

*Unincorp. Bus. Tax Determin.*  
**BUREAU OF LAW****MEMORANDUM**  
*Schary, Edmund Z. & Elaine*

A-Z

**TO: State Tax Commission**

**FROM: Francis V. Dow, Hearing Officer**

**SUBJECT: Application of Edmund Z. and Elaine Schary for Revision or Refund of Unincorporated Business Taxes under Article 16-A of the Tax Law for the Years 1956 and 1959**

A hearing with reference to the above matter was held before me at the New York City office on October 5, 1966. The taxpayer Edmund Z. Schary appeared personally and was also represented by his accountant.

The issue involved is whether the taxpayer's activities during the taxable years 1956 and 1959 as a salesman for multiple principals constituted the carrying on of an unincorporated business subject to the unincorporated business tax.

The taxpayer represented two companies in the sale of shoe trimmings, Al Lewis in New York City and Hub Stay and Shoe Trim Corporation in Boston, receiving a salary from the former and commissions from the latter. Although some of the customers he called on were the same for both companies, the items he sold for them were different. Neither firm withheld social security or income tax payments for him. He testified that he was told by both firms what accounts to call on, but the time and manner of doing so were left entirely up to him. Neither firm reimbursed him for the expenses incurred by him in making his sales.

The taxpayer on Schedule A of his income tax returns for 1956 and 1959 described his business as that of manufacturer's representative and jobber, and sales representative and jobber, respectively. The schedule included total income and expenses from both types of activity, without differentiation.

The taxpayer also carried on from his house a mail-order business as a jobber of buttons of various kinds, some of which were also used as shoe ornaments. There is no dispute that, insofar as his activities as a jobber were concerned, the taxpayer was conducting an unincorporated business.

It is my opinion from all of the above facts that there was not present during the taxable years sufficient supervision and control by the principals over the taxpayer to constitute an employer-employee relationship between them and that the taxpayer was conducting, on behalf of those principals, an unincorporated business subject to tax.

Therefore, I recommend that the determination of the State Tax Commission denying the taxpayers' application in the above matter be substantially in the form submitted herewith.

/s/

FRANCIS V. DOW

**FRANCIS V. DOW**

Hearing Officer by Martin Sc\_hapiro

AW:sc/ldd

Enc.

March 25, 1969

**STATE OF NEW YORK**

**STATE TAX COMMISSION**

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**IN THE MATTER OF THE APPLICATION**

**OF**

**EDMUND Z. & ELAINE SCHARY**

**FOR REVISION OR REFUND OF PERSONAL  
INCOME TAXES UNDER ARTICLE 16, AND  
UNINCORPORATED BUSINESS TAXES UNDER  
ARTICLE 16-A OF THE TAX LAW FOR THE  
YEARS 1956 AND 1959**  
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The taxpayers Edmund Z. and Elaine Schary having filed an application for revision or refund of unincorporated business tax under Article 16-A of the Tax Law for the years 1956 and 1959 and a hearing having been held in connection therewith at the office of the State Tax Commission, 80 Centre Street, New York, New York, on the 5th day of October, 1966 before Francis V. Dow, Hearing Officer of the Department of Taxation and Finance, the taxpayer Edmund Z. Schary having appeared personally and testified in connection therewith, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayers filed resident income tax returns for the years 1956 and 1959; that the taxpayer Edmund Z. Schary reported income as manufacturer's representative and jobber in the amount of \$10,559.74 for the year 1956 and \$11,301.86 for the year 1959; that the taxpayer Edmund Z. Schary did not file unincorporated business tax returns for the said years; that on February 7 and March 2, 1961, respectively, the Department of Taxation and Finance issued a notice of additional assessment against the taxpayers adjusting the normal tax liability for the years 1956 and 1959 to conform with the Federal audit of the tax returns for said years, and in addition held that the activities of Edmund Z. Schary as a manufacturer's representative during the years 1956 and 1959 constituted

the carrying on of an unincorporated business, the income of which was subject to the unincorporated business tax; that the taxpayer Edmund E. Schary is not contesting the imposition of additional personal income taxes for the years 1956 and 1959.

(2) That the taxpayer was a manufacturer's representative during the taxable years involved for two firms in the sale of shoe trimmings, selling non-competing products for them; that neither firm withheld social security or income tax payments from his earnings.

(3) That the taxpayer was not reimbursed for any of his selling expenses; that these expenses included car, travel, entertainment and telephone expenses, and gifts.

(4) That, while the principals of the taxpayer Edmund E. Schary asked him to call on customers, they did not specify the time and manner of doing so; that neither of the principals exercised sufficient control or supervision over the conduct by the taxpayer of his sales activities to constitute any actual employer-employee relationship between the parties.

(5) That the taxpayer Edmund E. Schary during the taxable years also conducted from his home the business of a jobber of buttons; that on Schedule A of his income tax return he reported only total income and expenses from his activities as a manufacturer's representative and as a jobber without differentiation; that the taxpayer does not dispute that his activities as a jobber constituted the carrying on of an unincorporated business.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby,

**DETERMINES:**

(A) That the assessments of normal tax for the taxable years 1956 and 1959 are correct and do not include any tax or other charge which could not have been lawfully demanded.

(B) That the activities of the taxpayer Edmund I. Schary as a manufacturer's representative during the years 1956 and 1959 were conducted by him as an independent contractor and not as an employee and that such activities constituted the carrying on of an unincorporated business subject to the unincorporated business tax within the intent and meaning of Section 386 of the Tax Law.

(C) That the income of the taxpayer Edmund I. Schary derived from his activities as a manufacturer's representative constitutes receipts of a combined business of jobber and manufacturer's representative regularly carried on by the taxpayer.

(D) That the assessments of unincorporated business tax for the taxable years 1956 and 1959 are correct and do not include any tax or other charge which could not have been lawfully demanded.

(E) That, accordingly, the applications for revision or refund filed by the taxpayers with respect to the aforementioned assessments be and the same are hereby denied.

Dated: Albany, New York on the 8th day of April , 1969.

**STATE TAX COMMISSION**

/s/

JOSEPH H. MURPHY

**PRESIDENT**

/s/

A. BRUCE MANLEY

**COMMISSIONER**

/s/

MILTON KOERNER

**COMMISSIONER**