STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

December 31, 1984

Acres Storage Co., Inc.
1776 2nd Ave.
New York, NY 10028

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Steven M. Coren
485 Madison Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK [illegible]

December [illegible]

Acme Storage [illegible], Inc.
[illegible] 2nd Ave.
New York, NY [illegible]

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

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Building #9, State Campus
Albany, New York 12227
Phone # (518) [illegible]

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Steven M. Cohen
385 Madison Ave.
New York, NY [illegible]
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Acres Storage Co., Inc.	:
	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision of a Determination or Refund of Sales & Use Tax under Article 28 & 29 of the Tax Law for the Period 12/1/78-5/31/80.	:

State of New York :
ss.:
County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of December, 1984, he served the within notice of Decision by certified mail upon Acres Storage Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Acres Storage Co., Inc.
1776 2nd Ave.
New York, NY 10028

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
31st day of December, 1984.

David Parchuck

Nicola J. Williams
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Acres Storage Co., Inc.	
for Redetermination of a Deficiency or Revision of a Determination or Refund of Sales & Use Tax under Article 28 & 29 of the Tax Law for the Period 12/1/78-5/31/80.	AFFIDAVIT OF MAILING

State of New York :
ss.:
County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of December, 1984, he served the within notice of Decision by certified mail upon Steven M. Coren, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Steven M. Coren
485 Madison Ave.
New York, NY 10022

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
31st day of December, 1984.

David Parchuck

Nicola L. Williams
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of ACRES STORAGE CO., INC. 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.	DECISION

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).

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.

II. 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.

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 Calderones 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.

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.

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.

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.

* * *

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) It appears that Messrs. Nordheimer and Levine actually tendered to the Calderones checks totalling $65,000.00. 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.

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. Acres began operating the service station sometime later in April, 1980. At that time, the underground storage tanks contained 9,000 gallons of gasoline, for which Messrs. Nordheimer and Levine paid some undisclosed amount to Gulf.

12. 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.

13. 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.

CONCLUSIONS OF LAW

A. That subdivision (c) of section 1141 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 subdivision, 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, limited to an amount not in excess of the purchase price or fair market value of the asset(s), whichever is higher.

B. That an examination of the lease of the premises at 1776 Second Avenue, New York, New York, between Adam and Oscar Calderone and Gulf Oil Corporation, the agreements between the Calderones and the partnership of Shepard Levine and Stanley H. Nordheimer, and the agreement between the partnership and petitioner discloses the essence of the entire transaction: petitioner received the written surrender of the Calderones' lease with Gulf and various items of tangible personal property situated at the service station premises in exchange for $65,000.00 (originally, funds of the partnership). This transaction constituted a bulk sale within Tax Law section 1141(c). (See Matter of Long Island Reliable Corp. v. Tax Comm., 72 A.D.2d 826, wherein for purposes of the bulk sale provision, the Third Department determined that the term "asset" means an item of value owned, including an intangible.) The fact that the

surrender of the lease, rather than the lease itself, was transferred due to the nonassignability of the lease does not dictate a different result.

Petitioner failed to comply with the requirements prescribed by section 1141(c) and is consequently liable for the sales tax due from Calga, in an amount not to exceed the fair market value of the assets transferred or the purchase price (whichever is the greater).

C. 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 section 1145[a][1][ii] and 20 NYCRR 536.1.)

D. That the petition of Acres Storage Co., Inc. is granted to the extent indicated in Conclusion "C"; the assessment issued on March 20, 1982 is to be reduced accordingly; and except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

DEC 31 1984

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER

P 470 315 367

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Acres Storage Co., Inc.	
Street and No. 1776 2nd Ave.	
P.O., State and ZIP Code New York, NY 10028	
Postage	$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	$
Postmark or Date	

PS Form 3800, Feb. 1982

P 470 315 368

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Steven M. Coren	
Street and No. 465 Madison Ave.	
P.O., State and ZIP Code NY, NY 10022	
Postage	$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	$
Postmark or Date	

PS Form 3800, Feb. 1982