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Clerk, Supreme Court of Appeals
Richmond, Va.

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Record No. 5116

In the Supreme Court of Appeals of Virginia at Richmond

COMMONWEALTH OF VIRGINIA

v.

AMERICAN RADIATOR AND STANDARD SANITARY CORPORATION

FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5116

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 27th day of November, 1959.

COMMONWEALTH OF VIRGINIA, Plaintiff in Error,

against

AMERICAN RADIATOR AND STANDARD SANITARY CORPORATION, Defendant in Error.

From the Circuit Court of the City of Richmond

Upon the petition of the Commonwealth of Virginia a writ of error and *supersedeas* is awarded her to a judgment rendered by the Circuit Court of the City of Richmond on the 3rd day of June, 1959, in a certain proceeding then therein depending wherein American Radiator and Standard Sanitary Corporation was plaintiff and the petitioner was defendant; no bond being required.

RECORD

• • • • •

Filed in the Clerk's Office the 17 day of June, 1957.

Teste:

LUTHER LIBBY, JR., Clerk
By E. M. EDWARDS, D. C.

A-1573

PETITION FOR CORRECTION OF ERRONEOUS ASSESSMENTS OF INCOME TAXES FOR THE YEARS 1952, 1953, 1954, 1955 AND 1956 AND REFUNDS OF THE SAME.

American Radiator & Standard Sanitary Corporation (the Taxpayer), a corporation organized and existing under the laws of the State of Delaware, and qualified to do business in the State of Virginia, respectfully represents that:

1. The Taxpayer is engaged in the business of manufacturing and selling plumbing fixtures, heating and air condiditioning equipment, and other products. The principal office of the Taxpayer is located at 40 West 40th. Street, New York 18, New York. All the manufacturing plants of the Taxpayer are located outside the State of
page 2 } Virginia and the Taxpayer did not maintain any stock of goods or inventory within the State of Virginia at any time material to this controversy.

2. During the taxable years in question the Taxpayer's sole business activity in Virginia consisted of soliciting orders for its products from customers within this State. For the convenience of its sales representatives, the Taxpayer maintained a sales office in Richmond, Virginia, but all orders secured from Virginia customers were transmitted to the Taxpayer's general office in Pittsburg, Pennsylvania, for acceptance or rejection. All sales to Virginia customers during the taxable years in question were shipped, billed and collected from locations outside Virginia. The Richmond, Virginia, sales office was discontinued on June 30, 1956, and after that time the Taxpayer has not maintained an office of any kind within the State of Virginia.

3. For the taxable years 1952-1956, inclusive, the Tax-

payer reported on forms furnished by the Department of Taxation the following net income, and, after assessment by the Department of Taxation, paid to the State of Virginia before the first day of June of the next succeeding year the following income tax:

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Taxable Year	Net Income	Income Tax
1952	$142,360.63	$ 6,477.41
1953	170,803.85	8,027.78
1954	181,724.19	8,541.04
1955	216,129.77	10,806.49
1956	102,209.88	5,110.49
		$38,963.21

4. The Honorable C. H. Morrissett, State Tax Commissioner, made the assessments. He gave bond and qualified in this Court.

5. Section 58-128 of Michie's Code of Virginia (1950) imposes the income tax only on foreign corporations "doing business in this State." Since all the activities of the Taxpayer in this State are exclusively in interstate commerce, it is not now and was not during the taxable years in question doing business in this State within the meaning of that Section. Accordingly, the Taxpayer is not now and was not during the taxable years in question subject to tax on its net income in Virginia. The whole amount of the assessments should be eliminated and the whole amount of the payments should be refunded.

6. The tax, if applied to the Taxpayer, would violate the interstate commerce clause of Article I, Section 8, of the Constitution of the United States.

WHEREFORE the Taxpayer prays that the attorney for the Commonwealth be required to defend this Ap-
page 4 } plication; that the assessment of the Petitioner's income taxes be corrected as shown above; that the Comptroller of the Commonwealth be required to refund to the Taxpayer the aggregate sum of $38,963.21 on account of excess income taxes heretofore erroneously paid for the years 1952, 1953, 1954, 1955 and 1956; and that your Petitioner have such other and further relief in the premises as may be allowed by Sections 58-1130 and 58-1134 of the Code of Vir-

ginia and by other statutes in such cases made and provided; and as in duty bound your Petitioner will ever pray, etc.

June 17, 1957.

AMERICAN RADIATOR &
STANDARD SANITARY
CORPORATION
JOHN C. LIUSENMEYER
Executive Vice President.

SULLIVAN & CROMWELL
48 Wall Street
New York 5, New York.

HUNTON, WILLIAMS, GAY, MOORE &
POWELL
1003 Electric Building
Richmond 12, Virginia
Counsel.

* * * * *

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* * * * *

Received and filed Jul. 10, 1957.

LUTHER LIBBY, JR., Clerk
By E. M. EDWARDS, D. C.

ANSWER OF DEFENDANT.

For answer to the petition herein, the defendant, Commonwealth of Virginia, answers and says:

1. Defendant has no knowledge concerning the allegations of paragraphs 1 and 2 of the petition. Said allegations are neither admitted nor denied, and defendant calls for strict proof of the same.
2. The allegations of paragraphs 3 and 4 of the petition are admitted.
3. The allegations of paragraphs 5 and 6 of the petition are denied.
4. The defendant, further answering, says that the petitioner is barred from recovery of any income taxes paid for the years 1952 and 1953 by reason of the expiration of more than two years from the 31st day of December of the years

(a) From January 1, 1952, to June 30, 1956, the Taxpayer maintained a sales office in the Central National Bank Building in Richmond, Virginia. This was the only office maintained by the Taxpayer in Virginia during the years here in question. The territory covered by the Richmond Sales Office consisted of (1) all that part of Virginia outside Staunton, Virginia, and the Fredericksburg and Winchester trading areas (including Alexandria, Arlington and Rosslyn) and (2) the northern part of North Carolina.

(b) From January 1, 1952, to June 1, 1954, the Richmond Sales Office operated under the direction of the Pittsburgh General Offices of the Taxpayer. All orders solicited by salesman operating from the Richmond Sales Office were mailed to Richmond for editing and processing and then mailed to the Pittsburgh General Order Handling Unit for acceptance or rejection. All sales accepted were shipped, billed and collected from locations outside the State of Virginia.

Published trade and wholesaler prices on the Taxpayer's products were established by the Pittsburgh General Office. Any special discounts requested by wholesale distributors to enable them to meet competitive quotations on page 10 } *bona fide* jobs were presented to the Pittsburgh General Office for approval. Any such approved special prices then would be quoted by either the Sales Manager or the sales representative calling on the wholesale distributor.

Published freight terms of the Taxpayer were F. O. B. its plants at Louisville, Kenutcky; Tiffin, Ohio; Kokomo, Indiana; Pittsburgh, Pennsylvania; Trenton and Bayonne, New Jersey; Buffalo, New York; and Baltimore, Maryland. Freight allowances were made on most products, generally the carload rail rate. Shipments to wholesalers were always collect. Shipments to job sites were prepaid upon request.

(c) During all of the years here in question, Taxpayer's salesmen solicited orders from selected local wholesale distributors who handled Taxpayer's plumbing, heating and air conditioning products. Taxpayer's salesmen usually called upon such local wholesale distributors at least once a week, sometimes more frequently and sometimes less frequently. Orders were solicited from and sales were made to such local wholesale distributors only, of which there were fourteen in Virginia solicited by salesmen attached to the Virginia office during all of the years here in question. In addition, it was the practice of Taxpayer's salesmen to contact prospective local users of Taxpayer's products, such as heating contractors, plumbing contractors, builders, archi-

1953 and 1954, in which years assessments for income taxes for the years 1952 and 1953, respectively, were made.

Now having fully answered the petition, defendant prays to be hence dismissed with its costs in this behalf expended.

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COMMONWEALTH OF VIRGINIA
R. D. McILWAINE, III
Of Counsel.

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Received and filed Aug. 19, 1958.

LUTHER LIBBY, JR., Clerk
By E. M. EDWARDS, D. C.

AGREED STATEMENT OF FACTS.

Come now the parties above named, by their respective attorneys of record, and agree that the following stated facts are true:

1. American Radiator and Standard Sanitary Corporation (hereinafter referred to as the Taxpayer) is a corporation organized and existing under the laws of the State of Delaware. The principal place of business of the Taxpayer is located at 40 West 40th Street, New York 18, New York. The Taxpayer qualified to do business in the State of Virginia on January 10, 1939, and has remained so qualified to the present time.

2. The principal business of the Taxpayer during the years here in question (1952 through 1956) consisted of the manufacture and wholesale distribution of plumbing fixtures and heating and air conditioning equipment. In addition, it was engaged, either directly or through subsidiaries, in the manufacture and sale of a variety of industrial products such as mechanical draft fans, dust collectors and precipitators, drying and process equipment, automatic controls and valves, heat exchangers and pig iron. During the years here in question the Taxpayer did not maintain any manufacturing facilities, stock of goods or inventory within the State of Virginia.

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3. The details of Taxpayer's operations in Virginia during the years here in question were as follows:

Personnel of the Taxpayer attached to the Richmond Office were paid a flat salary without commissions. During some years special year-end bonuses were paid, generally equal to one month's salary. The salesmen furnished their own automobiles and were paid a flat rate per mile, which varied with the price of gasoline, miles driven per month and whether urban or rural territories were covered.

The Richmond Sales Office of the Taxpayer maintained a Manager's Account in The Central National Bank of Richmond and paid its own personnel, except the Manager, who was paid from Pittsburgh. Purchases of office equipment, postage, supplies and services to maintain the Sales Office were paid locally from that bank account. Listing sheets were forwarded to Pittsburgh regularly for reimbursement of the Manager's Account.

(e) On June 1, 1954, the Richmond Sales Office was consolidated with the Baltimore, Maryland, and Silver Spring, Maryland, Sales Offices into one Capitol Sales District. All clerical and sales functions, except as hereafter noted, for the three former Sales Offices were centralized in the Capitol District Office, 8641 Colesville Road, Silver Spring, Maryland, under the over-all direction of Mr. H. H. Steck, Manager of the Capitol Sales District. The Richmond Sales
page 13 } Office space was reduced from 1050 square feet to 405 square feet in the Central National Bank Building, and the clerical personnel was reduced to one secretary to handle dictation, telephone calls and miscellaneous problems. After June 1, 1954, salaries, except that of the Manager of the Richmond Sales Office, and operating expenses were paid from the Capitol Sales District Office in Silver Spring, Maryland.

From June 1, 1954, to June 30, 1956, the Richmond Sales Office of the Taxpayer constituted the place from which Mr. Rogers, Manager of the Richmond Sales Office, telephoned, corresponded, held meetings for salesmen and conducted and directed the activities carried on by Taxpayer's sales personnel outlined above. All orders solicited by such salesmen during the period June 1, 1954 to June 30, 1956, were processed in the Capitol Sales Office and referred by that office to the Pittsburgh General Office for acceptance or rejection. All such accepted sales were shipped, billed and collected from locations outside the State of Virginia.

Mr. Rogers retired on June 30, 1956, and his secretary resigned from employment with the Taxpayer at that time. The lease on the office space was terminated on June 30,

tects, engineers and occasionally consumers, to encourage them to use and install Taxpayer's products and to induce them to purchase such products from Taxpayer's selected local wholesale distributors. In this connection, Taxpayer's salesmen would follow the progress of construction awards and call upon both its selected local wholesale distributors and prospective local users of Taxpayer's products as contract awards were made and various heating con-
page 11 } tractors, plumbing contractors, buildings, architects, engineers and consumers were ready to buy products of the type manufactured by Taxpayer.

On certain undertakings engaged in by prospective local users of Taxpayer's products, including most commercial and educational jobs, architects, engineers or contractors would request submission of brochures illustrating the specific items of Taxpayer's products which such architects, engineers or contractors proposed to use on a particular enterprise, together with necessary data, i, e., dimensions and descriptions, relating to such items. The data in question would be furnished to such prospective local users by Taxpayer's salesmen in the form of "roughing-in" books, which books were compiled, to meet the specific request of a local user, from printed material kept on file by the Taxpayer. Brochures and "roughing-in" books would have to be approved before the local wholesale distributor released the order for shipment.

(d) From January 1, 1952, to June 1, 1954, all personnel attached to the Richmond Sales Office were under the direct supervision of Mr. J. D. Rogers, Manager, who was a resident of Richmond, Virginia, during all of the years here in question. The clerical personnel attached to the Richmond Sales Office handled payroll matters, order processing, quotations, preparation of illustration brochures and "roughing-in" books for jobs, distribution of advertising and sales promotional aids and general stenographic duties. The number of personnel attached to the Taxpayer's Richmond Sales Office during this period was as follows:

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	Manager	Salesmen*	Clerical	Total
1952	1	8	10	19
1953	1	8	9	18
1/1/54 to 6/1/54	1	6	9	16

*Two salesmen included in the above figures lived in and covered territories in North Carolina. The other salesmen were residents of Virginia.

R. E. Hedrick	Norfolk	Norfolk-Newport News	August, 1956 Present
H. A. Wellhouse	Roanoke	Roanoke-Lynchburg Danville	July, 1956-Aug.-1957

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G. L. Dickens	Roanoke	Roanoke-Lynchburg Danville	August, 1956-February-1957
E. C. Jamison	Roanoke	Roanoke-Lynchburg Danville	March, 1957-Present

(h) At all times from 1952 to the present, the trading areas of Staunton, Fredericksburg, Winchester and Arlington, Virginia, were covered by two salesmen of the Taxpayer who carried on the activities outlined above. Both of these salesmen were nonresidents of Virginia, who worked under the Silver Spring, Maryland, office during the years here in question. The following local wholesale distributors, customers of the Taxpayer, were contacted once or twice a week by such salesmen and, from time to time, by other nonresident sales personnel of the Taxpayer:

1. Fredericksburg Pipe and Supply Company—Fredericksburg, Va.
2. Hajoca Corporation—Arlington, Virginia
3. J. & H. Aitcheson—Alexandria, Virginia
4. Noland Company—Rosslyn, Virginia
5. Hajoca Corporation—Staunton, Virginia
6. Raub Supply Corp.—Winchester, Virginia
7. Western Maryland Supply Corp.—Winchester, Virginia

During the years here in question the Taxpayer did not have any employees in the State of Virginia who were engaged in installing or repairing Taxpayer's products or who were engaged in selling directly from the Taxpayer to consumers of such products.

4. For the taxable years 1952-1956, inclusive, the Taxpayer reported on forms furnished by the Department of Taxation the following net income, and, after assessment by the Department of Taxation, paid to the State of Virginia before the first day of June of the next succeeding year the following income tax:

1956, and the Taxpayer has not maintained an office of any kind in Virginia after that time. During the period June 1, 1954, to June 30, 1956, the personnel operating under the Richmond Sales Office were as follows:

	Sales Manager	Salesmen*	Clerical	Total
6/1/54 to 12/31/54	1	7	1	9
1955	1	8	1	10
1/1/56 to 6/30/56	1	9	1	11

*Two salesmen were located in North Carolina. The others were residents of Virginia.

page 14 } (f) Because of contacts developed with architects, builders and the trade generally by the salesmen formerly operating under the Richmond Sales Office, a telephone listing has been maintained in the Richmond telephone directory from June 30, 1956, to the present time. In that connection, the Taxpayer contracted with Central Service, a telephone answering service agency in Richmond, to handle telephone calls for the two sales representatives of the Taxpayer residing in Richmond and who now work under the Capitol Sales District. That telephone answering service is still maintained at this time. A similar telephone answering service was established in Roanoke, Virginia, in June, 1956, and was discontinued on July 1, 1957, but the Taxpayer never has had an office in Roanoke, Virginia.

(g) From July 1, 1956, to the present time the following salesmen of the Taxpayer, working under the Capitol Sales District in Silver Spring, Maryland, have resided and carried on the above mentioned activities in the State of Virginia:

Salesmen	Residence	Trading Area Territory Covered	Dates
J. W. Atwell	Richmond	Charlottesville Staunton-Richmond Petersburg	July, 1956-Present
A. G. Pritchett	Norfolk	Same as above	July, 1956-Present
R. W. Greer	Norfolk	Norfolk-Newport News	July-1956 Jan.-1957

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Taxable Year	Net Income	Income Tax
1952	$142,360.63	$ 6,477.41
1953	170.803.85	8,027.78
1954	181,724.19	8,541.04
1955	216,129.77	10,806.49
1956	102,209.88	5,110.49
		$38,963.21

The Taxpayer has paid an income tax to the State of Virginia every year from 1939 through 1956. It has not filed a Virginia income tax return or paid any Virginia income tax with respect to the year 1957.

H. BRICE GRAVES
Counsel for Petitioner.

R. D. McILWAINE, III
Assistant Attorney General.
Counsel for Defendant.

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Filed by order Jun. 3, 1959.

LUTHER LIBBY, JR., Clerk
By E. M. EDWARDS, D. C.

May 13, 1959.

H. Brice Graves, Esq.
Attorney at Law
Electric Building

R. D. McIlwaine, III, Esq.
Assistant Attorney General
Supreme Court Building

Re: American Radiator & Standard Sanitary Corporation *v.* Commonwealth of Virginia

Gentlemen:

On June 17, 1957, the American Radiator & Standard Sanitary Corporation (hereinafter called taxpayer) filed its Petition for Correction of Erroneous Assessments of Income Taxes for the Years 1952, 1953, 1954, 1955 and 1956, and Refunds of the same. Through the office of the Attorney General the Commonwealth of Virginia duly filed its answer setting up among other defenses that the taxpayer was barred from recovery of any income taxes paid for the years 1952 and 1953 by reason of the expiration of more than two years from the 31st day of December of the years 1953 and 1954, in which years assessments for income taxes for the years 1952 and 1953, respectively, were made, pursuant to the provisions of Section 58-1130 of the Code of Virginia of 1950.

After filing an agreed statement of facts, the case has been argued orally and has been presented on written
page 18 } memoranda.

In oral argument counsel for the taxpayer conceded that the taxes paid by it for the years 1952 and 1953 cannot be recovered because of the provisions of Section 58-1130 of the Code.

Taxpayer's petition for refund of income taxes paid for the years 1954 through 1956 are based on the alternative grounds that (1) since the business of the Taxpayer in Virginia is exclusively in interstate commerce the Taxpayer is not doing business in Virginia for purposes of the income tax and (2) if it is doing business in Virginia for purposes of such tax, the application of the tax to it under the circumstances here present violates Article I, Section 8 of the Constitution of the United States.

Briefly stated, the questions presented may be set forth as follows:

(1) If a foreign corporation is engaged exclusively in interstate commerce in Virginia, is such corporation "doing business" in Virginia within the meaning of the Virginia income tax statute?

(2) If a foreign corporation is engaged exclusively in interstate commerce in Virginia and if the Virginia income tax otherwise is applicable to it, would the application of the Virginia income tax violate the commerce clause of the Constitution of the United States because the Virginia income tax is an excise or privilege tax?

The cases of *Northwestern States Portland Cement Co.* v. *Minn.* and *Williams* v. *Stockham Valves, etc.,* decided by the

Supreme Court of the United States on February 24, 1949, 3 L. ed. 421, 79 S. Ct. .... and subsequent to the filing of the memoranda in this case, clearly reject the position taken by the taxpayer in question numbered two above.

The answer to question numbered one above is to be found in the interpretation of the applicable statute and the cases interpreting it.

The applicable statute, Section 58-128 of the Code of Virginia (1950) reads in part as follows:

"* * * every foreign corporation doing business in this State * * * shall pay for each taxable year a tax to be computed by the Department of Taxation upon the entire net income, as herein defined, of such corporation, derived from business done, property located or sources in this State * * *"

page 19 } In *Dalton Adding Machine Company* v. *Commonwealth,* 118 Va. 563, 88 S. E. 167 (1916), our Supreme Court of Appeals stated the approach to be made to the question whether activities in Virginia are exclusively in interstate commerce in the following language:

" 'The suggestion that the intra-state business in this case is smaller than the interstate business, or insignificant and incidental, is not decisive. As is well said by the assistant attorney-general in his brief: "The test to determine whether a foreign corporation transacts such interstate business as can be reached by State taxation is whether domestic business is substantial in its essence, and whether it may reasonably be separated from its interstate commerce; and the question does not depend upon a comparison of its intrastate with its interstate commerce." ' "

The above holding was given further sanction by our Supreme Court in *Commonwealth* v. *Imperial Coal Sales Company, Inc.,* 161 Va. 718, 167 S. E. 268 (1933) where it was said:

"* * * It is at once seen that the essentials of the statute are (1) that the corporation must be doing business in this state, and (2) the net income must be derived from business done, property located, or sources in this state. If these essentials do not exist in respect of the business done by the sales company, the income tax is not authorized by the statute.

"This brings us to the pertinent inquiry of whether or

not the sales company does business in this state and has income derived therefrom within the purview of the statute.

* * * * *

"It is true, by maintaining the Lynchburg office, the sales company, in a limited sense, is doing business in Virginia, but that business arises out of, is inseparable from and incidental only to, the principal business of selling coal in interstate commerce. * * *"

* * * * *

page 20 } "Our conclusion is that the sales company does no business in Virginia that 'is substantial in its essence' and that 'may reasonably be separated from its interstate commerce,' and therefore, authority for the imposition of the income tax in controversy cannot be found in section 52 of the Tax Code, under which the present assessment for income was made. * * *"

A similar pronouncemnt from another jurisdiction and approved by the Supreme Court of the United States is found in the recent case of *United Piece Dye Works* v. *Joseph,* 282 App. Div. 60, 121 N. Y. Supp. (2d) 683; affd. 307 N. Y. 780, 121 N. E. (2d) 617 (1954); cert. den., Jan. 10, 1955, 348 U. S. 916.

The Attorney General contends that the *Imperial Coal Sales Company* case is not applicable for the reasons that (1) the case was incorrectly decided, (2) the basic factual determination upon which the income tax aspect of that case rested was subsequently disavowed and restated to the contrary upon rehearing of the capital tax aspect of that case and (3) the case is patently distinguishable on its facts from the case at bar, and for the further reason that the holding therein was overruled in *Ashburn* v. *Commonwealth,* 199 Va. 747,—S. E. (2d)—(decided March 10, 1958).

Following the doctrine of *stare decisis,* this Court is bound to follow the ruling in the *Imperial Coal Sales Company* case until our Supreme Court overturns the ruling therein, which this Court feels was not expressly or impliedly done in *Ashburn* v. *Commonwealth, supra.* In addition, this Court cannot agree with the Commonwealth's contentions regarding the distinction between the factual determination and the legal principles in the *Imperial Coal Sales Company* case and the instant case.

fend the Petition, and the facts proved upon such
page 23 } hearing are as stated in the Agreed Statement of
Facts;

And it appearing to the Court from said Petition and said Agreed Statement of Facts and for the reasons set forth in the opinion of the Court dated May 13, 1959, which opinion is hereby ordered to be filed as a part of the record herein, that;

1. The Department of Taxation duly assessed against the Petitioner the following income taxes, which taxes were paid by the Petitioner before the first day of June of the year next succeeding the taxable year in each instance:

Taxable Year	Tax Year	Income Tax
1952	1953	$ 6,477.41
1953	1954	8,027.78
1954	1955	8,541.04
1955	1956	10,806.49
1956	1957	5,110.49; and

2. Each of the foregoing assessments was in fact an erroneous assessment in the full amount thereof and the erroneous charge was not caused by the failure or refusal of the Petitioner to furnish an inventory of its property and other relevant information to the Department of Taxation, but the statute of limitations bars recovery by the Petitioner of the taxes paid for the taxable years 1952 and 1953;

The Court doth ADJUDGE, ORDER and DECREE that said assessments to the extent of $8,541.04 for the taxable year 1954, $10,806.49 for the taxable year 1955, and $5,110.49
for the taxable year 1956, or a total of $24,458.02,
page 24 } be and the same hereby are cancelled and directed
to be expunged from the Income Tax Register

and that Sidney C. Day, Jr., Comptroller of Virginia, do forthwith pay and refund to American Radiator and Standard Sanitary Corporation the sum of $24,458.02.

And it is further ORDERED that the Clerk deliver certified copies of this Order to E. B. Pendleton, Jr., Treasurer of Virginia, Sidney C. Day, Jr., Comptroller of Virginia, and C. H. Morrissett, State Tax Commissioner.

To all of which the Commonwealth excepts and prays that its exceptions be noted of record, which is accordingly done.

In passing, it might be mentioned that although a different result on this question might ultimately be reached by the Supreme Court of Appeals of Virginia in view of the recent holdings in *Northwestern States Portland Cement Co.* v. *Minn.* and *Williams* v. *Stockham Valves, etc.;* nevertheless, attention is invited to the fact that the taxing statutes in the cases last mentioned now differ in terminology and effect from the taxing statute in the instant case. Also, the interpretation given to the words "doing business in this State" in the *Imperial Coal Sales Co.* case should be given effect by this Court until such interpretation is changed by proper authority.

For the reasons stated this Court is of the opinion that the taxpayer is entitled to a refund of the Virginia
page 21 } income tax paid for the years 1954, 1955 and 1956.

Counsel are requested to promptly prepare and present an appropriate order in conformity with the views herein expressed.

Very truly yours,

EDMUND W. HENING, JR., Judge.

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ORDER.

This cause came on this day to be heard on the Petition of American Radiator and Standard Sanitary Corporation, by counsel, for the Correction of Erroneous Assessments of Income Taxes for the taxable years 1952, 1953, 1954, 1955 and 1956 and Refunds of the Same, said Petition having been filed in the Clerk's Office of this Court on the 17th. day of June, 1957, and due notice thereof having been given to T. Gray Haddon, Commonwealth Attorney for the City of Richmond, Virginia, and to C. H. Morrissett, State Tax Commissioner, and upon an Agreed Statement of Facts filed in the Clerk's Office of this Court on the 18th. day of August, 1958, and upon briefs filed by the parties, and was argued by counsel;

And the Court doth certify that R. D. McIlwaine, III, Assistant Attorney General of Virginia, designated by the Department of Taxation, did appear at the hearing and did de-

(1) The Court erred in holding that the petitioner in this case was not doing business in Virginia within the page 26 } meaning of Section 58-128 of the Code of Virginia (1950) and was not liable for income taxes imposed by this statute for the years 1954, 1955 and 1956.

COMMONWEALTH OF VIRGINIA
By R. D. McILWAINE, III
Assistant Attorney General
Counsel for Defendant.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

Enter 6/3/59.

EDMUND W. HENING, JR.

Edmund W. Hening, Jr.
Judge, Circuit Court of the City of Richmond.

I ask for this:

H. BRICE GRAVES
Counsel for Petitioner.

Seen and objected to:

R. D. McILWAINE, III
Assistant Attorney General.

* * * * *

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* * * * *

Received and filed Jul. 30, 1959.

LUTHER LIBBY, JR., Clerk
By E. M. EDWARDS, D. C.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To: The Honorable Luther Libby, Jr., Clerk Circuit Court of the City of Richmond:

The Commonwealth of Virginia, by its counsel, the undersigned Assistant Attorney General, hereby gives notice of appeal that it will apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to the judgment entered by the Circuit Court of the City of Richmond, Virginia, in the above captioned case on June 3, 1959.

The Commonwealth of Virginia, by its counsel, the undersigned Assistant Attorney General, sets forth the following assignment of error:

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