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COURT OF APPEALS

STATE OF NEW YORK

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HUDSON VALLEY FEDERAL CREDIT UNION,

Appellant,

-against-

No. 154

NEW YORK STATE DEPARTMENT OF TAXATION  
AND FINANCE,

Respondent.  
-----

20 Eagle Street  
Albany, New York 12207  
September 4, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE THEODORE T. JONES

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Penina Wolicki  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Hudson Valley Federal  
2 Credit Union.

3 Counsel?

4 MR. MATTIOLI: May it please the Court, Eli  
5 Mattioli of K&L Gates, counsel for the appellant. My  
6 co-counsel, Dale Lois of Quartararo & Lois. Your  
7 Honor, we would ask for three minutes for rebuttal.

8 CHIEF JUDGE LIPPMAN: Sure. Counsel, why  
9 isn't this a mortgage recording tax? Or is it?

10 JUDGE READ: It is.

11 JUDGE CIPARICK: It's excise tax.

12 MR. MATTIOLI: This is a mortgage recording  
13 tax.

14 CHIEF JUDGE LIPPMAN: An excise tax rather  
15 than a property tax?

16 MR. MATTIOLI: Your Honor, we have believed  
17 that the Supreme Court decisions that we discuss in  
18 our brief to claim, call for a characterization of  
19 this tax as a property tax in deciding the impact of  
20 this exemption. However, it's also clear from the  
21 language of the exemption and case law construing  
22 this exemption, that even if the court decides to  
23 call it a privilege tax, as the court did in  
24 Franklin, in an entirely different context, this  
25 exemption still applies. The exemption provides in

1 the plainest language that federal credit unions are  
2 exempt from all taxation, now and hereafter - - -

3 JUDGE READ: You're talking about them as  
4 an entity. Is that what you're arguing?

5 MR. MATTIOLI: As an entity. That's right,  
6 Your Honor.

7 JUDGE CIPARICK: The cases that you're  
8 referring to go back to 1923, 1939, 1961. These are  
9 the cases that you're referring to, the Supreme Court  
10 cases?

11 MR. MATTIOLI: That's correct, Your Honor.

12 JUDGE CIPARICK: They predate our holdings,  
13 do they not?

14 MR. MATTIOLI: Two of them predate the 1939  
15 decision of this court in Franklin. One of them  
16 postdates the Silberblatt decision of this court,  
17 which I believe was 1959. But again, all means all.

18 JUDGE PIGOTT: Yeah, but if you got your  
19 1.8 million dollars back, what would you do with it?

20 MR. MATTIOLI: That money would belong to  
21 the credit union.

22 JUDGE PIGOTT: Well, it - - -

23 MR. MATTIOLI: I should say - - -

24 JUDGE PIGOTT: - - - I'm willing to bet  
25 that when you went to your closings - - - you don't

1 go, but somebody does - - - that that's on the  
2 closing statement and it's paid by your borrower.

3 MR. MATTIOLI: That's right, Your Honor.

4 JUDGE PIGOTT: Are you going to give it  
5 back to him?

6 MR. MATTIOLI: I think it would probably go  
7 back to them, yes. And we have - - - the application  
8 identifies - - -

9 JUDGE PIGOTT: So it doesn't go back to the  
10 CU; it goes back to the borrower.

11 MR. MATTIOLI: That's - - - you're correct.  
12 And when I think of a credit union, it's a  
13 cooperative association. Its funds are the members'  
14 funds.

15 JUDGE PIGOTT: Yes, but the members are not  
16 the only ones that borrow.

17 MR. MATTIOLI: Again, it would go to the  
18 borrowers.

19 JUDGE GRAFFEO: There's a lot of federal  
20 credit unions operating in New York State, aren't  
21 there?

22 MR. MATTIOLI: Yes, there are, Your Honor.

23 JUDGE GRAFFEO: And there's a lot of  
24 mortgages that they're processing. And I assume, as  
25 Judge Pigott mentions, that these are all pass-along

1 charges?

2 MR. MATTIOLI: The fact - - -

3 JUDGE GRAFFEO: I don't think - - - the  
4 credit union's not paying out of its own resources?

5 MR. MATTIOLI: Well, the credit union is a  
6 composite, a cooperative association of its members.  
7 They lend - - -

8 JUDGE GRAFFEO: But the bor - - -

9 MR. MATTIOLI: - - - member funds.

10 JUDGE GRAFFEO: - - - but the borrower is  
11 being charged this mortgage recording tax.

12 MR. MATTIOLI: It doesn't change - - - the  
13 borrower may be charged with the tax. The incidence  
14 of the tax falls on the credit union.

15 JUDGE GRAFFEO: I understand that.

16 MR. MATTIOLI: And the fact that the  
17 borrower may be charged it does not make this  
18 exemption any less applicable.

19 JUDGE CIPARICK: So that's irrelevant, in  
20 your view?

21 JUDGE GRAFFEO: If the borrower doesn't  
22 come up with the money for the mortgage recording  
23 tax, they're going to go through with the closing? I  
24 don't think so.

25 MR. MATTIOLI: If the borrower doesn't come

1 up with the mortgage recording tax, there are some  
2 loans that federal credit unions make without  
3 charging the tax as a closing cost to the borrower.  
4 But if it doesn't, in the final analysis, the  
5 mortgagee, the lender, is the party that must record.  
6 For perfection of its lien, for priority of its lien

7 - - -

8 JUDGE PIGOTT: Well, it's in your best  
9 interest to. If you just said to Mr. and Mrs. Smith,  
10 here's a hundred grand for your house, and by the  
11 way, would you file this for us, you would be really  
12 upset if they didn't give you the lien on the  
13 property that you gave them the money for.

14 MR. MATTIOLI: In your hypothetical, if I  
15 were Mr. and Mrs. Smith and the bank asked me to  
16 record my mortgage, I'd throw it in the closest can.  
17 This statute provides not only can a lender not  
18 foreclose on the mortgage, it can't sue on the  
19 underlying debt.

20 And this debate about whether it's a  
21 privilege tax or a property tax is an unnecessary  
22 question. Again, all means all. There are only two  
23 exceptions in this exemption. One is for real  
24 property tax; one is for tangible personal property  
25 tax.

1                   JUDGE GRAFFEO: Did Congress intend to give  
2                   you this pretty significant competitive advantage  
3                   over the other types of banks that do business in New  
4                   York State? I mean, this is usually over 1,000  
5                   dollars, correct, at each closing?

6                   MR. MATTIOLI: New York State - - -

7                   JUDGE GRAFFEO: Depending on the size - - -  
8                   I realize it's based on the size of the mortgage, but  
9                   this could be worth well over 1,000 dollars to a  
10                  borrower. So did Congress intend to make the federal  
11                  credit unions that much more attractive than banks in  
12                  New York State?

13                  MR. MATTIOLI: I look at the preamble in  
14                  the statute. And Congress said credit unions, unlike  
15                  other participants in the financial services market,  
16                  are exempt. And it goes on to recite the reasons,  
17                  including, not only that they're member-owned, and  
18                  not for profit, but they have the specified mission  
19                  of meeting the credit and savings needs of consumers,  
20                  especially persons of modest means.

21                  CHIEF JUDGE LIPPMAN: Are they  
22                  instrumentalities of the federal government?

23                  MR. MATTIOLI: We believe that - - - since  
24                  every court that's addressed that question, federal  
25                  and state, has answered in the affirmative, since the

1 NCUA has held that, since the Internal Revenue  
2 Service has held it, and until Thursday afternoon I  
3 was almost certain that the State of New York  
4 continued to adhere to that rule, I'd answer the  
5 question yes. Does this court need to find, in this  
6 case, that they are?

7 CHIEF JUDGE LIPPMAN: Does it matter - - -

8 MR. MATTIOLI: It bols - - -

9 JUDGE JONES: - - - whether it's a private  
10 entity or an instrument of the federal government?

11 MR. MATTIOLI: Their status as federal  
12 instrumentality certainly bolsters the - - - first of  
13 all, it informs the proper construction - - -

14 CHIEF JUDGE LIPPMAN: But not necessary to  
15 find for you?

16 MR. MATTIOLI: Not as a matter of statutory  
17 construction. I would remind the court that the  
18 decisions that are not mentioned in the Appellate  
19 Division decisions that construed this statute hold  
20 that the immunity that it confers is the same as the  
21 immunity from taxation conferred under the supremacy  
22 clause.

23 JUDGE CIPARICK: Why wasn't this case  
24 brought earlier? I mean, you've had all these  
25 federal cases for so many years; why is this the

1 first time that we're seeing this, after so many  
2 years of paying the tax?

3 MR. MATTIOLI: Your Honor, the person  
4 sitting next to me, Dale Lois, called the Department  
5 of Taxation and Finance in the summer of 2008. This  
6 is not in the record, but you've asked the question.  
7 He was asking a question about how the special  
8 additional tax works in the case of a loan made by a  
9 federal credit union.

10 A senior tax technician at the very top of  
11 the department whose been working there for decades  
12 told him that this exemption should apply to the  
13 basic tax and that it was unlawful and in violation  
14 of this statute for the State to continue to charge  
15 this tax to federal credit unions. Mr. Lois - - -

16 JUDGE READ: So a state employee threw the  
17 State in, huh? A state employee threw the State in?  
18 Is that what you're saying?

19 MR. MATTIOLI: That's one way of putting  
20 it. Mr. Lois, as a lawyer, has an ethical  
21 responsibility to his client.

22 JUDGE PIGOTT: Under the bus.

23 MR. MATTIOLI: He researched it. He  
24 confirmed what he was told and told his client. So  
25 that's why we're here today.

1 JUDGE PIGOTT: But this is - - -

2 JUDGE GRAFFEO: How many years - - - how  
3 many years has there been a New York mortgage  
4 recording tax?

5 MR. MATTIOLI: There's been a New York  
6 mortgage recording tax since 1906, I believe.  
7 Federal credit unions were making mortgage loans on  
8 very short terms until 1977.

9 JUDGE GRAFFEO: Well, let me ask this way.  
10 What happens to all the borrowers that have paid a  
11 mortgage recording tax that got their mortgages  
12 through federal credit unions, if we agree with you?  
13 Do they all have a claim to come back and ask for a  
14 refund from the Tax Department?

15 MR. MATTIOLI: I believe that the refund  
16 period, Your Honor, is two years. And I haven't  
17 researched beyond that what would be the rights - - -

18 JUDGE GRAFFEO: So perhaps all those  
19 borrowers within the two-year period would be able to  
20 claim a refund?

21 MR. MATTIOLI: Yes. And I would point out  
22 - - -

23 JUDGE GRAFFEO: I'm just trying to think  
24 what the ramifications are - - -

25 MR. MATTIOLI: I will - - -

1 JUDGE GRAFFEO: - - - of what you're  
2 proposing.

3 MR. MATTIOLI: I'm sorry, Your Honor. One  
4 indication of the ramifications: the New York State  
5 Conference of Mayors and Municipal Officials filed a  
6 brief in this case. And that brief, in support of  
7 the State's position, states that the mortgage  
8 recording tax is a relatively small part of the  
9 financial support of municipalities throughout the  
10 state.

11 JUDGE PIGOTT: If they called it a fee,  
12 does that solve the problem?

13 MR. MATTIOLI: No, it doesn't.

14 JUDGE PIGOTT: Why not?

15 MR. MATTIOLI: Because it's still a tax.  
16 It's a true tax. That's what Justice Brandeis said.  
17 In fact, that's what Judge Lehman said in the  
18 Franklin case. He said this is a tax that reaches a  
19 form of intangible personal property.

20 JUDGE PIGOTT: But doesn't some of the  
21 money stay with the county?

22 MR. MATTIOLI: I believe that some stays  
23 with the county, yes.

24 JUDGE PIGOTT: You know, to pay the county  
25 clerk for the filings, I assume, or something like

1 that. And then some of it goes to Transit, right?  
2 Doesn't some of the money get allocated to the NFTA,  
3 in my case, or the MTA in your case? I don't know.

4 MR. MATTIOLI: I believe it's allocated  
5 out. I don't know what small part of it. But if you  
6 have a million dollar loan mortgage, and I have  
7 50,000 dollar loan mortgage, and it's the same number  
8 of pages, you're - - -

9 JUDGE PIGOTT: Ten bucks a piece.

10 MR. MATTIOLI: - - - going to have a much  
11 higher tax on yours than I'll have on mine. So I  
12 don't know that this fee part of the - - -

13 JUDGE PIGOTT: Much higher fee, yeah, I  
14 guess.

15 MR. MATTIOLI: - - - yes. There's not much  
16 of a fee involved here, and there's not much of a  
17 cost.

18 CHIEF JUDGE LIPPMAN: Okay, counsel.  
19 Thanks.

20 MR. MATTIOLI: Thank you, Your Honor.

21 CHIEF JUDGE LIPPMAN: Counselor, what makes  
22 this an excise tax rather than a property tax?

23 MR. SUTHERLAND: May it please the Court,  
24 I'm Brian Sutherland for the State defendants. The  
25 tax is an excise tax and not a property tax - - -

1 CHIEF JUDGE LIPPMAN: Why?

2 MR. SUTHERLAND: - - - because of the  
3 language of the statute, the intent of the  
4 legislature, this court's opinions in Franklin and in  
5 Silberblatt, and the actual operation of the tax.  
6 I'll start with the statute. Section 257 - - -

7 CHIEF JUDGE LIPPMAN: Tell us in common  
8 sense, why it's more in the nature of an excise tax?

9 MR. SUTHERLAND: Because, the tax falls on  
10 the transaction. The triggering event for this tax  
11 is the occurrence of a transaction. It's payable by  
12 the borrower or the lender. And that wouldn't be  
13 true of a property tax. A property tax - - -

14 JUDGE PIGOTT: That would be true if Mr.  
15 Mattioli and I had mortgages for - - - you know,  
16 mine's a million and his is 10,000 and we both paid  
17 10 bucks to file it. But I can't get past ad valorem  
18 taxes, by the way, but that's not being litigated  
19 here. But, I mean, doesn't that make it strong  
20 argument that it's a tax?

21 MR. SUTHERLAND: This tax - - - the  
22 mortgage recording tax is certainly a tax - - -

23 JUDGE PIGOTT: All right. So it's a tax.

24 MR. SUTHERLAND: - - - and not a fee.

25 JUDGE PIGOTT: Okay.

1 JUDGE GRAFFEO: How - - -

2 MR. SUTHERLAND: There's no question about  
3 that. It's a tax to raise money for the general  
4 welfare. It's not a property tax. We had a property  
5 tax in 1905. The legislature very deliberately  
6 changed it to a tax on the transaction, triggered by  
7 the occurrence of an event, and payable by both the  
8 borrower and the lender. That means it's not a  
9 property tax.

10 And in Silberblatt, this court held that  
11 for the purposes of federal law, this court - - - the  
12 tax is not a property tax. In Silberblatt, the  
13 dissent made the same argument that Mr. Mattioli is  
14 making here that the court should treat this  
15 differently when the question arises under federal  
16 law. It did arise under federal law in Silberblatt,  
17 and - - -

18 JUDGE PIGOTT: What were the facts in that?  
19 Was that that Plattsburgh thing?

20 MR. SUTHERLAND: In that case lessees of  
21 federal property sought an exemption under Section  
22 511 of the Housing Act of 1956.

23 JUDGE PIGOTT: Yes, that was 137,000 dollar  
24 filing fee, right?

25 MR. SUTHERLAND: In Silberblatt?

1 JUDGE PIGOTT: Yes.

2 MR. SUTHERLAND: I don't recall what the  
3 amount of the fee was. There was a tax imposed, and  
4 I don't recall the amount of the tax - - -

5 JUDGE PIGOTT: Okay.

6 MR. SUTHERLAND: - - - either. What I do  
7 want to tell the court about that case is that it  
8 rejected the proposition that Franklin could be  
9 distinguished on the ground that the question was  
10 federal.

11 JUDGE PIGOTT: There was a point made  
12 somewhere that credit unions couldn't do mortgages  
13 for a long time, and then they were authorized to do  
14 so. Do you recall when that kicked in?

15 MR. SUTHERLAND: That's exactly right. In  
16 1934, Congress enacted the Federal Credit Union Act.  
17 If you look at Section 18 of that act, it expressly  
18 provides that the State may impose taxes on both the  
19 borrowers and the lenders. In 1937, Congress amended  
20 the Federal Credit Union Act. But the purpose of  
21 that amendment was to create parity as between credit  
22 unions and banks, not to create a special exemption  
23 that the credit union is seeking here.

24 JUDGE PIGOTT: No, but to let them - - -

25 MR. SUTHERLAND: They didn't have the power

1 - - -

2 JUDGE PIGOTT: - - - to let them do  
3 mortgages?

4 MR. SUTHERLAND: They didn't have the power  
5 to make mortgage loans in 1937.

6 JUDGE PIGOTT: So - - -

7 MR. SUTHERLAND: They got that power in  
8 1977, forty years later.

9 JUDGE PIGOTT: So when this law was passed  
10 in 1906, credit unions weren't even on the horizon.  
11 So this was not something that was contemplated at  
12 that time?

13 MR. SUTHERLAND: Well, that's right. The  
14 New York legislature couldn't have had credit unions  
15 in mind when it enacted this statute.

16 JUDGE CIPARICK: What about the Bismarck  
17 case?

18 MR. SUTHERLAND: The Bismarck case is  
19 totally irrelevant here. In that case, the court  
20 held that the North Dakota sales tax fell exclusively  
21 and only on the consumer. Where a tax - - -

22 JUDGE CIPARICK: The statute was very  
23 specific in that case, right? The statute was very  
24 specific.

25 MR. SUTHERLAND: The statute was very

1 specific, and there was no dispute about the statute  
2 in that case.

3 JUDGE CIPARICK: We don't have that here?

4 MR. SUTHERLAND: It fell only on the  
5 Federal Land Bank. This statute doesn't fall only on  
6 federal credit unions. Section 257 provides that the  
7 tax is payable by the borrower or the lender. It's  
8 silent, and courts have construed that to mean that  
9 it is payable by the borrower or - - -

10 JUDGE READ: So in your view, that case is  
11 totally irrelevant?

12 MR. SUTHERLAND: That case is totally  
13 irrelevant because of the fact that the tax fell  
14 directly on the Federal Land Bank. This tax does not  
15 fall on the credit union; it falls on both the  
16 borrower and the lender. But one party in - - -

17 JUDGE GRAFFEO: Well, then how do you get  
18 around the Alabama case, which seems to be a bit more  
19 in line with what we have here?

20 MR. SUTHERLAND: It's a bit more in line.  
21 The key to Crosland is that the court held that both  
22 the borrower and the lender were immune from tax. So  
23 what the court held in that case was that the special  
24 language, first mortgages executed to federal land  
25 banks immunized the entire lending process from



1 by borrowers and lenders. And when one party is  
2 immune - - -

3 JUDGE READ: So that's - - - in your mind -  
4 - -

5 MR. SUTHERLAND: - - - the other party must  
6 pay the tax.

7 JUDGE READ: - - - that's the distinction.  
8 This falls on borrowers?

9 MR. SUTHERLAND: That's the - - - yes.  
10 That's the distinction. The tax falls on the  
11 borrowers, where the other party is immune.

12 JUDGE GRAFFEO: Well, if the tax isn't  
13 paid, say - - - I don't know if it would happen, but  
14 say the county clerk accepts the mortgage and this  
15 tax isn't paid and there's a deficiency that your  
16 department notices. Who gets notice of that, and who  
17 is - - - who does your department hold responsible  
18 for owing that tax? It would be the credit union,  
19 wouldn't it?

20 MR. SUTHERLAND: No, Your Honor.

21 JUDGE GRAFFEO: No?

22 MR. SUTHERLAND: Under Section 266 of the  
23 tax law, the attorney general is authorized to bring  
24 an action against the mortgagor when the mortgagor is  
25 liable. Where the other party to the transaction is

1           immune, that means that the mortgagor is liable and  
2           the attorney general could bring an action against  
3           the mortgagor under Section 266.

4                         But as Your Honor points out, that  
5           virtually never happens. Neither party has cited any  
6           cases arising under Section 266, because Section 258  
7           of the tax law requires the county recorder to take  
8           the tax before recording the mortgage. So Section  
9           266, it's pretty far afield.

10                        But I will say that Section 266 confirms in  
11           express language that the tax is payable by both the  
12           borrower and the lender. It says that right in the  
13           statute, if there were any doubt.

14                        CHIEF JUDGE LIPPMAN: Does it matter  
15           whether a federal credit union is a federal  
16           instrumentality?

17                        MR. SUTHERLAND: It matters not at all  
18           because of the reason that the tax is payable by the  
19           borrower. It also doesn't matter because of the  
20           Supreme Court's holding in CoBank which says that the  
21           scope of an instrumentality's immunity, if it is one,  
22           is set forth in the statute. But for the reasons I  
23           state, 12 U.S.C. 1768 doesn't provide any immunity  
24           for transactions, only immunity for credit unions and  
25           their property. This tax doesn't fall exclusively on

1 credit unions or their property.

2 JUDGE PIGOTT: If we rule - - -

3 JUDGE GRAFFEO: Is this the first time - -  
4 - I'm sorry.

5 JUDGE PIGOTT: Please, go ahead.

6 JUDGE GRAFFEO: Is this the first time this  
7 issue's been raised, or has the tax tribunal had  
8 other cases in the past challenging this assessment?

9 MR. SUTHERLAND: This is the only  
10 litigation of which I'm aware. Hudson Valley has  
11 appended a few letters to its briefs indicating that  
12 the Department has considered this issue, first in  
13 1990 and again in 1991.

14 My understanding is that this has been the  
15 position of the Department from the very beginning.  
16 There was an exception made in 1990. The Department  
17 reconsidered that position. And it's been official  
18 Department policy, at least since 1991, to assess  
19 this tax in connection with mortgages given to  
20 federal credit unions. And my understanding is that  
21 from before that time - - - ever since 1977, this tax  
22 has been collected in - - -

23 JUDGE PIGOTT: I'm not trying to make - - -  
24 put words in your mouth, but let's assume for a  
25 minute that borrower A, the first one that we're all

1 talking about - - - and I know that there's a lot  
2 more involved - - - and we were to find against you.  
3 Is it your argument that under the tax law, you'd say  
4 fine, here's your tax back, and then you write a  
5 letter to the borrower saying you now owe us the 160  
6 bucks that we just sent back to the FCU, because  
7 they're both responsible for this tax?

8 MR. SUTHERLAND: I don't think I understood  
9 Your Honor's hypothetical question.

10 JUDGE PIGOTT: Well, when you close on one  
11 of these things, the tax gets paid, they're saying,  
12 by them. They pay this tax. If we were to rule in  
13 their favor, we'd then say, FCU, you don't have to  
14 pay the tax. You're saying the state tax says both  
15 of them are responsible. So when you pay the 160  
16 back to this borrower - - - or excuse me, to the FCU,  
17 do you then go to the - - - could you then go to the  
18 borrower and say you now owe the 160 bucks that we  
19 gave the FCU? Because you said they're both  
20 responsible.

21 MR. SUTHERLAND: Well, I think in Your  
22 Honor's prior hypothetical, with Hudson Valley, the  
23 question was whether the borrower had paid the tax,  
24 and the refund would then go to the borrower. I  
25 can't predict what the State would do, whether it

1 would - - - if you ruled in favor of Hudson Valley,  
2 the entire transaction is exempt from tax, then that  
3 refund - - - that would mean that no tax should be  
4 paid, so then no, we wouldn't have a cause of action  
5 against the mortgagors, in that case.

6 JUDGE PIGOTT: So the fact that they're  
7 both - - - so the fact they're both responsible for  
8 the tax means nothing if, in fact, the credit union  
9 is not responsible for the tax?

10 MR. SUTHERLAND: In order for you to rule  
11 in favor of Hudson Valley, in my view, you would have  
12 to hold that the entire transaction is exempt from  
13 tax.

14 JUDGE PIGOTT: Got you. Okay.

15 MR. SUTHERLAND: That means that we have no  
16 one left to go after. Both sides are immune.

17 JUDGE PIGOTT: Okay.

18 CHIEF JUDGE LIPPMAN: Okay. Thanks,  
19 counselor.

20 MR. SUTHERLAND: Thank you, Your Honor.

21 MR. MATTIOLI: And, Your Honors, the  
22 Supreme Court, in the case of the Laurens First  
23 Federal Savings and Loan Association against the  
24 State of South Carolina held exactly that. The  
25 Supreme Court in that case applied a lender's

1 exemption to a tax imposed on a borrower. The lender  
2 was a North Carolina federal home loan bank. It  
3 loaned money to a South Carolina savings and loan  
4 association. The State of South Carolina imposed a  
5 tax - - - this is a real borrower's tax.

6 We don't have that here. But in that case,  
7 the South Carolina Tax Commission taxed the borrower  
8 a stamp tax on its promissory notes. And the Supreme  
9 Court said if two conditions are met, which are met  
10 in this case, the lender's exemption applies to the  
11 borrower's tax. Condition one: does the history of  
12 the statute and the overall purpose of the statute  
13 reflect the congressional purpose to provide low-cost  
14 credit to borrowers. Condition two: does the tax  
15 operate on an essential part of the lending process  
16 and increase the cost of the tax.

17 And the Laurens decision, in 1961, the  
18 Supreme Court said, where those conditions are met,  
19 the lender's exemption applies to even a borrower's  
20 tax. Here you can read Section 266. There's only  
21 one instance in which a borrower may be liable for  
22 unpaid tax. And it's the only provision in the  
23 statute that makes a borrower or a mortgagor  
24 responsible for tax; where it has made a special  
25 agreement in the mortgage.

1                   Now, their brief made a big to do about the  
2 HUD regulations, and we looked at the HUD  
3 regulations. And the HUD regulations, of course,  
4 prescribe mortgage forms for every state. The ones  
5 for New York contain no provision for the borrower to  
6 agree to be responsible for unpaid tax. This tax  
7 statute in New York is silent as to who pays.  
8 Attorney General Javits, in an opinion that he wrote  
9 to a federal officer, the Secretary of Agriculture,  
10 made it clear: the one who presents the mortgage,  
11 and in his view and in the view of the courts, the  
12 one who needs to present it for recording, the  
13 mortgagee, the lender, is presumed to be the party  
14 who will pay the tax.

15                   So we look at the statute. It doesn't say  
16 who pays. There's not a word of that in the statute.  
17 What the statute does say is who's going to apply for  
18 an exemption. And there are several sections we  
19 cited in our brief that provide that the owner of the  
20 mortgage will apply for an exemption because it's the  
21 party presumed to be responsible for the tax.

22                   They've said it in their own rulings. This  
23 tax - - - in the Department's rulings they say this  
24 tax operates as a tax on a mortgage of an exempt  
25 lender tantamount to a tax on the lender itself.

1 Now, they should live by their words. They're the  
2 agency of this state that is supposed to, with  
3 integrity, administer our tax laws.

4 If you accept their interpretation, if you  
5 affirm the Appellate Division's holding, you're  
6 rendering an exemption, an act of Congress,  
7 meaningless. And there are only ten states that have  
8 mortgage recording taxes, but there are fifty that  
9 have needs to find new and creative ways to tax  
10 anything they can tax. And that Appellate Division  
11 decision, if affirmed here, will - - - will permit  
12 states and encourage states to tax the federal credit  
13 union system out of existence. And there's no legal  
14 justification for it.

15 CHIEF JUDGE LIPPMAN: Okay, counsel.

16 Thanks.

17 MR. MATTIOLI: Thanks very much.

18 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Hudson Valley Federal Credit Union v. NYS Department of Taxation and Finance, No. 154 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

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