STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JALAL ZUWIYYA	:	SMALL CLAIMS DETERMINATION DTA NO. 820591
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 September 1, 2001 through December 31, 2003.	:	

Petitioner, Jalal Zuwiyya, 4632 Salem Drive, Vestal, New York 13850, 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 September 1, 2001 through December 31, 2003.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 44 Hawley Street, Binghamton, New York 13091, on December 15, 2005 at 1:00 P.M. Petitioner appeared by Levene Gouldin & Thompson, LLP (Jeremy R. Root, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Andrea P. More and Carrie Lipfeld).

The final brief in this matter was filed by the February 24, 2006 due date, and it is this date that commences the three-month period for the issuance of this determination.

ISSUE

Whether tangible personal property purchased by petitioner was used in constructing, expanding or rehabilitating industrial or commercial real property located within a designated empire zone area, thus qualifying petitioner for a refund of the sales tax paid on said property pursuant to Tax Law § 1119(a)(6).

FINDINGS OF FACT

1. In 2001, petitioner, Jalal Zuwiyya, simultaneously purchased, as a sole proprietor, two parcels of real property identified as 204 Grand Avenue and 196 Grand Avenue, both of which were located in the Village of Johnson City, New York. The 204 Grand Avenue property was located on the corner of Grand Avenue and Baldwin Street, and it was improved by a three-story structure encompassing approximately 15,000 square feet. Adjacent to the 204 Grand Avenue property was 200 Grand Avenue, a property which petitioner had previously purchased and leased to a commercial tenant. The property located at 196 Grand Avenue, which was adjacent to the 200 Grand Avenue property, was vacant property and was used as a parking lot. The property located at 204 Grand Avenue is the only property at issue in this proceeding.

2. Pursuant to the applicable Johnson City Code, the 204 Grand Avenue property was located within a "Neighborhood Commercial District," which permitted, subject to site plan approval, the following uses: retail store or service (except department store); business office; personal service; restaurant/bar; religious institution; school; community center; public building; hospital; public outdoor recreation; membership clubhouse; funeral home; cemetery; enclosed accessory use; sign; parking and residential and multiple dwellings. Other commercial uses were also permitted provided a special permit was obtained from the Village Board, Planning Board or the Zoning Board of Appeals.

3. On September 18, 2001, petitioner filed an Application for Joint Certification of an Empire Zone Business Enterprise ("empire zone application") with the State of New York Empire Zones Program for the 204 Grand Avenue property. On the empire zone application, petitioner indicated that the nature of the business was commercial real estate development; that

the real property was purchased for $60,000.00 and that $50,000.00 in renovations were expected to be completed by June 2002. On December 19, 2001, the Local Economic Development Zone Certification Officer, Commissioner of Labor and Commissioner of Economic Development jointly certified that petitioner's 204 Grand Avenue property, located within the Triple Cities of Broome County Empire Zone, was eligible to receive the benefits contained in section 966 of the General Municipal Law. Petitioner's eligibility for these benefits was effective as of September 18, 2001. One of the benefits available to petitioner as the result of his certification of the 204 Grand Avenue property as a qualified empire zone business was that he was eligible for a refund of the sales tax paid on his purchase of materials which were used to construct, expand or rehabilitate industrial or commercial real property, but only with respect to materials which became an integral component part of the real property (General Municipal Law § 966[g]; Tax Law § 1119[a][6]).

4. On September 4, 2001, petitioner listed the 204 Grand Avenue property with Pyramid Brokerage Company ("Pyramid") authorizing it to act as his exclusive broker for the lease of the approximately 5,000 square feet of space located on the ground floor of the building. Pyramid specializes principally in the sale or lease of commercial real estate, and petitioner retained Pyramid to seek only commercial tenants for the ground floor. Pyramid was not retained by petitioner to be the broker for the space on the second or third floors of the 204 Grand Avenue property. Petitioner listed the ground floor space at 204 Grand Avenue with Pyramid for a period of one year, until September 1, 2002, at which time the agreement expired. Despite its best efforts, Pyramid was not successful in obtaining a commercial tenant for the ground floor space at the 204 Grand Avenue property.

5. In September 2001, petitioner, acting as his own contractor, began renovating the third floor of the 204 Grand Avenue property, and once that was completed, he started to renovate the second floor. Both the second and third floors each contained four units, which petitioner leased as residential apartments. At the time that petitioner completed the renovations to the second floor, he still did not have a commercial tenant for the ground floor space, and although he would have preferred a commercial tenant, he could not afford to keep the ground floor space vacant. Accordingly, petitioner decided to split the ground floor space into five separate units which, after renovations were completed, he leased as residential apartments.

6. Petitioner invested approximately $350,000.00 in renovating all three floors of the 204 Grand Avenue property, and as noted earlier, petitioner acted as his own contractor. Accordingly, petitioner personally paid for the materials which were used to renovate the building, and thus he paid the sales tax that was charged on these materials.

7. Petitioner filed with the Division of Taxation ("Division") four separate applications for credit or refund seeking refunds of the sales tax that he paid on the materials which were used to renovate the 204 Grand Avenue property. The following chart sets forth the relevant information contained in each Application for Credit or Refund:

Refund Claim No.	**Period**	**Amount**
2002110829	09/01/2001 to 10/23/2002	$2,853.50
2002120414	10/29/2001 to 05/19/2002	$1,663.11
2003120154	07/02/2003 to 11/03/2003	$1,060.87
2004030228	12/15/2002 to 12/31/2003	$1,470.35

8. The first three refunds claimed by petitioner under refund claim numbers 2002110829, 2002120414 and 2003120154 were granted by the Division, and three refund checks were

issued, two on April 9, 2003 (for refund claim numbers 2002110829 and 2002120414) and one on April 23, 2004 (for refund claim number 2003120154). By letter dated June 9, 2004, the Division denied in full the $1,470.35 refund claimed by petitioner pursuant to refund claim number 2004030228. On September 3, 2004, the Division issued a Notice of Determination to petitioner asserting that $5,577.48 of tax was due (the sum of the refunds granted to petitioner pursuant to the first three applications for credit or refund), plus interest. The Division's basis for both the refund denial and the Notice of Determination was explained as follows:

> To qualify for the refund or credit of sales tax paid on building materials used in construction within an Empire Zone, three criteria must be met. One of these criteria is that the real property on which the construction is performed must be classified as industrial or commercial property. Residential property does not qualify. The claim for sales tax paid on purchases of building materials for apartments does not meet the criteria and does not qualify for refund or credit.

9. Petitioner disagreed with the Division's position that the 204 Grand Avenue property did not qualify for the refund authorized by Tax Law § 1119(a)(6), and on June 21, 2004, he protested the Division's June 9, 2004 denial of his fourth application for credit or refund under refund claim number 2004030228 by filing a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). In his request for conference, petitioner made the following statements:

> I have received an Empire Zone certificate in 2001 for a commercial property that was composed of one commercial store on the first floor and apartments on the 2nd and third floor. The property was in a dilapidated condition and completely vacant. At the time I met with Empire Zone representative in Binghamton, she explain[ed] to me the benefit of the Program which includes sale[s] tax refund for the materials expense I will invest in remodeling this property. Subsequently I began a project in 2001 and by 2002 the second and third floor apartments were remodeled. Since then I have submitted three applications for sales tax refund, all of which were approved. In 2003 I proceeded remodeling the commercial store and have submitted application for sales tax refund but it was denied.

* * *

> Based on the Empire Zone representative stated benefit, and the previous approvals of my application for sales tax refund, I am writing to appeal this denial for my application for a refund of sales tax.

10. By Conciliation Order dated March 25, 2005, BCMS denied petitioner's request and sustained the Division's June 9, 2004 denial of the fourth application for credit or refund submitted under refund claim number 2004030228. Petitioner protested both the refund denial dated June 9, 2004 and the Notice of Determination dated September 3, 2004 by filing a petition with the Division of Tax Appeals and this small claims proceeding ultimately ensued.

SUMMARY OF THE PARTIES' POSITIONS

11. The Division maintains that the 204 Grand Avenue property is a mixed-use property, i.e., it can be used commercially, residentially or partly as both. Relying on its Publication 30, A Guide To Sales And Use Tax Incentives Within Empire Zones, the Division argues that "[R]esidential space does not qualify for the Empire Zone exemption. . . . The [Division] has always allowed refunds of sales tax on materials incorporated into renovations of qualifying mixed-use of commercial or industrial space, but never on the residential portion of a building." It is the Division's position that it "looks at 'intent' with respect to property usage, our position has been to look at the point in time when the materials are incorporated in the property." The Division asserts that the materials used in the renovation of all three floors of the 204 Grand Avenue property do not qualify for the Empire Zone incentive since, at the time the materials were incorporated into the building, the intended use of the renovated space was for residential purposes. Finally, the Division argues that petitioner has failed to meet his burden of proof to

clearly show that the 204 Grand Avenue property qualified for the Empire Zone incentive provided for in Tax Law § 1119(a)(6).

12. Petitioner asserts that he has established that his intent and actual use of the 204 Grand Avenue property during the period that the renovations were made was as commercial property and not residential property. Petitioner states that "the period from September 1, 2001 to December 31, 2003 (the 'Refund Period') is the relevant time period during which 204 Grand Avenue must have been considered commercial real property in order for the Petitioner to be entitled to [the] refunds at issue." Petitioner maintains that the 204 Grand Avenue property was, pursuant to the applicable Johnson City Code, deemed to be commercial property, and since it did not contain any residential dwelling units during the Refund Period, the property qualifies as commercial property as that term is defined in the Division's Publication 30.

In his brief petitioner argues that:

> While the [Division] contends in its post-hearing brief that the renovation of the ground floor was done for residential purposes, the Petitioner testified that at the time the units were built, they were designed to accommodate either commercial or residential tenants in order for Petitioner to keep his options open. The Petitioner also testified that his preference was to lease those units to commercial tenants.
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> Moreover, even during the conversion of the ground floor to several smaller units which occurred during the final three months of the Refund Period, the Petitioner's continuing intent was to use the ground floor for commercial purposes. As such, because no evidence was adduced to the effect that the ground floor was used [as] a residence during the Refund Period, the ground floor of 204 Grand Avenue was properly characterized as commercial property during the entire Refund Period.

Petitioner maintains that since he never testified that any of the units on the second and third floors were in use as residences at any point during the Refund Period, it must be concluded

that the 204 Grand Avenue property was commercial property which was renovated to be leased to commercial tenants. Since the 204 Grand Avenue property "did not contain a dwelling unit used as a permanent home or residence during the Refund Period, 204 Grand Avenue met the [Division's] definition of commercial property during the Refund Period. . . ."

CONCLUSIONS OF LAW

A. General Municipal Law § 966 states that certain benefits are provided in the case of zone equivalent areas and, as relevant to this proceeding, subsection (g) provides for the following benefit:

> For refund or credit of payments of certain of the taxes imposed under article twenty-eight . . . of the tax law, with respect to purchases of materials used in constructing, expanding or rehabilitating certain business property located in an empire zone, see subdivision (a) of section eleven hundred nineteen of the tax law. . . .

Tax Law § 1119(a)(6), in turn, provides that a refund or credit shall be allowed for tax paid:

> on the sale of tangible personal property purchased for use in constructing, expanding or rehabilitating industrial or commercial real property (other than property used or to be used exclusively by one or more registered vendors primarily engaged in the retail sale of tangible personal property) located in an area designated as an empire zone pursuant to article eighteen-B of the general municipal law, but only to the extent that such property becomes an integral component part of the real property.

B. In the instant matter, there is no dispute that the 204 Grand Avenue property is located within a designated empire zone area. There also appears to be no dispute between the parties that sales tax paid on materials used to renovate residential real property located within an empire zone cannot be refunded pursuant to Tax Law § 1119(a)(6). Article 18-B of the General Municipal Law, referred to as the New York State Empire Zones Act, was enacted to offer various incentives to promote the development of new businesses; the expansion of existing

businesses and the creation of job opportunities located within impoverished communities which have been designated as an empire zone (***see***, 87 NY Jur 2d, Public Housing and Urban Renewal, § 84). Accordingly, the Division's position that renovations made to residential real property do not qualify for the refund provisions of Tax Law § 1119(a)(6) falls within the spirit and intent of the law. Furthermore, since Tax Law § 1119(a)(6) specifically excludes an otherwise qualifying renovated property from a refund if it is used, or to be used, exclusively by a vendor engaged in retail sales, it follows that the Legislature intended this provision to apply to renovations made by commercial (but not retail) or industrial businesses and not renovations made in a residential scenario.

C. The crux of the problem in dispute is whether the 204 Grand Avenue property is properly classified as commercial property or residential property. The applicable Johnson City Code is not dispositive of the issue since it enables this property to be used as either. Accordingly, it is necessary to resort to intrinsic factors, such as intent and use, to determine its proper classification. It is at this point that the parties disagree. The Division maintains that petitioner's intent at the time he renovated each floor was to utilize the renovated space as residential apartments. Petitioner, on the other hand, asserts that his intent was, and has always been, to lease all of 204 Grand Avenue to a commercial tenant or tenants.

D. After carefully reviewing the record before me, I conclude that petitioner is not entitled to a refund of the sales tax he paid on the materials incorporated into the renovation of the 204 Grand Avenue property. Although petitioner maintains that he never testified that the second and third floor units were used as residences during the Refund Period, I find such argument unpersuasive. I am certain that if the units on the second and third floors were leased to commercial tenants, then documentary evidence of such would have made its way into the

record. Since no such evidence was adduced, it can only be concluded that the second and third floors were either left vacant or were rented as residential apartments. In my view, it is far more likely that petitioner rented the units, apartments, as personal residences during the Refund Period rather than leave them vacant. For economic reasons, petitioner chose to convert the ground floor of the building, by far the most desirable space in the building for potential commercial use, into residential apartments rather than leave the space vacant. It defies logic to find that petitioner would have converted the most commercially desirable portion of the building into residential apartments for financial reasons, and yet, leave eight completely renovated units, or apartments, on the second and third floors unoccupied. Moreover, the statement made by petitioner on his Request for Conciliation Conference to the effect that the second and third floor "apartments" were remodeled by 2002 does not support his position that the second and third floors had been renovated as commercial space. Finally, the fact that petitioner did not list the space on the second and third floors with Pyramid, the commercial broker engaged by petitioner to lease the ground floor space, supports the conclusion that petitioner intended to and in fact renovated the second and third floor units to be used as residential apartments.

Petitioner's argument that the renovations on the ground floor of the building were designed in such a manner to accommodate either commercial or residential tenants is also unavailing. Once again, it seems unlikely that petitioner would go through the trouble and expense of renovating the ground floor space into residential apartments if he had any prospect of a commercial tenant. While it is true that some of the renovations to the ground floor could have been equally applicable to either a commercial or residential tenant, the fact remains that the renovations produced five residential apartments which were used in a residential

application. Without a commercial tenant in sight, it can only be concluded that petitioner, at the time the ground floor renovations were made, fully intended for these renovations to result in residential apartment units.

E. Finally, I find that the Division's standard of applying intent at the time that the materials were incorporated into the real property to be a reasonable and objective standard that is in harmony with the spirit, intent and goal of the statute. In this matter, I have no doubt that petitioner's intent at the time he renovated each floor of the 204 Grand Avenue property was to use the renovated space as residential apartments. Accordingly, since the materials used to convert the 204 Grand Avenue property to residential apartments were not used in the renovation of business property or industrial or commercial real property, petitioner is not entitled to a refund of the sales tax he paid on said materials pursuant to Tax Law § 1119(a)(6).

F. The petition of Jalal Zuwiyya is denied and the Division's refund denial dated June 9, 2004 and its Notice of Determination dated September 3, 2004 are both sustained.

DATED: Troy, New York
May 18, 2006

/s/ James Hoefer
PRESIDING OFFICER