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Applying a different concept would not cure the step away from uniformity as to the *ratio decidendi* in *Marks*,[18] even though it might result in uniformity *ad hoc*. As a practical matter, it is doubtful that that situation will often arise as the Federal provision will probably act as a strong deterrent. However, in the interest of uniformity, New York legislation to conform to the exception to the general rule would appear to be desireable.

NIGHT CLUB OWNER EMPLOYER FOR UNEMPLOYMENT INSURANCE TAX PURPOSES

The taxation of employers for the purpose of unemployment insurance is carried on at both the state and the federal level. The Federal Government imposes a tax of 3% for unemployment insurance, based upon all wages paid by an employer during a given tax period.[19] New York State imposes a 2.7% tax for unemployment insurance purposes on the basis of all wages paid by an employer,[20] but the Federal Government gives a 90% tax credit to any employer against his federal unemployment taxes based on all taxes paid to the state unemployment insurance fund. This credit will only be granted to the same employer who paid the state tax.[21] A difficult problem arises in the area of entertainment, specifically concerning dance bands, as to the liability of the leader for unemployment insurance taxes.

In *In re Basin St., Inc.*,[22] the Court of Appeals reversed a decision of the Appellate Division,[23] and reinstated a determination by the Industrial Commissioner that Basin Street, Inc., a night club, was the employer of certain musicians for unemployment insurance tax purposes. Basin Street, Inc. contracted with numerous bands during the years 1953 and 1954, the tax periods in question. The standard form B union contract was used with a form B rider attached. The form B contract stated that the night club operator would have complete control of the musicians and designated the operator as the employer; the band leader and the rest of the band were designated as employees. The form B rider made the band leader liable for all withholding taxes and gave him 7% above the contract price for employment tax purposes. The rider, contrary to the main contract, designated the operator as a purchaser of music, instead of an employer.

The Court of Appeals had to construe the contract and rider standing alone in order to determine whether the operator or the band leader, was the employer for unemployment insurance tax purposes, because no evidence was offered on this point before the Unemployment Insurance Appeal Board. The Court interpreted the form B contract as giving full control of the musicians and the band leader to the night club operator. It construed the form B rider

18. *Ibid.*
19. INT. REV. CODE OF 1954 § 3301.
20. N.Y. LABOR LAW § 570.
21. *Supra* note 19, §§ 3302-3306.
22. 6 N.Y.2d 276, 189 N.Y.S.2d 641 (1959).
23. 6 A.D.2d 922, 175 N.Y.S.2d 889 (3d Dep't 1958).

as making the band leader merely the agent of the operator for tax purposes, and although the operator was designated a purchaser of the music, this was not effective to shift the tax liabilities imposed upon the operator by the form B contract. The Court concluded that, as a matter of law, the form B contract with form B rider, made the operator the employer for unemployment insurance tax purposes.

The Court distinguished *Savoy Ballroom Co. v. Lubin*,[24] relied upon by the Appellate Division to hold that the band leader was the real employer. It pointed out that in the *Savoy* case, there was actual proof of complete control by the band leader, whereas in the instant case there was only the contract with rider standing alone. Close analysis of the *Savoy* case reveals, however, that the rider was held to negate any employer-employee relationship set up in the main contract, and the Court there went on to butress this conclusion by stating that the facts also showed that the bandleader was in fact the employer. The true distinction between the *Savoy* case and the present one is that a name band was involved in the former, while numerous relatively unknown bands were involved in the latter.

The *Savoy* case was an attempt to reconcile New York cases[25] with a leading Federal decision, *Bartels v. Birmingham*,[26] which held the leaders of name bands to be the employers of their musicians for federal unemployment insurance tax purposes, and pointed out the complete control which they exercised over their men. Except for name bands, the Federal courts using common law principles have usually held the operator to be liable for the taxes as the employer.[27] If the state and federal authorities do not hold the same employer liable, the person liable for the Federal tax will get no credit for state taxes paid on the employees in question. Instead of paying a total of 3%, all that the law requires, a total of 5.7% of the total wages paid will be exacted. The decision in the present case will be effective to reconcile State and Federal decisions, for in most cases the operator will be the employer under the contract with the rider, but if a name band is involved the courts may still look behind the contract to see which party has actual control.[28]

EXTENSION OF MORTGAGE NOT SUBJECT TO MORTGAGE RECORDING TAX

A mere extension of an existing mortgage does not require the imposition of a mortgage recording tax.[29] In *Suffolk County Federal Savings & Loan Assoc. v. Bragalini*,[30] the State Tax Commissioner argued that, although the instrument was an extension agreement, since new obligors were substituted

24. 286 App. Div. 684, 146 N.Y.S.2d 69 (3d Dep't 1955).
25. Cassetta v. Realty Hotels, 282 App. Div. 793, 122 N.Y.S.2d 547 (3d Dep't 1953); In re Hotels Statler Co., 279 App. Div. 814, 109 N.Y.S.2d 433 (2d Dep't 1952).
26. 332 U.S. 126 (1957).
27. "These cases are not concerned with musicians hired by petitioners to play regularly for their dance halls, but with 'name bands' hired for short engagements." *Id.* at 127.
28. In re Morton, 284 N.Y. 167, 30 N.E.2d 369 (1940).
29. Park & 46th St. Corp. v. State Tax Comm., 295 N.Y. 173, 65 N.E.2d 763 (1946).
30. 5 N.Y.2d 579, 186 N.Y.S.2d 602 (1959).