

OPINION NO. 988

DISTRICT OF COLUMBIA TAX COURT FILED

THOMPSON'S DAIRY, INC.,
Petitioner,

vs.

DISTRICT OF COLUMBIA,
Respondent.

JUL 14 1961

District of Columbia
Tax Court

DOCKET NOS. 1731 and
1733

FINDINGS OF FACT AND OPINION

The petitioner filed with the Finance Officer of the District of Columbia claims for refund of franchise taxes for the calendar years 1956, 1957 and 1958. The Finance Officer not only denied the claims, but assessed additional franchise taxes or deficiencies therein for the years 1957 and 1958. From such actions on the part of the Finance Officer the petitioner here appeals.

Findings of Fact

General

1. The Petitioner, Thompson's Dairy, Inc., is a District of Columbia corporation with offices and plant located at 2012 - 11th Street, N. W., Washington, D. C. The business was started in 1881 and incorporated in 1932.
2. Petitioner timely filed Corporate Franchise Tax returns for the years 1956 to 1958 inclusive, with the Finance Office of the District of Columbia, Revenue Division, Washington, District of Columbia.
3. Petitioner, during 1956, 1957 and 1958, was engaged in the business of selling and distributing milk and milk products in the District of Columbia, Maryland and Virginia. Petitioner's plant is located in the District of Columbia, where it processes milk and milk products which

it sells and distributes. The raw milk is imported from farms located in Maryland, Virginia and West Virginia. Petitioner receives no raw milk from dairy farms located in the District. Orange juice, yogurt, margarine and some other products petitioner receives at its plant as finished products ready for sale and distribution.

4. During the taxable years, the petitioner sold and distributed the following products: Fluid milk, cottage cheese, yogurt, Reddi-Whip, cream, both sweet and sour, butter, margarine, eggs and chilled orange juice.

5(a) Petitioner sold and distributed its milk products by motor trucks owned by it in the District of Columbia, Maryland and Virginia. The trucks were operated by driver-salesmen who were employees of petitioner.

(b) In addition, petitioner maintained three distribution centers in Virginia and Maryland. They were located near Fairfax, Virginia, Rockville, Maryland and Temple Hills, Maryland. The dairy products would be transported to the distribution centers by a large truck from the District of Columbia plant. At the distribution centers the products would be transferred to smaller delivery trucks for distribution in Maryland and Virginia. At the distribution centers petitioner had offices.

6. Petitioner's driver-salesmen are paid a salary and a commission on sales. They are also paid for obtaining new customers. The driver-salesmen and the supervisors secure most of the petitioner's new customers.

7. Wholesale customers are solicited at their place of business. This is true in the case of smaller independent stores. In the case of the chain stores, they are solicited where their headquarters is located. For example, Food Town was solicited in the District of Columbia; A&P stores for the District of Columbia and Maryland were negotiated in Baltimore,

Maryland; A&P stores in Virginia were negotiated in Richmond, Virginia; Independent Grocers Association stores were negotiated in Baltimore, Maryland.

8. During the years here involved petitioner employed on the average of 584 employees. Of these employees, 138 spent a majority of their working time in Maryland and 105 spent a majority of their working time in Virginia.

9. Petitioner sells its milk products both to the retail and wholesale trade. Both the retail and wholesale customers are served the milk products by petitioner's driver-salesmen. Each driver-salesman is assigned a route covering a certain designated area and number of customers. During the years 1956 and 1957 petitioner had 188 retail routes. During 1958 it had 187 retail routes. During the years 1956 and 1957 it had 29 wholesale routes and in 1958 it had 33 wholesale routes.

10. On the average, a retail route consists of between 300 and 315 homes or apartments. Each home or apartment is served milk products on Mondays, Wednesdays and Fridays or Tuesdays, Thursdays and Saturdays so that each retail customer is served three times a week.

11. During the years 1956, 1957 and 1958 petitioner had retail routes located wholly within the District of Columbia, Maryland and Virginia as follows:

	<u>1956</u>	<u>1957</u>	<u>1958</u>
District of Columbia	44	40	38
Maryland	65	67	67
Virginia	58	61	61

During the years 1956, 1957 and 1958 it had split retail routes that extended into both Maryland and the District of Columbia as follows:

	<u>1956</u>	<u>1957</u>	<u>1958</u>
	21	20	21

12. During the years 1956, 1957 and 1958 petitioner had wholesale routes located wholly within the District of Columbia, Maryland and Virginia as follows:

	<u>1956</u>	<u>1957</u>	<u>1958</u>
District of Columbia	13	10	11
Maryland	4	4	5
Virginia	5	7	9

During the years 1956, 1957 and 1958 it had split wholesale routes that extended into both Maryland and the District of Columbia as follows:

<u>1956</u>	<u>1957</u>	<u>1958</u>
7	8	8

13. During the years 1956, 1957 and 1958 petitioner had the following number of retail customers:

1956	-	57,814
1957	-	56,525
1958	-	58,784

14. During the years 1956 and 1957 petitioner had approximately 1,200 wholesale customers. In 1958 petitioner had approximately 1,275 wholesale customers.

15. The milk products sold and distributed by petitioner remain the property of Thompson's Dairy, Inc., until delivery is made to the retail or wholesale customers by Thompson's Dairy employees in trucks owned by Thompson's Dairy, Inc.

16. Delivery of milk products outside the District of Columbia in Maryland and Virginia in trucks owned by petitioner and operated by petitioner's employees were recorded on the records of the petitioner as sales to customers located outside the District of Columbia and delivered outside the District of Columbia.

17. During the years 1956, 1957 and 1958 petitioner and its employees and agents made or effected sales of dairy products in the District of Columbia, Maryland and Virginia and ratio to total sales as follows:

Year	Jurisdiction	Net Sales	Ratio to Total
1956	D. C.	\$4,390,522.46	35.468971 %
	Maryland	4,699,088.98	37.961736 %
	Virginia	3,288,876.81	26.669293 %
	Total	<u>\$12,378,488.25</u>	<u>100 %</u>

Year	Jurisdiction	Net Sales	Ratio to Total
1957	D. C.	\$ 4,206,683.17	33.132376 %
	Maryland	4,662,629.47	36.723467 %
	Virginia	3,827,281.11	30.144157 %
	Total	\$12,696,593.75	100 %
1958	D. C.	\$ 4,471,133.33	33.472145 %
	Maryland	4,848,411.01	36.296714 %
	Virginia	4,038,262.37	30.231141 %
	Total	\$13,357,955.71	100 %

18. During the taxable years involved, the petitioner's business of selling and distributing dairy products was carried on within and without the District of Columbia.

19. During the taxable years 1956, 1957 and 1958 petitioner received and reported gross income from interest on loans, notes, etc., in the amounts of \$15.65, \$122.30 and \$234.69 respectively. All of said gross income was reported from sources within the District of Columbia on its tax returns for the respective years.

20. During the taxable years involved the petitioner's net income was as follows:

Year	Amount of Net Income
1956	\$648,942.71
1957	466,321.37
1958	465,712.62

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21(a) On the 4th day of April, 1957 petitioner filed its franchise tax return for the calendar year 1956 with the assessor showing a franchise tax due in the amount of \$16,390.75. In computing the tax, the petitioner included in its 1956 tax return District of Columbia sales in the amount of \$4,213,168.91 and, in addition, included 25% of its sales in Maryland and Virginia in the amount of \$2,041,329.84 or total sales allocated to the District of Columbia of \$6,254,498.75.

(b) Petitioner paid the aforesaid franchise tax for 1956 in three installments; on April 3, 1957, \$4,097.69,

July 3, 1957, \$4,097.69 and on October 17, 1957, \$8,195.37.

(c) On March 30, 1960 petitioner timely filed with the Finance Officer a claim for refund of franchise taxes for the year 1956 in the amount of \$5,349.32. The claim for refund in the amount of \$5,349.32 was computed as follows:

D. C. Sales		\$ 4,213,168.91
Maryland Sales	\$4,807,086.68	
Virginia Sales	<u>3,358,232.66</u>	
	\$8,165,319.34	
25% of Maryland and Virginia Sales		<u>2,041,329.84</u>
Sales used for D. C. Allocation		6,254,498.75
divided by Total Sales of		<u>12,378,488.25</u>
D. C. Allocation Factor (A)		<u>.50527161</u>
<u>Without 25% Adjustment</u>		
D. C. Sales divided by Total Sales*		
D. C. Allocation Factor (B)		<u>.34036215</u>
<u>Tax Computation</u>		
Gross Profit at (B) Factor	\$4,454,263.19	\$1,516,062.60
Interest received at Actual	15.65	15.65
Loss on Assets sold at Actual		-
Other Income at (B) Factor	15,438.18	<u>5,251.57</u>
Total D. C. Income		1,521,332.82
Total deduction per return	3,820,942.71	
Less U.S. Adjustment - Per Report 12-11-59	-	
Total deductions at (B)		
Factor	3,820,942.71	<u>1,300,504.28</u>
Corrected D. C. Net Income*		<u>\$ 220,828.54</u>
Tax paid D. C. (Using "A" Factor)		
Per Original Return	\$ 16,390.75	
Per Additional Assessment	-	
Total Taxes paid to D. C.		\$ 16,390.75
Corrected D. C. Tax (Using "B" Factor) Above * at 5%		<u>11,041.43</u>
Overpayment of D. C. Tax		<u>\$ 5,349.32</u>

On October 26, 1960 the claim for refund was denied by the Finance Officer.

(d) On January 19, 1961 the petitioner filed a petition in this Court appealing from the denial of the aforesaid claim for refund and praying for a refund of franchise tax in the amount of \$5,349.32 for calendar year 1956, with interest.

22(a) On the 16th day of April, 1958 petitioner filed its franchise tax return for the calendar year 1957 with the

Finance Officer showing a franchise tax due in the amount of \$11,133.35. In computing the tax, petitioner included in its 1957 tax return District of Columbia sales in the amount of \$3,848,840.09 and, in addition, 25% of its sales in Maryland and Virginia in the amount of \$2,211,938.43 or total sales allocated to the District of Columbia of \$6,060,778.51.

(b) Petitioner paid the aforesaid franchise tax for 1957 in two equal installments of \$5,566.68 on April 4, 1958 and October 6, 1958 and on March 17, 1960 paid an additional amount of \$551.12.

(c) On March 30, 1960 petitioner timely filed with the Finance Officer a claim for refund of franchise taxes for the year 1957 in the amount of \$4,259.12. The claim for refund in the amount of \$4,259.12 was computed as follows:

D. C. Sales		\$ 3,848,840.09
Maryland Sales	\$4,851,854.48	
Virginia Sales	3,995,899.18	
	<u>\$8,847,753.66</u>	
25% of Maryland and Virginia Sales		2,211,938.42
Sales used for D. C. Allocation		6,060,778.51
divided by Total Sales of		12,696,593.75
D. C. Allocation Factor (A)		<u>.47735168</u>
<u>Without 25% Adjustment</u>		
D. C. Sales divided by Total Sales*		.30313958
D. C. Allocation Factor (B)		<u>.30313958</u>
<u>Tax Computation</u>		
Gross Profit at (B) Factor	\$5,567,542.80	\$ 1,687,742.59
Interest received at Actual	122.30	122.30
Loss on Assets sold at Actual	-	-
Other Income at (B) Factor	16,630.05	5,011.23
Total D. C. Income		<u>1,692,906.12</u>
Total deduction per return	5,117,970.78	
Less U.S. Adjustment - Per Report 12-11-59	23,290.69	
Total deductions at (B) Factor	5,094,680.09	1,511,399.18
Corrected D. C. Net Income*		<u>\$ 118,506.94</u>
Tax paid D. C. (Using "A" Factor)		
Per Original Return	\$11,133.35	
Per Additional Assessment	551.12	
Total Taxes paid to D. C.		\$ 11,684.47
Corrected D. C. Tax (Using "B" Factor) Above * at 5%		<u>7,425.35</u>
Overpayment of D. C. Tax		<u>\$ 4,259.12</u>

On October 26, 1960 the claim for refund was denied by the Finance Officer.

(d) On January 19, 1961 the petitioner filed a petition in this Court appealing from the denial of the aforesaid claim for refund and praying for a refund of franchise taxes in the amount of \$4,259.12 for the calendar year 1957 with interest.

23(a) On the 13th or 15th day of April, 1959 petitioner filed its franchise tax return for the calendar year 1958 with the Finance Officer showing a tax due in the amount of \$11,590.56. In computing the tax, the petitioner included in its 1958 tax return District of Columbia sales in the amount of \$4,408,684.31 and, in addition, included 25% of its sales in Maryland and Virginia in the amount of \$2,237,317.85 or total sales allocated to the District of Columbia of \$6,646,002.16.

(b) Petitioner paid the aforesaid franchise taxes for 1958 in two equal installments of \$5,795.28 on April 10, 1959 and October 6, 1959. In addition, on March 17, 1960 petitioner paid additional franchise taxes to the District of Columbia in the amount of \$59.60 for the year 1960.

(c) On March 30, 1960 petitioner timely filed with the Finance Officer a claim for refund of franchise taxes for the year 1958 in the amount of \$3,918.46. The claim for refund in the amount of \$3,918.46 was computed as follows:

D. C. Sales		\$ 4,408,684.31
Maryland Sales	\$4,871,135.43	
Virginia Sales	4,078,085.97	
	<u>8,949,271.40</u>	
25% of Maryland and Virginia Sales		<u>2,237,317.85</u>
Sales used for D. C. Allocation		6,616,002.16
divided by Total Sales of		13,357,955.71
D. C. Allocation Factor (A)		<u>.4975138</u>
<u>Without 25% Adjustment</u>		
D. C. Sales divided by Total Sales*		
D. C. Allocation Factor (B)		<u>.33004184</u>
<u>Tax Computation</u>		
Gross Profit at (B) Factor	5,829,201.95	\$ 1,923,880.54
Interest received at Actual	234.67	234.67
Loss on Assets sold at Actual	(26.73)	(26.73)
Other Income at (B) Factor	15,577.16	<u>5,141.11</u>
Total D. C. Income		1,929,229.59
Total deduction per return	5,379,274.45	
Less J.S. Adjustment - Per		
Report 12-11-59	<u>2,398.91</u>	
Total deductions at (B)		
Factor	5,376,875.54	<u>1,774,593.90</u>
Corrected D. C. Net Income*		<u>\$ 154,635.69</u>
Tax paid D. C. (Using "A" Factor)		
Per Original Return	11,590.56	
Per Additional Assessment	<u>59.58</u>	
Total Taxes paid to D. C.		\$ 11,650.24
Corrected D. C. Tax (Using B		
Factor) Above * at 5%		<u>7,731.78</u>
Overpayment of D. C. Tax		<u>\$ 3,918.46</u>

On October 26, 1960 the claim for refund was denied by the Finance Officer.

(d) On January 19, 1961 petitioner filed a petition in this Court appealing from the denial of the aforesaid claim for refund and praying for a refund of franchise taxes in the amount of \$3,918.46 for the calendar year 1958 with interest.

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24(a) On January 31, 1961 after respondent had denied the petitioner's claim for refund for the years 1956, 1957 and 1958, the respondent made an additional assessment of franchise taxes against the petitioner for the years 1957 and 1958 in the aggregate amount of \$28,020.08 computing the franchise tax and giving an explanation as follows:

CORPORATION FRANCHISE TAX

Calendar years ending December 31,	1957	1958
Net income per Form D-20	\$466,324.37	\$465,712.62
Add: Net adjustments made by Internal Revenue Service	<u>23,790.69</u>	<u>2,398.21</u>
Adjusted net income	\$489,615.06	\$468,111.53
Tax at 5%	24,480.75	23,405.58
Less: Tax reported & previously assessed*	<u>11,684.47</u>	<u>11,650.24</u>
Deficiency	<u>\$ 12,796.28</u>	<u>\$ 11,755.34</u>

EXPLANATION

* Tax reported on Form D-20	\$ 11,133.35	\$ 11,590.56
Add: Deficiency assessed as a result of adjustments by Internal Revenue Service	<u>551.12</u>	<u>59.68</u>
Total tax reported and previously assessed	<u>\$ 11,684.47</u>	<u>\$ 11,650.24</u>

Your entire net income is derived from engaging in trade or business in the District and shall be allocated to the District under the provisions of Section 10.2(b) of the Regulations.

(b) Petitioner paid the aforesaid additional assessment of franchise taxes on February 7, 1961 together with interest for the year 1957 in the amount of \$2,175.37 and interest for the year 1958 in the amount of \$1,293.09.

(c) On February 20, 1961 petitioner filed in this Court a petition praying for a refund of the franchise taxes set forth in sub-paragraph (b) above together with interest paid as aforesaid.

25. For the years 1956, 1957 and 1958 petitioner filed corporation Income Tax Returns in the states of Maryland and Virginia and paid income taxes on its Maryland and Virginia sales to the states of Maryland and Virginia as follows:

Year	Amount paid to	
	Maryland	Virginia
1956	\$6,658.51	\$7,957.82
1957	\$4,917.50	\$6,652.20
1958	\$4,689.48	\$6,180.13

Opinion

The petitioning taxpayer is a corporation engaged in the processing and sale of dairy products. Its processing plant is in the District of Columbia. It sells its products in the District and in the nearby sections of Maryland and Virginia.

The assessing authority of the District assessed a franchise tax measured by the entire net income of the petitioner. The petitioner contends that inasmuch as it was engaged in business within and without the District the net income should have been apportioned accordingly. The solution of the question presented is by no means free from difficulty, because of the confused and muddled situation concerning the regulations and formulas pertaining to the determination of the portion of net income from multi-state corporate business, partly carried on within the District of Columbia. The Court, however, believes that the solution of the problem is controlled by the opinion in District of Columbia v. Gallant, Incorporated, ___ U.S. App. D.C. ___, ___ F.2d ___, 89 W.L.R. 760 (decided May 4, 1961), where it was held that the regulation of August 6, 1953, adopted by the Commissioners for the determination of income "fairly attributable to the trade or business carried on or engaged in within the District" had no formula for such determination; and that

"However, irrespective of the authority of the Assessor, the Tax Court itself cannot be precluded, for lack of a regulatory formula, from determining the income which is fairly apportionable to the District.

* * * * *

"The case is remanded to the Tax Court for further proceedings not inconsistent with this opinion. The Tax Court is directed to determine the amount of the income which is fairly attributable to the District by applying the August 6, 1953 regulations, including, if necessary the use of such formula or formulas as the Tax Court deems best suited for determination of that question in this case." (Emphasis supplied).

The formula adopted in the regulation is based on the definition of "District sales" in the regulation of August 1, 1930, which provided that the portion of income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year.

was considered in Snoot Sand & Gravel Corp. v. District of Columbia, 104 U.S. App. D.C. 292, 261 F.2d 758 (1958) and was upheld as valid. See also District of Columbia v. Southern Railway Co., 107 U.S. App. D. C. 285, 277 F.2d 64 (1950). * * * *"

Due to the mental and intellectual limitations of the Judge of this Court, the Court is not certain or clear as to the meaning of the opinion in the Gallant case, but it is of the belief that the opinion reaffirms the holding in prior cases that a formula having but one factor, namely, "sales", is valid; and that what is really needed is a definition of "District sales", although this Court is given pause by the language in the opinion following:

"The definition of 'District sales' in the regulation quoted above incorporates the language of the statute, that is, it counts as District sales those sales producing income which is fairly attributable to business, carried on in the District or which is from District sources. So far as it goes, the regulation is in accord with the statute, and cannot be said to be invalid. The difficulty is in what it fails to provide.

"It is plain that the Commissioners have failed to provide a 'formula' as the term is ordinarily understood, in the regulation." (Emphasis supplied).

We have in this case the same situation that arose in the Gallant case. This Court believes that it is now its duty to follow the directive in that case and to determine the amount

- (1) Lever Brothers Co. v. D. C., 92 U.S. App. D.C. 147, 205 F.2d 49, 81 W.L.R. 981; Snoot Sand & Gravel Co. v. D. C., 104 U.S. App. D.C. 292, 261 F.2d 758, 85 W.L.R. 1073.
- (2) What the opinion means, no doubt, is that the provisions, which in effect states, that "fairly attributable" income is "fairly attributable" income, and income from District sources is income from District sources, is meaningless, as this Court has repeatedly held. See Snoot Sand & Gravel v. D. C., D. C. T.C., Docket No. 1340.

of personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such income as the District sales made during such taxable year bear to total sales made or effected everywhere during such taxable year. The term "District sales" means all sales made or effected by the petitioner or its employees, agents or representatives within the District.

"(3) The Court is of the opinion that a meaningful definition of "District sales" is necessary, since the sole factor in the equation is to be "sales", under the ruling in the Gallant and prior cases; and that, solely on the premise that a one factor formula of "sales" is permissible under Section 47-1580a of the Code, as was held in the Gallant case, the formula "best suited for determination of that question in this case" is the following:

Where income for any taxable year is derived from the manufacturer and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such income as the District sales made during such taxable year bear to total sales made or effected everywhere during such taxable year. The term "District sales" means all sales made or effected by the petitioner or its employees, agents or representatives within the District.

During the years 1956, 1957 and 1958 petitioner and its employees and agents made or effected sales of dairy products in the District of Columbia, Maryland and Virginia and ratio to total sales as follows:

Year	Jurisdiction	Net Sales	Ratio to Total
1956	D. C.	\$ 4,390,522.46	35.468971 %
	Maryland	4,699,088.98	37.961736 %
	Virginia	3,298,876.81	26.569293 %
	Total	\$12,378,488.25	100 %
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	Maryland	4,662,629.47	36.723467 %
	Virginia	3,827,281.11	30.144157 %
	Total	\$12,696,593.75	100 %
1958	D. C.	\$ 4,471,194.33	33.472245 %
	Maryland	4,843,499.01	36.296714 %
	Virginia	4,055,282.37	30.231141 %
	Total	\$13,321,975.71	100 %

- (3) Section 47-1580a of the Code provides in part that: "If the trade or business of any corporation/unincorporated business is carried on or engaged in both within and without the District, the net income derived therefrom shall, for the purposes of this article, be deemed to be income from sources within and without the District." Apparently a formula with one factor of sales would not be permissible, if all the merchandise was manufactured without, but sold within the District, or vice versa.
- (4) The portion up to this point was held to be valid in the Gallant case.

net income of the petitioner during the taxable years
was as follows:

<u>Year</u>	<u>Amount of Net Income</u>
1956	\$348,442.71
1957	\$166,324.37
1958	\$465,712.62

It should be observed that for the taxable years the
petitioner paid income taxes to Maryland and Virginia as
follows:

<u>Year</u>	<u>Amount paid to</u>	
	<u>Maryland</u>	<u>Virginia</u>
1956	\$6,650.51	\$7,967.82
1957	\$4,917.80	\$6,652.20
1958	\$4,689.46	\$6,180.13

While it is true, as counsel for respondent state in their
brief, that the United States Court of Appeals held in District
of Columbia v. Evening Star Newspaper Co., 106 U.S. App. D. C.
360, 273 F.2d 95, 87 W.L.R. 1371, that the fact that a taxpayer
had not paid income taxes to another taxing jurisdiction was
not significant, the same court held in the Smoot Sand & Gravel
Co., case (supra), exactly to the contrary, saying:

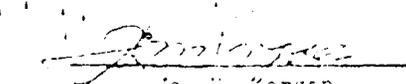
"Not only is there no express showing that the District
has allocated to itself tax values beyond its jurisdiction,
but the view that it has done so seems greatly weakened by
the fact that the petitioner has never been required to pay
any income or franchise taxes to the states of Maryland or
Virginia. Cf. American Bombing Corp. v. Carson, 188 Tenn.
263, 276-77, 219 S.W.2d 169, 174 (1949). Thus, we are not
here presented with a situation where the District is in
competition with other taxing jurisdictions for an appor-
tionment of petitioner's net income."

For the reasons stated the Court holds as follows:

Decret No. 1731. The denial of the claims for refund of
franchise taxes for the years 1956, 1957 and 1958, filed by
the petitioner, was erroneous. They should have ^{been} granted.
The correct amounts of refund, however, are not those claimed.
The amounts to be refunded will be determined under Rule 30.

Decret No. 1732. The deficiencies in franchise taxes for
the years 1957 and 1958 were erroneously assessed. The correct
amount to be refunded will be determined under Rule 30.

Decret No. 1733. The deficiencies will be entered under Rule 30.


Jo. V. Morgan,
Judge.