



NO. 10-0053

IN THE SUPREME COURT OF TEXAS

PAUL E. NUNU,

Petitioner,

**HARRIS COUNTY APPRAISAL DISTRICT, and
HARRIS COUNTY APPRAISAL REVIEW BOARD**

Respondents,

**On Petition for Review from the Fourteenth Court of Appeals
Cause No. 14-08-00528-CV**

RESPONSE TO THE PETITION FOR REVIEW

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HARRIS COUNTY APPRAISAL REVIEW BOARD**



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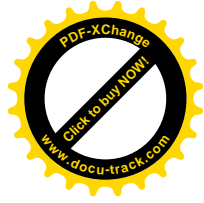
RESPONSE TO THE PETITION FOR REVIEW

TO THE HONORABLE SUPREME COURT:

**I.
INTRODUCTION**

Respondents, the Harris County Appraisal District and the Harris County Appraisal Review Board (hereinafter collectively “HCAD”), respectfully file this Response in opposition to the Petition for Review by Paul E. Nunu (hereinafter “Nunu”).¹

¹ References to the record are as follows: Clerk’s Record (“C.R.”).



II. **STATEMENT OF THE CASE**

The issue in this litigation is whether the Petitioner’s two-story residential house is entitled to a 100% homestead exemption, when Petitioner uses the first floor area as his law office.

The Appraisal District had reduced the homestead exemption by 12% because of the presence of the law office (*i.e.*, to an 88% exemption). The District Court reinstated the 100% exemption. The Court of Appeals reversed, holding that Petitioner was not entitled to the 100% exemption because the business use was incompatible with the residential use, and affirming the Appraisal District’s grant of an 88% exemption.

III. **ISSUE PRESENTED**

Issue: The Court of Appeals correctly applied the Tax Code to the agreed facts when it denied an ad valorem homestead exemption for the portion of Nunu’s residence used as his law office.

IV. **STATEMENT OF FACTS**

Pursuant to Rule 263 of the Texas Rules of Civil Procedure, the parties tried the case upon an agreed statement of facts. (C.R. 46-49). The agreed statement of facts was signed by the parties and certified by the judge (a copy is attached hereto under Tab A of the Appendix). From the agreed statement of facts it is undisputed that:

1. The “subject property” (a two-story residence) is located at 1235 Harvard Street, Houston, Texas, in the Houston Heights, and is identified on the appraisal rolls of HCAD as account number 020-183-000-0003. (C.R. 46, Stmt. 2, 3).



2. Part of the building (the downstairs) on the subject property is used as Nunu's law office, and the other part (the upstairs) is used as Nunu's residence. (C.R. 46-47, Stmt. 6, 7).

3. A portion of the building was used *entirely* for Nunu's law office. (C.R. 47, Stmt. 7).

4. Another portion of the building was used *primarily* for Nunu's law office. (C.R. 47, Stmt. 7).

5. Conferences, depositions, and client interviews for Nunu's law practice were conducted sometimes in the dining room located in the downstairs portion of the building. (C.R. 47, Stmt. 7).

6. Nunu deducted business expenses from his federal income taxes for that portion of the building's utility costs attributable to his law office. (C.R. 47, Stmt. 12).

7. Because of the use of the downstairs portion of the building as a law office, HCAD's Chief Appraiser revoked 12% of the ad valorem tax exemption to reflect that portion of the subject property being used as the law office. The previous ad valorem exemption given had originally included the law office portion of Nunu's building for tax years 2000-2004. (C.R. 47, Stmt. 8).

Notwithstanding the foregoing, Nunu argued that the whole building, including the law office, should be exempt from ad valorem taxation because the property qualified as an "urban homestead" under the Texas Property Code (hereinafter "the Property Code"). HCAD does not dispute that Nunu's property qualifies generally as an "urban homestead." HCAD differs with Nunu on whether a qualification as an "urban



homestead” under the Property Code has any relevance to Nunu’s law office also qualifying for a homestead tax exemption under the Tax Code.

V.
SUMMARY OF THE ARGUMENT

The agreed facts preclude qualification of Nunu’s building for a 100% homestead exemption from ad valorem taxation. Nunu admits that part of his building is used “entirely” for his law office. Indeed, this exclusive use is a prerequisite for Nunu’s “home office” to qualify for a federal income tax deduction, since the Internal Revenue Code limits such a deduction to that part of the building “exclusively used on a regular basis” as his law office.

For ad valorem taxation in Texas, a “... residence homestead exemption does not apply to the value of that portion of the structure that is used primarily for purposes that are incompatible with the owner’s residential use.” Tex. Tax Code Ann. §11.13(k) (Vernon 2008). Thus, the areas Nunu used “entirely” and “primarily” as his office are, by definition, mutually exclusive of and therefore incompatible with his **residential** use. The office portions (12%) of Nunu’s building cannot qualify for homestead tax exemption if, as he has represented to the federal government, they are exclusively used for his business. The Court of Appeals correctly applied the Tax Code to these agreed facts.



VI. ARGUMENT AND AUTHORITIES

A. The Court of Appeals correctly applied the Tax Code to the agreed facts when it concluded Nunu’s law office was not exempt from ad valorem taxation.

Nunu is not entitled to have his law office exempted from ad valorem taxation. The Tax Code is the controlling law in ad valorem tax exemption cases and its remedies are exclusive. Tex. Tax Code Ann. §42.09 (Vernon 2008). Obligations to pay, as well as exemptions from, ad valorem taxes are derived entirely from constitutional and statutory provisions. *Jim Wells County v. El Paso Production Oil and Gas Co.*, 189 S.W.3d 861, 870 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). Article VIII of the Texas Constitution provides the legal authority for imposing ad valorem taxes and exempting residence homesteads from taxation. Tex. Const. art. VIII, §1-b; *see also City of Houston v. Northwood Mun. Utility Dist. No. 1*, 73 S.W.3d 304, 311 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). The laws relating to exemptions from taxation are strictly construed against the grant of such exemptions. *See Bullock v. National Bancshares Corp.*, 584 S.W.2d 268, 271-72 (Tex. 1979), *cert. denied*, 444 U.S. 1016 (1980). Section 11.13 of the Tax Code sets forth the requirements for a residence homestead. Section 11.13 defines “residence homestead” as:

[A] structure (including a mobile home) or a separately secured and occupied portion of a structure (together with the land, not to exceed 20 acres, and improvements used in the residential occupancy of the structure, if the structure and the land and improvements have identical ownership) that:

- (A) is owned by one or more individuals, either directly or through a beneficial interest in a qualifying trust;
- (B) is designed or adapted for human residence;



(C) is used as a residence; and
(D) is occupied as his principal residence by an owner or, for property owned through a beneficial interest in a qualifying trust, by a trustor of the trust who qualifies for the exemption.

Tex. Tax Code Ann. §11.13(j)(1) (Vernon 2008). The Tax Code is clear that a property which meets this definition will not qualify for a total exemption if a portion of the structure is used primarily for commercial purposes that are incompatible with the owner's residential use. Tax Code §11.13(k) provides:

(k) A qualified residential structure does not lose its character as a residence homestead if a portion of the structure is rented to another or is used primarily for other purposes that are incompatible with the owner's residential use of the structure. **However, the amount of any residence homestead exemption does not apply to the value of that portion of the structure that is used primarily for purposes that are incompatible with the owner's residential use.**

Tex. Tax Code Ann. §11.13(k) (Vernon 2008) (emphasis added). When applying Section 11.13 to the agreed facts of this case, it is clear that Nunu is not entitled to an exemption for 100% of his building. As such, the Court of Appeals correctly concluded that the portion of Nunu's building that was used as a law office was not exempt from ad valorem taxation. Accordingly, the Petition for Review should be denied.

1. Residence Homesteads and the Texas Tax Code.

To prevail in this case, Nunu had to clearly show that: (1) the property met the requirements of a residence homestead set forth in Section 11.13(j) of the Tax Code; and (2) his law office was entitled to a homestead exemption from ad valorem taxation, notwithstanding Section 11.13(k) of the Tax Code. Tex. Tax Code Ann. §§11.13(j), (k) (Vernon 2008).



Instead, Nunu asserted that his property met the requirements of an “urban homestead” found in Section 41.002 of the Property Code. Nunu argues that if his property meets the Property Code’s definition of a homestead, then it also meets the Tax Code’s definition of homestead. This argument is misplaced. The cited provisions of the Property Code protect property from forced sale by certain creditors. “The Constitution itself treats property differently depending on whether it is it is being sold to pay the owner’s debts or to pay taxes on the property.” *Hutson v. Tri-County Properties*, 240 S.W.3d 484, 489 (Tex. App.—Fort Worth 2007, pet. denied); see Tex. Prop. Code Ann. §41.001 (Vernon Supp. 2005); Tex. Prop. Code Ann. §41.002 (Vernon 2000). The Property Code does not control or even relate to the qualification for a homestead tax exemption under the Tax Code.

“Homestead” property is defined and treated differently by the Texas Constitution, and subsequently treated differently by the Texas Legislature, depending on the policy and circumstances involved. *Hutson, supra*, 240 S.W.3d at 488. See Tex. Const. art. VIII, §1-b, and art. XVI, §§50, 51; Tex. Tax Code Ann. §11.13(j), (k) (Vernon 2008); Tex. Prop. Code Ann. §41.002 (Vernon 2000). For purposes of determining whether property is exempt from a creditor’s claims, Section 41.002 of the Property Code defines property more broadly as a homestead if it is “used for the purposes of an urban home or as both an urban home *and a place to exercise a calling or business*, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than 10 acres of land . . . together with any improvements thereon.” Tex. Prop. Code Ann. §41.002(a) (Vernon 2000) (emphasis added).



On the other hand, the Tax Code establishes a system of uniform taxation. *Jim Wells County*, 189 S.W.3d at 871. The purpose of exempting a residence homestead from ad valorem taxation is to exempt from taxation that portion of a building the owner actually uses as a home. *See* Op. Tex. Att’y Gen. No. JC-0415 (2001) (“Normally, the exemption applies to those portions of the house actually used for residential, as opposed to business, purposes.”), *quoting* Carole Keeton Rylander, Comptroller of Public Accounts, “Texas Property Tax: Appraisal Review Board Manual” (excerpt attached hereto under Tab B of the Appendix). To be considered a residence homestead eligible for exemption from taxation, the property must meet the requirements of Tax Code Section 11.13. Tex. Tax Code Ann. §11.13(j)(1) (Vernon 2008), *supra*.

Thus, while the Texas Constitution, article XVI, and the Property Code establish criteria to exempt specific property from certain creditors, article VIII of the Texas Constitution and the Tax Code establish specific criteria to exempt specific residential property from taxation. As this Court has said in a somewhat different context: “These statutes create a right not existing at common law and prescribed a remedy to enforce the right. Thus, the courts may act only in the manner provided by the statute which created the right.” *Bullock v. Amoco Production Co.*, 608 S.W.2d 899, 901 (Tex. 1980)

As explained earlier in this Response, Tax Code Section 11.13(k) expressly provides that the residence homestead exemption *does not* apply to the value of that portion of the structure which is used *primarily* for purposes that are *incompatible* with the owner’s **residential use**. *See* Tex. Tax Code Ann. §11.13(k) (Vernon 2008). The operative terms in that section are “primarily” and “incompatible.”



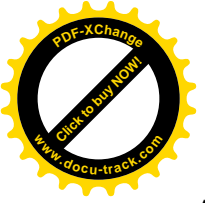
However, the statute does not define “primarily” or which purposes are considered to be “incompatible” with the owner’s residential use. Absent a statutory definition, the Code Construction Act (“the Act”) provides guidance to the courts when interpreting the Tax Code. Tex. Tax Code Ann. § 1.03 (Vernon’s 2008); *Bader v. Dallas County Appr. Dist.*, 139 S.W.3d 778, 780 (Tex. App.–Dallas 2004, pet. denied); Tex. Gov’t Code Ann. §311.001 *et seq.* (Vernon 2005); *Fleming Foods, Inc. v. Rylander*, 6 S.W.3d 278, 283-84 (Tex. 1999). According to the Act, statutes must be construed as written, and if possible, the legislative intent ascertained by the statute’s ordinary language. However, other factors such as administrative construction of the act may be considered to determine the legislature’s intent, even if the statute is not ambiguous. Tex. Gov’t Code Ann. § 311.023 (Vernon 2005). Moreover, when a term or phrase is undefined, it should be given its ordinary or common meaning. *See Monsanto v. Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937, 939 (Tex. 1993); *see also* Tex. Gov’t Code Ann. § 311.011 (Vernon 2005).

The Oxford English Dictionary defines the ordinary or common meaning of “incompatible” as “two things not able to exist or be used together”. *Compact Oxford English Dictionary of Current English*, (3rd ed. 2005). It also defines the ordinary and common meaning of “primarily” as “for the most part.” *Compact Oxford English Dictionary of Current English*, (3rd ed. 2005). Applying these definitions, it is clear that the Tax Code homestead exemption does not apply to portions of Nunu’s building which are, *for the most part*, used for purposes that are *not able to exist together* with the residential use of the property.



In the instant case, Nunu admitted that he used portions of the building *primarily*, *entirely*, and *exclusively* for his law office. The Oxford English Dictionary also defines “exclusively” as “not admitting other things” and defines “entirely” as “wholly, completely, solely.” *Compact Oxford English Dictionary of Current English* (3rd ed. 2005). By definition, it is not possible that the portion of Nunu’s building used *for the most part, wholly, completely, solely* and to the *exclusion of other uses*, as his law office could also be used for a different purpose, such as his home. Giving the statutory words “primarily” and “incompatible” their plain meaning, it is clear that using a portion of the property *primarily, entirely* and *exclusively* as a business is not compatible with Nunu’s residential use of that part of the building.

Further, the statute has been interpreted to mean that any portion of the residence which is used for a business purpose does not qualify for the homestead exemption. For instance, the Texas Attorney General has opined the legislature’s apparent purpose in drafting Tax Code Section 11.13 was to exempt from taxation a residence that the owner uses as his *home*. Op. Tex. Att’y Gen. No. JC-0415 (2001). “Keeping with this apparent intent, subsection (k) preserves the tax exemption, even if part of the residence is not used *primarily* as the owner’s home, but only with respect to that part that the owner continues to use *primarily* as his or her home.” *Id.* (emphasis added). The Attorney General relied in part on the model Appraisal Review Board Manual published by the Comptroller of Public Accounts. According to the Appraisal Review Board Manual, the homestead exemption applies to those portions of the house actually used for residential, as opposed to business, purposes. *See* Carole Keeton Rylander, Comptroller of Public



Accounts, *Texas Property Tax: Appraisal Review Board Manual* (2000) (copy of an excerpt attached hereto as Tab B of the Appendix).

2. Applying the Tax Code to the Agreed Statement of Facts.

When considering the ordinary meaning of the statute, the legislative intent, and the administrative construction of the statute by both the Comptroller of Public Accounts and the Attorney General, it has been shown that the portion of the residence which was used *primarily, entirely, and exclusively* as Nunu’s law office could not also be used *primarily* for residential purposes. As such, Nunu was not entitled to a homestead exemption for those portions of the property which were used as his law office.

Since the Texas Constitutional Convention in 1875, exemptions from taxation have been disfavored in the law. *River Oaks Garden Club v. City of Houston*, 370 S.W.2d 851, 854 (Tex. 1963) (“The action of the delegates in the Constitutional Convention of 1875 on various tax exemption proposals, as reflected in the Journal of the Convention, indicates that they intended that exemptions from taxes be narrow and limited.”). This Court has consistently recognized that statutory exemptions from taxation should be “subject to strict construction” as they are the antithesis of uniformity and equality and place a greater burden on other taxpayers. See *Bullock v. National Bancshares*, 584 S.W.2d at 271-72 (Tex. 1979); *Bexar Appraisal Dist. v. Incarnate Word College*, 824 S.W.2d 295, 297 (Tex. App.—San Antonio 1992, writ denied); *North Alamo Water Supply Corp. v. Willacy County Appr. Dist.*, 804 S.W.2d 894, 899 (Tex. 1991); *Circle C Child Development Center v. Travis Central Appr. Dist.*, 981 S.W.2d 483, 486 (Tex. App.—Austin 1998, no pet.). Thus, claims for tax exemptions must be



“strictly and narrowly construed, resolving doubts *against the taxpayer.*” *Davies v. Meyer*, 541 S.W.2d 827, 829 (Tex. 1976) (emphasis added). “Because tax exemptions are not favored by the law and are strictly construed, the party claiming an exemption bears the heavy burden of proof of *clearly showing* by a preponderance of the evidence that it falls within the statutory exemption.” *Circle C Child Development Center*, 981 S.W.2d at 486 (emphasis in original); *see also Davies*, 541 S.W.2d 827; *Lamb County Appraisal District v. South Plains Hospital-Clinic, Inc.*, 688 S.W.2d 896 (Tex. App.—Amarillo 1985, no writ).

In the instant case, HCAD revoked Nunu’s ad valorem homestead exemption for that portion of the residence dedicated to his law office (approximately 12% of the total building value) for tax years 2000-2004. (C.R. 47, Stmt. 8). This partial revocation was the Chief Appraiser’s statutory and constitutional non-discretionary duty. *See Atascosa County v. Atascosa County Appraisal District*, 990 S.W.2d 255, 259 (Tex. 1999). In the agreed statement of facts, Nunu admitted that “the study” was used *entirely* for his office and that the “downstairs bedroom” was used *primarily* for conducting his law practice. (C.R. 47, Stmt. 7). Nunu also admitted that the “dining room” on the first floor was used to hold conferences and depositions and that the “sitting room” was used to interview clients. (*Id.*).

Nunu also admitted that he deducted as a business expense the building’s utility costs attributable to his law office for tax years 2000-2004 on his IRS tax returns. (C.R. 47, Stmt. 12). According to 26 U.S.C. § 280A(c)(1)(A) (2007), such a deduction only applies to that “portion of the dwelling unit which is *exclusively used* on a regular basis



... as the principal place of business for any trade or business of the taxpayer” 26 U.S.C. § 280A(c)(1)(A) (emphasis added). By way of juxtaposition, Nunu could not have claimed this deduction if his “office” had also been used as his home. The Internal Revenue Service provides the following example:

“You are an attorney and use a den in your home to write legal briefs and prepare clients’ tax returns. Your family also uses the den for recreation. The den is not used exclusively in your profession, so you cannot claim a business deduction for its use.”

Internal Revenue Service Publication 587, *Business Use of Your Home* (2007), p. 3, (copy is attached hereto as Tab C in the Appendix).² Thus, when Nunu represented to the Federal Government, under penalty of perjury, that a portion of his residence was used on a regular basis exclusively for his principal place of business, he also proved that not all of his building was entitled to a residence homestead exemption from ad valorem taxation.

VII. **CONCLUSION AND PRAYER**

A residence homestead exemption from taxation does not apply to the value of that portion of the structure which is used primarily for purposes that are not compatible with the owner’s residential use. Tex. Tax Code Ann. §11.13(k) (Vernon 2008). Based on the plain meaning, legislative intent, and administrative construction of the statute, it is clear that Nunu’s property is not entitled to a 100% residence homestead exemption for those portions of the property which he used primarily, entirely, and exclusively for his

² Except for tax year 2003, this same example appeared in Publication 587 for all of the relevant tax years.



law office; thus, HCAD properly reduced the exemption by 12%. The agreed statement of facts fails to prove Nunu's law office would be eligible for exemption, and to the contrary the agreed statement affirmatively establishes that it would not. The Court of Appeals did not err in concluding that the portion of Nunu's property that was used as a law office should not be exempted as a homestead.

WHEREFORE, PREMISES CONSIDERED, Respondents, Harris County Appraisal District and Harris County Appraisal Review Board, pray that this Court will deny the Petition for Review.

Respectfully submitted,

By: _____

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ATTORNEYS FOR RESPONDENTS,
Harris County Appraisal District and
Harris County Appraisal Review Board



CERTIFICATE OF SERVICE

I hereby certify that on this ____ the day of May, 2010, a true and correct copy of the foregoing Response to the Petition for Review was sent by certified mail, return receipt requested, to Mr. Paul E. Nunu, 1235 Harvard Street, Houston, Texas 77008.

G. Todd Stewart