STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ACRES STORAGE CO., INC. DECISION

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 : of the Tax Law for the Period December 1, 1978 through May 31, 1980.

Petitioner, Acres Storage Co., Inc., 1776 Second Avenue, New York, New York 10028, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1978 through May 31, 1980 (File No. 38548).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 7, 1984 at 1:15 P.M. Petitioner appeared by Steven M. Coren, P.C. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

Petitioner commenced an Article 78 proceeding in the Appellate Division, Third Department, to review the determination of the State Tax Commission issued December 31, 1984. On May 15, 1986, the Appellate Division annulled the determination and remitted the matter to the State Tax Commission for further clarification of the record.

Petitioner's appeal of the decision of the Appellate Division was dismissed by the Court of Appeals on September 18, 1986, on the ground that the decision appealed from was not final.

On remand, petitioner waived the right to proceed with a hearing and requested the State Tax Commission to render a decision based on the entire record contained in the file, including additional documentation and argument to be submitted by April 20, 1987. After due consideration, the State Tax Commission renders the following decision.

ISSUES

I. Whether petitioner may properly be held liable, as the purchaser in bulk of business assets of a service station, for sales tax alleged to be due from the previous operators.

11. Whether penalties assessed against petitioner, as the purchaser in bulk, for the seller's failure to timely pay the correct amount of tax due should be abated.

111. Whether the Audit Division properly calculated petitioner's personal liability for the taxes due from the seller.

FINDINGS OF FACT

1. On March 20, 1982, the Audit Division issued to petitioner, Acres Storage Co., Inc. ("Acres"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1978 through May 31, 1980 in the amount of $83,086.08, plus penalty of $20,771.52 and interest of $24,593.95, for a total of $128,451.55. The notice stated, among other things, that the taxes were "determined to be due from Calga SVC Center, Inc. and represents [sic] your liability as purchaser in accordance with Section 1141(c) of the Sales Tax Law."

2. For many years, Mr. Shepard Levine and Mr. Stanley Nordheimer have engaged in various business ventures, usually as partners. (Messrs. Levine and

Nordheimer, together with Lillian Wallace, own all the outstanding shares of Acres.) Their principal business activity is the short- and long-term leasing of automobiles through entities such as Holiday Drive Ur-Self, Inc. and Holiday Auto Lease, Ltd.

3. Sometime prior to December 1979, the partnership of Shepard Levine and Stanley **H.** Nordheimer ("the partnership") sold a garage facility at which the leased autos had been serviced and fueled. In the course of seeking another garage in the same general vicinity, Mr. Nordheimer met one Adam Calderone, who with his brother, Oscar Calderone, was operating a Gulf Oil Corporation ("Gulf") service station at 1776 Second Avenue, New York, New York, under the name Calga Service Center ("Calga").

4. The partnership commenced negotiations with the Calderones to the end that it would operate the Gulf station to service its leased vehicles. This change in operators required that the Calerones tender their lease of the premises back to Gulf, and that Gulf grant a lease **of** the premises to the partnership.

5. The lease between Gulf and Adam and Oscar Calderone had been executed on May 1, 1978 for a term of one year and had thereafter been extended to April **30,** 1982. The lease provided, in part, "[S]hould Lessee sell, assign, pledge, sublet, or mortgage this lease or sublease in whole or in part, or attempt to do *so*, **...**Lessor may without notice immediately terminate this lease and all Lessee's rights hereunder...."

6. On December 5, 1979, Adam Calderone and Oscar Calderone, partners doing business as Calga Service Center (referred to as the Seller), entered into an agreement with Messrs. Nordheimer and Levine (referred to as the Buyer) wherein the parties agreed as follows:

(a) Seller agreed to terminate the lease for the Gulf station upon receipt of written notice that Buyer had obtained written notification from Gulf that it would enter into a lease with Buyer;

(b) if the terms required by Buyer under a lease could not be obtained from Gulf, Buyer would not purchase from Seller the lease and related fixtures and inventory; and

(c) the written agreement did not constitute an assignment of Seller's lease nor was it an action on the part of Seller which violated any term of the lease.

On the same date, the parties executed a second agreement, pertinent portions of which are set forth below.

> "1. That Buyer agrees to pay to Seller the sum of SEVENTY FIVE THOUSAND ($75,000.00) DOLLARS upon GULF OIL CORP. agreeing to give to Buyer a lease for a Gulf Service Station at the premises herein upon the terms and conditions specified in the Agreement executed simultaneously between the parties hereto and upon Seller terminating its lease for said premises.
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> 2. Seller agrees to sell to Buyer all of the stock (except gas and oil) on the premises and all the tools and equipment which it owns, all of which will be specified in a Bill of Sale to be executed at the time of closing, and which is included in the purchase price agreed upon.
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> 3. The parties agree that at the time of closing Buyer shall pay to Seller the cost of all oil and gas in inventory at that time.
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> 4. The Buyer herein agrees to deposit with Seller's attorneys, UGELOW, EVANS and KOPPELMAN, as escrow agents the sum of FIVE THOUSAND ($5,000.00) DOLLARS. Upon notice that Buyer cannot obtain a lease under the terms and conditions specified in the other Agreement between the parties, then said deposit shall be returned to Buyer.
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> 9. Buyer agrees to expeditiously undertake to enter into negotiations with the Gulf Oil Corporation for a proposed lease, but agrees to not enter into a lease until the terms of this agreement are fulfilled."

7. On or about January 30, 1980, as part of the procedure for becoming Gulf dealers, Messrs. Nordheimer and Levine each submitted to Gulf a personal financial statement, detailing their personal assets and liabilities and setting forth their proposed purchases from Gulf of gasoline, oil and accessories.

8. (a) On April 4, 1980, Adam and Oscar Calderone executed a written surrender of their lease of the service station premises "along with all of the appurtenances attached thereto and belonging to Gulf Oil Corporation" to Gulf. This written surrender, which was not delivered to Gulf but placed in escrow (see Finding of Fact "8(c)", infra), provided, in relevant part:

> "All of said equipment and the station itself have been surrendered to the new lessees of the station, Stanley H. Nordheimer and Shepard Levine, who have accepted them in their present condition."

(b) On April 4, 1980, Adam and Oscar Calderone and the partnership executed a Bill of Sale for the items of tangible personal property at the service station premises, which property was enumerated in a schedule appended to the Bill of Sale. (The items sold included, e.g., oil filters, brake shoes, fuel filters, spark plugs, wiper blades, air hoses, rotor caps, batteries and tool stands.) The Bill of Sale stated that Adam Calderone and Oscar Calderone, "for and in consideration of the sum of $75,000.00" paid by Messrs. Nordheimer and Levine, sold, transferred and assigned "all of the equipment on the attached Schedule. Included in $75,000.00 is payment for the surrender of lease to Gulf Oil Corp." The Bill of Sale assigned a value of $1,000.00 to the items of tangible personal property transferred.

(c) On April 4, 1980, Adam and Oscar Calderone and Messrs. Nordheimer and Levine executed a further agreement to provide for the escrow of checks totalling $75,000.00 ("representing the balance of the purchase price of the lease to the premises 1776 Second Avenue, New York, New York") and the bill of

sale and letter of surrender of the lease. This further agreement was necessary because Gulf had not yet presented a lease to Messrs. Nordheimer and Levine.

(d) Messrs. Nordheimer and Levine actually tendered to the Calderones checks totalling $65,000.00. At the time the Calderones surrendered their lease, approximately 9,000 gallons of gasoline remained in the service station's underground storage tanks. This gasoline was acquired by the partnership, although the exact nature of the transaction by which this occurred is uncertain. As part of the dealership agreement with Gulf, the partnership assigned to Gulf a certificate of deposit in the sum of $10,000.00 to secure the payment of any indebtedness arising as a result of Gulf's extension of credit to the partnership. Presumably, Gulf then returned to the Calderones the sum of $10,000.00 previously furnished by them to Gulf for a similar purpose. At one point in the proceedings, petitioner's representative characterized this transaction as "a swap of funds". However, this same transaction was also described as a purchase of the 9,000 gallons of gasoline from Gulf. In either case, this $10,000.00 was not paid by the partnership to the Calderones, and as a transaction, it was outside of the bulk sale at issue.

9. After consulting with their attorney, Messrs. Nordheimer and Levine decided to operate the Gulf station as a corporation rather than as a partnership. On April 4, 1980, Messrs. Nordheimer and Levine assigned to Acres, a corporation then inactive and without assets, all rights accruing to them under their agreements with Adam Calderone and Oscar Calderone, in consideration of one dollar "and other good and valuable consideration."

10. Neither petitioner nor the partnership gave notice to the Tax Commission of the change in operators of the station, since they believed the change did not come within the scope of Tax Law section 1141(c).

11. Unlike the Calderones who sold gasoline to and performed repair services for the public, Acres serviced only vehicles subject to leases held by related entities. Approximately 15 percent of the gasoline sales of Acres was made to the public; the remaining 85 percent was consumed in the leased vehicles.

12. In January 1981, when a sales tax examiner visited the service station to perform an audit of Calga, he discovered that Acres was operating the station. He requested the contract of sale between Calga and Acres but was never furnished with a copy. Inasmuch as no records of Calga were available, the examiner estimated the sales tax due from Calga for the period December 1, 1978 through May 31, 1980 by the method described below.

(a) Comparison of Acres' reported gross sales to Calga's reported gross sales disclosed that Acres' gross sales exceeded those of Calga by approximately 300 percent. The examiner therefore increased Calga's reported gross sales of $259,644.00 by 300 percent to $1,038,576.00.

(b) The examiner considered all gross sales to be taxable sales and calculated sales tax due of $83,086.08.

(c) No credit for sales tax reported and paid was allowed because the examiner was unable to locate any record of payment by or collection from Calga. The tax plus penalty and interest was assessed against Calga and against petitioner.

13. Upon review of the State Tax Commission's decision, the Appellate Division, Third Department, held that "the transaction between the Calderones and the Levine/Nordheimer partnership constituted a 'bulk sale'...[and that] the transfer from Levine and Nordheimer to petitioner constituted a bulk sale in itself [by which] petitioner became responsible for the taxes due from Levine and Nordheimer". However, the Court found the record unclear as to the

value of the assets transferred in the bulk sale transactions and the amount that Levine and Nordheimer actually paid the Calderones. Accordingly, the matter was remitted for further development of the record.

14. The Levine/Nordheimer partnership paid the Calderones $64,000.00 for their agreement to surrender the lease with Gulf and $1,000.00 for miscellaneous parts and equipment, for a total of $65,000.00.

15. Messrs. Nordheimer and Levine assigned to petitioner all rights accruing to them under their agreements with Adam Calderone and Oscar Calderone, in consideration of $1.00 "and other good and valuable consideration".

CONCLUSIONS OF LAW

A. That section 1141(c) of the Tax Law provides that whenever a person required to collect tax makes a sale, transfer or assignment in bulk of any part or the whole of his business assets, other than in the ordinary course of business, the purchaser, transferee or assignee shall, at least ten days before taking possession of the asset(s) or paying therefor, notify the Tax Commission of the proposed sale. For failure to comply with the provisions of such section, the purchaser, transferee or assignee shall be personally liable for payment to the state of any taxes theretofore or thereafter determined to be due to the state from the seller, transferor or assignor, except that the liability of the purchaser, transferee or assignee shall be limited to an amount not in excess of the purchase price or fair market value of the asset(s), whichever is higher.

B. That the Levine and Nordheimer partnership received the surrender of the Calderones' lease with Gulf and various items of tangible personal property in exchange for $65,000.00; this transaction constituted a bulk sale within the meaning of Tax Law § 1141(c). (Matter of Acres Storage Co., Inc. v. Chu, 120

AD2d 854, annulling on other grounds the decision of the State Tax Commission, December 31, 1984, appeal dismissed 68 NY2d 807 [written surrender of a lease, together with business equipment and inventory on hand, constituted a bulk sale within the context of the bulk sale statute]. See also Matter of Long Island Reliable Corp. v. State Tax Commn., 72 AD2d 826, lv denied 49 NY2d 707 [for purposes of the bulk sale provision, the term "asset" means an item of value owned, whether tangible or intangible].)

C. That because the Levine and Nordheimer partnership failed to comply with the requirements prescribed by Tax Law § 1141(c), it became personally liable for the sales taxes due from Calga, in "an amount not in excess of the purchase price or fair market value of the business assets sold, transferred or assigned ... whichever is higher" (Tax Law § 1141[c]). The partnership paid the Calderones $65,000.00 for certain assets, consisting of the Calderones' right to continue their lease with Gulf, for which the partnership paid $64,000.00, and items of tangible personal property, for which it paid $1,000.00. Accordingly, the partnership became personally liable for sales tax due from Calga in an amount not in excess of $65,000.00.

D. That the assignment of assets by the Levine and Nordheimer partnership to petitioner constituted a bulk sale in itself. By that transaction, petitioner became personally liable for all taxes due from Levine and Nordheimer, including the assessments attributable to Calga, again, in an amount not in excess of the purchase price or fair market value of the assets assigned, whichever is higher (Matter of Acres Storage Co., Inc. v. Chu, 120 AD2d 854, supra. See also Matter of Long Island Reliable Corp. v. State Tax Commn., 72 AD2d 826, supra). The consideration given by petitioner to Levine and Nordheimer for "all rights accruing to the partnership under their agreement with the Calderones" was $1.00

"and other good and valuable consideration." Petitioner's contention that the $1.00 consideration paid represents the higher of purchase price or fair market value of the assets assigned has no merit, resting as it does on the premise that the assets transferred by the Calderones to Levine and Nordheimer had no market value. The market value of the assets assigned can be measured by the price Levine and Nordheimer paid the Calderones for those same assets - $65,000.00. Accordingly, petitioner is personally liable for payment of all taxes due from Calga, except that its liability is limited to $65,000.00.

E. That petitioner failed to comply with the bulk sales provision requirements (due to misunderstanding the nature of the transaction) but otherwise acted in good faith; all penalties in excess of the amount of interest prescribed by statute are remitted (Tax Law § 1145[a][1][ii]; 20 NYCRR 536.1).

F. That the petition of Acres Storage Co., Inc. is granted to the extent indicated in Conclusions of Law "D" and "E"; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on March 20, 1982 is to be modified accordingly; and that, in all other respects, the petition is denied.

DATED: Albany, New York

JUN 25 1987

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER