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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).

a new mortgage debt was created, requiring the payment of a tax under New York Tax Law, Section 253.[31] The Court of Appeals held that no new mortgage was created for recording tax purposes since the original mortgage, on which the tax had been paid, was continued as a valid first lien on the premises and no new money was loaned or advanced.

It is clear that the instrument must secure a new indebtedness before a mortgage recording tax may be levied.[32] In *Park & 46th St. Corp. v. State Tax Comm'n*,[33] it was held that where the lien of the original mortgage was continued and the principal debt was preserved, no tax need be paid.[34] In the *Suffolk* case, the mortgage lien was expressly continued and when the original obligors were released in the instrument, the debt was assumed by substituted obligors. While the tax would have been payable if the original debt had been extinguished,[35] the Court of Appeals did not feel that the change in obligors brought about this result, but rather that the original debt had been continued in force by the assumption.

The decision of the State Tax Commission,[36] confirmed by the Appellate Division,[37] relied on *People ex rel. Williamsburgh Savings Bank v. State Tax Comm'n*[38] in concluding that the substitution of a new mortgagor created a new mortgage. Although this decision seems to reach its result solely on the fact that there were new mortgagors, the cases are distinguishable since the original mortgage lien was not expressly preserved in the *Williamsburgh* case.[39] This case appears now to have been abandoned insofar as it stood for the proposition that a change in mortgagors only creates a new mortgage for purposes of Section 253.[40] In reversing the determination of the Commissioner, the Court had in mind the rules of interpretation which construe tax laws so as to avoid double taxation,[41] and in favor of the taxpayer where the law is doubtful.[42] Quite likely, the Court was influenced by the fact that the type of arrangement in question has been in common usage for some time. To hold such transac-

31. A tax of fifty cents for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation which is, or under any contingency may be secured at the date of execution thereof or at any time thereafter by a mortgage on real property . . . is hereby imposed on each such mortgage . . . . N.Y. TAX LAW, § 253.

32. People *ex rel.* Banner Land Co. v. State Tax Comm., 244 N.Y. 159, 155 N.E. 84 (1926).

33. *Supra* note 29.

34. Fifth Ave. & 46th St. Corp. v. Bragalini, 4 A.D.2d 387, 165 N.Y.S.2d 312 (3d Dep't 1957).

35. People *ex rel.* Jewelers Building Corp. v. State Tax Comm., 214 App. Div. 99, 210 N.Y. Supp. 263, *aff'd on other grounds* 241 N.Y. 524, 150 N.E. 539 (1925).

36. 2 P-H N.Y. Tax Serv. ¶ 35934.

37. Suffolk County Federal Savings & Loan Assoc. v. Bragalini, 5 A.D.2d 641, 174 N.Y.S.2d 395 (3d Dep't 1958).

38. 245 N.Y. 414, 157 N.E. 513 (1927).

39. People *ex rel.* Metropolitan Playhouses, Inc. v. Graves, 251 App. Div. 655, 297 N.Y. Supp. 983, *aff'd without opinion* 275 N.Y. 621, 11 N.E.2d 786 (1937).

40. N.Y. TAX LAW, § 253, *supra* note 31.

41. In re Cooley, 186 N.Y. 220, 78 N.E. 939 (1906).

42. Metropolitan Convoy Corp. v. City of New York, 2 N.Y.2d 384, 161 N.Y.S.2d 31 (1957).

tions taxable would subject a large number of these instruments to taxation and the penalties of New York Tax Law Section 258 until such tax was paid.[43]

NEW YORK MORTGAGE TAX: IMMUNITY OF CONTRACTOR UNDER FEDERAL HOUSING ACT

The National Housing Act provides an elaborate scheme for the construction of military housing by a private contractor with funds received from mortgages which are insured by F.H.A., and paid by the Department of Defense out of funds provided for quarters allowance.[44] The petitioner in *Silverblatt, Inc. v. Tax Comm'n of State*,[45] as low bidder, was awarded the contract for construction of on-base housing at Plattsburg Air Force Base. Pursuant to the contract he formed five private corporations which leased the land from the Defense Department for a sum equal to their paid-in capital stock. They then borrowed money in the amount of the contract price, securing their notes by five mortgages on the leased property. These mortgages were insured, and payment of the notes guaranteed, by the Federal Government. The Court of Appeals held that these mortgages were not immune from the state mortgage recording tax.[46]

Section 511 of the National Housing Act provides for the immunity from state or local property taxes of the leasehold interest of a lessee from the Federal Government.[47] This does not apply to the mortgage recording tax since New York considers the incident of taxation there to be the privilege of recording a mortgage and, therefore, it is not a property tax.[48] Under the building contract the entire capital stock of the mortgagor-corporations was placed in escrow to be transferred to the government when the construction was finished. The Defense Department was liable for the payment of the mortgage principal and interest and also took over and managed each unit upon completion. In other words, the financial arrangements were a mere bookkeeping device on the part of the government. The Court, however, felt that the corporations were created for commercial purposes by the petitioner and, since they remained an entity separate from the Federal Government, they were not immune from taxation as agencies of the government. Judge Van Voorhis dissented on both points. He felt that Federal law controlled.[49] Hence, the incident of tax was

43. This section provides that no mortgage subject to the recording tax shall be released, discharged of record or received in evidence in any proceeding; nor shall any assignment or extension of it be recorded; nor shall any judgment or final order for the foreclosure or enforcement of it be made, until the tax is paid. It also provides for an additional sum to be paid as a penalty if a mortgage has been recorded without the payment of the tax.

44. 42 U.S.C. §§ 1594-1594-g (1956).

45. 5 N.Y.2d 635, 186 N.Y.S.2d 646 (1959).

46. N.Y. TAX LAW, § 253.

47. Housing Act of 1956, § 511, 70 Stat. 1110, 42 U.S.C. § 1594.

48. Franklin Society for Home Building and Savings v. Bennett, 282 N.Y. 79, 24 N.E.2d 854, *appeal dismissed* 309 U.S. 640 (1940).

49. United States v. County of Allegheny, 322 U.S. 174 (1944).