Ritholz  
80 Pine St.  
New York, NY  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
LEONARD GAINES	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1966	:	
through 1971.	:	

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Petitioner, Leonard Gaines, 225 East 73rd Street, New York, New York 10021, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1966 through 1971 (File No. 01102).

A formal hearing was held before Herbert M. Feinsod, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 24, 1976 at 1:15 P.M. and was continued before Edward Goodell, Hearing Officer, at the same offices on November 15, 1977 at 9:15 A.M. Petitioner appeared by Kostelanetz & Ritholz, Esqs. (Robert S. Fink, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Solomon Sies, Esq. and Alexander Weiss, Esq., of counsel).

ISSUE

Whether petitioner, in his relationship with the corporations hereafter named during the years 1966 through 1971, was an independent contractor subject to unincorporated business tax, or an employee of said corporations and, therefore, not subject to unincorporated business tax.

FINDINGS OF FACT

1. Petitioner, Leonard Gaines, and his wife, Evelyn Gaines, filed New York State combined income tax returns for the years 1966 through 1968, and

joint New York State resident returns for 1969 through 1971. Petitioner Leonard Gaines did not file unincorporated business tax returns for any of said years.

2. On January 29, 1973, the Income Tax Bureau issued a Statement of Audit Changes and a Notice of Deficiency against petitioner, Leonard Gaines, imposing unincorporated business tax for 1966, 1967, 1968, 1969, 1970 and 1971 of \$11,361.51, plus interest. This was done because:

"Based on the decision dated April 14, 1972 by the New York State Tax Commission, your business activities as a sales representative and the salary income from Jane Holly, Inc. was held to be subject to the Unincorporated Business Tax."

Federal audit adjustments were included in the computation of unincorporated business tax for the years 1966 through 1969.

3. During the period at issue, petitioner acted as sales representative with the duties hereafter stated for the non-competitive companies hereafter mentioned, claiming that he was an employee of each of said companies.

4. (a) One of the companies for which petitioner acted as sales representative during the years 1966 through 1971 was Jane Holly, Inc. and its subsidiary, Morlove Blouses, Inc. Said company was engaged during the same period in the manufacture and sale of women's blouses.

(b) Petitioner also acted as a sales representative as aforesaid during the years 1966 through 1970 and the first seven weeks of 1971 for Sportempos, Inc. Said company, an independent entity unrelated to Jane Holly, Inc., was engaged in the manufacture and sales of ladies' sportswear such as slacks, skirts, sweaters, dresses, jackets and blouses, during the period at issue.

5. The offices and showrooms of Jane Holly, Inc. and Sportempos, Inc. were both located in New York City during the period 1966 through 1970 and the

first seven weeks of 1971. Said offices and showrooms were in the same building during part of the period and in adjoining buildings during the remainder of the period.

6. During the period from 1966 to and including the seventh week of 1971, petitioner, in the performance of his duties as sales representative of Jane Holly, Inc. and Sportempos Inc., spent approximately one-half of each year in the offices and showrooms of said companies in New York City, and the balance of each year or approximately one-half of each year "on the road", rendering his services in the territory allotted exclusively to him by Jane Holly, Inc. and Sportempos, Inc., to wit, Virginia, North Carolina, South Carolina, Georgia, Tennessee, Alabama, Mississippi and Florida.

7. (a) Petitioner's duties in relation to the services rendered by him to Jane Holly, Inc. in its office and showroom in New York City, during the period at issue, were to assist in the development and fabrication of a fashion line of blouses for its various seasons during said period. This included assistance in the selection, design and styling of fabrics and, in addition, the sale of such blouses in the showroom to representatives of key stores located throughout the United States, regardless of the salesman's territory.

(b) Petitioner's duties in relation to the services rendered by him to Jane Holly, Inc., while servicing his territory during the period at issue, were test marketing its lines of blouses, giving advice with respect to modifications of said lines and selling them, as modified, to stores in his sales territory.

8. (a) Petitioner's duties in relation to the services rendered by him to Sportempos, Inc. in its office and showroom in New York City during the period from 1966 to and including the first seven weeks of 1971, were to

assist in the development of five major lines of sportswear each year during said period, including assistance in the selection of fabrics and the styling of said lines. In addition, petitioner assisted in the selection and training of salesmen and also engaged in the sale of merchandise in the showroom to customers of Sportempos, Inc. from various parts of the United States.

(b) Petitioner's duties in relation to the services rendered by him to Sportempos, Inc. while servicing his territory during the aforementioned period, were to "spearhead" the lines, getting them several weeks in advance of other salesmen and giving advice to the principals of Sportempos, Inc. as to modifications that should be made and the direction the lines should take before Sportempos, Inc.'s other salesmen received them. In addition, he was to sell these lines to stores located in said territory, the principals following his advice as to the lines' modification and the direction to be taken in selling the lines.

9. There was no agreement, either oral or written, between Jane Holly, Inc. and Sportempos, Inc. with respect to the allocation of time to be given to each of them by petitioner in the rendition of his services aforesaid during the period at issue either in their respective offices and showrooms in New York City or while the petitioner was on the road in his territory.

10. Neither Jane Holly, Inc. nor Sportempos, Inc. entered into either a written or oral agreement with petitioner, fixing the time he was required to devote to each or either of them in the rendition of his services during the period at issue, either in their respective offices and showrooms or while petitioner was on the road in his territory.

11. During 1971 Sportempos, Inc. ceased doing business. With the consent of Jane Holly, Inc. petitioner then began performing services as a "road

salesman" for Tru-Fit Manufacturing Co., Inc., an independent entity engaged in the sportswear business. For a period of about six months during 1971, petitioner rendered services to both Jane Holly, Inc. and Tru-Fit Manufacturing Co., Inc. on substantially the same basis as he had previously done for Jane Holly, Inc. and Sportempos, Inc. Tru-Fit Manufacturing Co., Inc., in effect, substituted for Sportempos, Inc. during said period, in relation to both petitioner and Jane Holly, Inc.

12. Petitioner's Federal income tax returns for 1966 through 1970 reported as income from "wages, salaries, tips, etc." \$10,400.00 for each of said years and the sum of \$10,600.00 for 1971. Said sums were received by petitioner from Jane Holly, Inc. in weekly installments of \$200.00 each, less deductions by Jane Holly, Inc. for social security and withholding taxes.

13. In addition to the above income reported by petitioner, petitioner's Federal income tax returns for 1966 through 1971 reported "other income" received by him for his services as follows:

(a) For each of the years 1966 and 1967, petitioner filed Schedule C (Form 1040) entitled Profit (or Loss) From Business or Profession, in which he stated that his "principal business activity" was that of "traveling salesman"; that his "gross profit" for 1966 was \$112,057.00 (after reduction for claimed business expenses such as automobile expense, travel expense, entertainment, and other business expenses, petitioner reported business income of \$55,264.00 on his State return) that his "gross profit" for 1967 was \$95,493.00, consisting of \$45,000.00 from Sportempos, Inc., \$37,271.00 from Jane Holly, Inc. and \$13,222.00 from the sale of samples; and that "business deductions" for 1967 such as auto expenses, travel expenses, entertainment and other business expenses totaled \$55,402.00.



(b) For 1968 petitioner reported as "other income" in Part II of Form 1040, "miscellaneous income" as follows:

"Sample sale	\$ 3,877.00
Commissions - Sportempos	35,000.00
Jane Holly, Inc.	<u>40,367.00</u>
Total miscellaneous income	\$79,244.00"

Said return for 1968 reported \$44,756.00 as "miscellaneous deductions" (namely "auto expenses", "travel expense", "entertainment" and "other business expenses"). These expenses were not considered by the Audit Division in determining the deficiency for 1968.

(c) For 1969 petitioner reported in Schedule E of Form 1040, entitled Supplemental and Miscellaneous Income, the following "other income":

"Sportempos (Sales Comm)	\$25,000.00
1407 Bdwy	
Jane Holly, Inc. (Sales Comm)	26,814.01
Sample Sales	2,941.95
NYC Tax Refund	<u>126.72</u>
Income (or loss) total of column (d)	<u>54,882.68"</u>

Petitioner's total miscellaneous income was used by the Audit Division in determining the deficiency for 1969. Said 1969 return also reported "unreimbursed business expense" (namely "auto expenses", "travel expenses", "entertainment" and "other business expenses") of \$40,250.76.

(d) For 1970 petitioner reported in Part II of Form 1040 entitled Income other than Wages, Dividends and Interest, the following:

"Miscellaneous Income	
Sportempos, Inc. - Commissions	\$30,937.82
Jane Holly, Inc.	25,785.72
Morlove Blouses, Inc.	3,017.14
Sample Sales	<u>3,395.65</u>
Total	\$63,136.33"

Said 1970 return also reported "unreimbursed business expenses" (namely "auto expenses", "travel expenses", "selling and entertainment" and "other business expenses") totaling \$42,022.82.

(e) For 1971 petitioner reported in Part II of Form 1040, entitled Income other than Wages, Dividends and Interest the following "Miscellaneous Income - Commissions":

Sportempos, Inc.	\$ 3,500.00
Jane Holly, Inc.	29,769.88
Tru-Fil Mfg. Co., Inc.	15,369.42
Sample Sales	<u>1,562.33</u>
Total	\$53,728.95

Said 1971 return also reported "unreimbursed business expenses" (namely "auto expenses", "travel expenses -other", "selling and entertainment" and "other business expenses") totaling \$43,112.34.

14. Included in the sums reported in petitioner's U.S. individual tax returns as "other income" received from Sportempos, Inc. was \$500.00 paid weekly to petitioner by Sportempos during the years 1966 through the first seven weeks of 1971; however, during the first seven weeks of 1971, no sales were shipped by Sportempos, Inc.

15. No social security or withholding taxes were deducted by either Jane Holly, Inc. or Sportempos, Inc. from the "other income" described in Findings of Fact "13" or "14", above.

16. (a) In addition to the compensation for his services described in Findings of Fact "12" and "13" above, petitioner received benefits from Jane Holly, Inc. during the period at issue, including participation in its profit sharing, major medical and group hospitalization plans, as well as coverage for workmen's compensation, unemployment, disability and life insurance.

(b) In addition to the compensation described in Finding of Fact "13" above, petitioner received the following benefits from Sportempos, Inc. during 1966 through the first seven weeks of 1971, namely, participation in its hospitalization and major medical plans, as well as coverage for unemployment, disability and life insurance.

17. (a) Salesmen of Jane Holly, Inc. (other than petitioner) did not participate in its profit sharing plan, were required to live in the territory they serviced, were required to sign contracts stating they were independent contractors, and were invoiced for samples.

(b) Salesmen of Sportempos, Inc. (other than petitioner) did not participate in its major medical, hospitalization or life insurance programs, were required to live in the territory they serviced and were not allowed to carry any line of merchandise other than that of Sportempos, Inc.

18. (a) Commissions earned on sales effected by petitioner in the New York showrooms of Jane Holly, Inc. and Sportempos, Inc. to customers from territories serviced by salesmen other than petitioner, were credited and paid to the salesmen covering such other territories.

(b) Commissions earned on sales effected in the New York showrooms of Jane Holly, Inc. and Sportempos, Inc. to customers from the territory serviced by petitioner, were credited and paid to petitioner, even though not made by petitioner.

19. Jane Holly, Inc. and Sportempos, Inc. each gave instructions to petitioner as its sales representative concerning the stores located in the states allocated to him that he was to visit and from which he was to solicit orders, as well as those stores in said states from which he was not to solicit orders; each required petitioner to report to it while he was on the road (orally four or five times a week in the case of Jane Holly, Inc., and daily in writing in the case of Sportempos, Inc.) concerning his sales activities and recommendations as to modifications of their respective lines and the directions their respective lines should take; Jane Holly, Inc. required petitioner to obtain its prior approval to act as sales representative for

another company; Sportempos, Inc. instructed petitioner concerning the items in its line that it wanted him to "push".

20. On occasion petitioner used his own initiative in procuring new customers as sales representative of Jane Holly, Inc. and Sportempos, Inc., and neither of said companies exercised control over petitioner regarding the manner or method by which he was to make sales, the time or effort he was required to devote to the selling of their respective products, or the division of his time and effort between them.

21. (a) The State Tax Commission in a decision dated April 4, 1972 determined that the selling activities of petitioner, Leonard Gaines, as a women's blouse and sportswear salesman for two non-affiliated, non-competitive concerns during 1963, 1964 and 1965, constituted the carrying on of an unincorporated business subject to unincorporated business tax.

(b) To the extent indicated herein, the prior proceeding is distinguishable from the present one by virtue of the following:

(i) During the period involved in the prior proceeding, Sportempos, Inc. was controlled by Puritan Manufacturing Company which required its regional salesmen (including petitioner) to be assisted while on the road by junior salesmen. Petitioner paid part of the expenses of the junior salesmen who assisted him during the prior period and, in addition, paid each a bonus. In or about 1966, Matt Baker, a witness in the present proceeding, and his brother, Jack Baker, reacquired control of Sportempos, Inc., at which time the practice of assigning junior salesmen to assist petitioner and other Sportempos salesmen was discontinued.

(ii) In the present proceeding, petitioner is represented by lawyers. In the prior proceeding, petitioner was represented by accountants.

(iii) No witnesses were called to testify for petitioner, nor was any affidavit submitted on his behalf in the prior proceeding.

22. During the period at issue, petitioner suffered from a back condition which necessitated his engaging (at his expense) the services of an assistant

while on the road, who could help him by carrying, packing and unpacking heavy garment bags containing samples of Jane Holly, Inc. and Sportempos, Inc. clothing.

CONCLUSIONS OF LAW

A. That during 1966 through 1971, petitioner, Leonard Gaines, in his capacity as a sales representative of Jane Holly, Inc. (including its subsidiary, Morlove Blouses, Inc.) acted as an independent contractor and not as its employee.

B. That during 1966 through 1970 and during the first seven weeks of 1971, petitioner, Leonard Gaines, in his capacity as a sales representative of Sportempos, Inc. acted as an independent contractor and not as its employee.

C. That during the balance of 1971, subsequent to the discontinuance of Sportempos, Inc.'s business, petitioner, in his capacity as a sales representative of Tru-Fit Manufacturing Co., Inc., acted as an independent contractor and not as its employee.

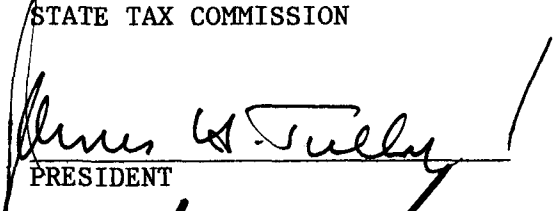
D. That the activities of petitioner, Leonard Gaines, for the firms he represented during the years 1966 through 1971, constituted the carrying of an unincorporated business within the meaning and intent of section 703 of the Tax Law; that the income from such unincorporated business is subject to the unincorporated business tax imposed by section 701 of the Tax Law.

E. That the Audit Division is directed to modify the Notice of Deficiency issued January 23, 1973 by allowing as business expenses for 1968 those expenses shown in Finding of Fact "13(b)" (supra) which were not considered in arriving at unincorporated business taxable income; and by removing from unincorporated business taxable income for 1969 the amount of New York City tax refund as shown in Finding of Fact "13(c)" (supra) which was erroneously included in arriving at same.

F. That the petition of Leonard Gaines is granted to the extent indicated in Conclusion of Law "E" (supra) and, except as so granted, the petition is in all other respects denied and the Notice of Deficiency, as modified, is sustained, together with such interest as may be lawfully due.

DATED: Albany, New York  
NOV 28 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER