STATE OF WISCONSIN

TAX APPEALS COMMISSION

CITY OF LACROSSE, **DOCKET NO. 03-M-134**

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE, **RULING AND ORDER**

Respondent,

vs.

GUNDERSEN CLINIC, LTD.,

Intervenor.

CITY OF LACROSSE, **DOCKET NO. 04-M-134**

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

GUNDERSEN CLINIC, LTD., **DOCKET NO. 04-M-139**

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vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DAVID C. SWANSON, COMMISSIONER:

These matters come before the Commission on a motion for summary judgment filed by petitioner-intervenor Gundersen Clinic, Ltd., a Wisconsin corporation ("Gundersen") that owns and operates a medical clinic located in the City of La Crosse, Wisconsin (the "City"). Gundersen appears by Attorney Maureen A. McGinnity of Foley & Lardner LLP. The City, a petitioner in these matters, appears by Attorney Robert Horowitz of Stafford Rosenbaum LLP. Respondent, the Wisconsin Department of Revenue (the "Department"), appears by Attorneys Donald J. Goldsworthy and Lisa Ann Gilmore. Gundersen has submitted a brief and affidavits with exhibits and a reply brief with a supplemental affidavit and exhibits in support of its motion. The City has submitted a brief and affidavits with exhibits in opposition to Gundersen's motion. The Department has submitted a brief and affidavit with exhibits in support of Gundersen's motion.

Having considered the entire record before it, the Commission finds, concludes, rules and orders as follows:

INTRODUCTION

The central issue in these cases is whether nine categories of medical devices owned and operated by Gundersen are exempt from property tax under Wis. Stat. § 70.11(39), which exempts "personal computers," "servers," and "electronic peripheral equipment," but not "equipment with embedded computerized components." In particular, the parties dispute the application of the Department's

Computer Exemption Guidelines for Assessors and Property Owners (the "Computer Exemption Guidelines," "Exemption Guidelines" or "Guidelines"), which have been incorporated into the Property Assessment Manual for Wisconsin Assessors (the "Manual"). The Guidelines generally provide that medical devices are exempt from property tax if they are either computers or connected to and controlled by a computer, and further provide examples of exempt and taxable medical devices. In these cases, the State Board of Assessors (the "Board") determined that all of Gundersen's medical devices at issue were exempt under Wis. Stat. § 70.11(39) and the Guidelines during 2002 and 2003 (the "years at issue" or "period at issue").[1] The City appealed, and Gundersen intervened.

ISSUES PRESENTED

1. When a municipality challenges an exemption from property tax granted by the State Board of Assessors, which party has the burden of proof?

2. Do the Computer Exemption Guidelines apply for determining the treatment of the medical devices at issue in these cases under Wis. Stat. § 70.11(39)?

3. Are the medical devices at issue in these matters exempt from property tax under Wis. Stat. § 70.11(39)?

JURISDICTIONAL FACTS

A. Docket Number 03-M-134

1. Gundersen filed its City personal property return for the year 2002 on or about March 1, 2002. (Affidavit of Daryl E. Applebury dated July 11, 2007

[1] All statutory quotations and references in this brief are to the 2005-06 Wisconsin Statutes. The relevant statutes were not amended during the period at issue.

("Applebury Aff.), ¶ 2 & Ex. 1.) On Schedule C-1 of the return, covering "Exempt Computer Equipment and Software," Gundersen reported items with a total net indexed value (full value) of $10,879,889, which items included the medical devices at issue in this matter.

2. The City Assessor agreed that two categories of Gundersen's medical devices were exempt under Wis. Stat. § 70.11(39) and the Computer Exemption Guidelines. However, the assessor reclassified most of Gundersen's other medical devices at issue as taxable property and reduced the 2002 net indexed value (full value) of Gundersen's exempt computer equipment and software to $7,472,328. (Id., ¶ 3 & Ex. 2, 3; City's Am. Pet. dated May 12, 2003, p. 2.)

3. Gundersen filed an Objection with the Board to challenge the City's reclassifications of the subject medical devices. (Applebury Aff., ¶ 4 & Ex. 4.) On March 12, 2003, the Board issued a Notice of Determination reversing most of the City's reclassifications, finding that the medical devices were exempt under Wis. Stat. § 70.11(39) and the Computer Exemption Guidelines. The Board increased the total full value of exempt computer equipment and software to $10,645,370, resulting in a refund (the "2002 Board Determination"). (Id., ¶ 5 & Ex. 5.)

4. On May 9, 2003, the City filed a Petition for Review with the Commission challenging the 2002 Board Determination, and on May 12, 2003, the City filed an Amended Petition for Review (the "2002 Appeal").

5. The Department of Revenue ("Department") filed a Notice of Appearance on May 28, 2003.

6. Gundersen filed a motion to intervene in the 2002 Appeal, which the Commission granted by Order dated January 29, 2004.

B. Docket Numbers 04-M-134 and 04-M-139

7. Gundersen filed its City personal property return for the year 2003 on March 17, 2003. (Applebury Aff., ¶ 6 & Ex. 6.) On Schedule C-1 of the return, covering "Exempt Computer Equipment and Software," Gundersen reported items with a total net indexed value of $8,416,636, which items included the medical devices at issue in this case and also included multifunction devices used for document production ("MFDs").

8. The City Assessor reclassified the medical devices at issue and the MFDs as taxable property and later amended such reclassifications, ultimately reducing the 2003 net indexed value (full value) of Gundersen's exempt computer equipment and software to $6,224,542. The Assessor again allowed the exemption for two categories of Gundersen's medical devices but reclassified the others as taxable. The Assessor also reclassified Gundersen's MFDs as taxable. (Id., ¶ 7 & Ex. 7, 8.)

9. Gundersen filed an Objection with the Board to challenge the City's 2003 reclassifications of the subject medical devices and the MFDs. (Id., ¶ 8 & Ex. 9.) On March 29, 2004, the Board issued a Notice of Determination reversing the City's reclassifications of the medical devices and sustaining its reclassifications of the MFDs. The Board increased the 2003 total full value of exempt computer equipment and software to $8,416,600, resulting in a refund ("2003 Board Determination"). (Id., ¶ 9 & Ex. 10.)

10. On May 14, 2004, the City filed a Petition for Review with the Commission challenging the 2003 Board Determination.

11. On May 24, 2004, Gundersen filed a Petition for Review and Cross-Appeal to challenge the 2003 Board Determination with respect to the MFDs and respond to the City's 2003 Appeal regarding medical equipment (the City's 2003 Petition and Gundersen's Petition and Cross-Appeal are collectively referred to herein as the "2003 Appeals").

12. The Department filed a Notice of Appearance on May 28, 2003.

C. Consolidated Proceedings

13. By stipulated Order dated March 18, 2005, the Commission consolidated the 2002 and 2003 Appeals for all purposes (the "Consolidation Order"), but deferred further proceedings regarding the MFDs pending final resolution of the Xerox Corporation cases (Docket Numbers 02-M-66 and 02-M-67).

14. The Consolidation Order provided that the tax status of the subject medical devices would be determined on the basis of representative examples in each of nine categories as agreed by the parties ("Representative Examples"). The Consolidation Order also set forth a schedule for discovery, equipment inspection, and expert designations and reports ("pre-hearing deadlines").

15. Following the completion of discovery and the expiration of the pre-hearing deadlines, Gundersen moved for leave to file a summary judgment motion, which the Commission granted by Order dated May 3, 2007.

16. The parties subsequently filed their briefs and supporting materials

pursuant to the Commission's May 16, 2007 Briefing Order.

MATERIAL FACTS[2]

A. The Subject Medical Devices

17. The categories of medical devices at issue in these matters,[3] and the Representative Examples for each category, are as follows:

	Category	Item
1.	Ultrasound equipment	Acuson Sequoia C256 Echocard System, Asset #9221
2.	MRI equipment	Siemens Magnetom Vision 1.5 System, Asset #7408
3.	Radiation oncology and linear accelerator equipment	Varian 21 EXP Radiotherapy Linear Accelerator, Asset #1188
4.	Laser equipment	Alcon Surgical Autonomous LadarVision 4000, Asset #9484
5.	Mammography equipment	GE DMR Mammography Unit, Asset #9844
6.	Cardiology equipment	Cardiometrics Cardiassist ECP System, Model 3000, Asset #9839
7.	Nuclear medicine equipment	Elscint Gamma Camera, Asset #6736
8.	Digital imaging equipment	Seimens Multistar TOP Special Procedures Laboratory, Asset #4482
9.	Diagnostic equipment	Nervus/Aura Comet 4 Digital EEG/LTM PSG, Asset #9210

(Second Amendment to Consolidation Order dated August 14, 2006, Ex. 1; Applebury Aff., Ex. 11 (photographs of equipment)).

18. Representative Example 1, the Acuson Sequoia ultrasound equipment, is an echocardiography instrument based on a computer that runs a version

[2] Gundersen asserts that the facts cited in this section are undisputed. However, while the City does not contest Gundersen's technical descriptions of the medical devices at issue, it does dispute how their technical specifications and various definitions relate to the applicable legal definitions.

[3] Gundersen's motion for summary judgment includes only the medical devices in categories 1-4 and 6-9, thus excluding category 5.

of UNIX as its operating system, which is updated by Gundersen's local information technology ("IT") staff. UNIX is a standard multi-user operating system that loads from disk and runs on servers. The device connects to the network and allows remote access to other users via a Virtual Private Network (VPN). The server is connected to peripheral equipment which requires the server to function. (Report of Rick Konopacki dated August 31, 2006 ("Konopacki Report"), § 7.1.[4]) The vendor has access to the operating system over the Internet via a virtual private network connection so the vendor can run diagnostic tests of the peripheral connected to the computer. (Konopacki Dep., at 59-60.)

19. Representative Example 2, the Siemens Magnetom Magnetic Resonance Imaging (MRI) equipment, is an instrument based on a special version of the multi-user UNIX operating system that loads from disk and is accessible via the Internet. (Konopacki Report, § 7.2.) The manufacturer's system manual for this equipment describes the computer system that controls it, including the fact it works with the UNIX operating system and Numeras user software. UNIX is a general server operating system that allows multiple users to access it simultaneously. (Konopacki Dep., at 71-72; Dep. Ex. 34.)

20. Representative Example 3, the Varian 21 EXP Radiotherapy Linear Accelerator, is designed to deliver radiotherapy and is based around a collection of computers utilized to both calculate and deliver dose. The computers include a commercially available Dell Optiplex and would be considered personal computers by

[4] The reports and deposition excerpts cited in this section are attached to the Affidavit of Maureen A. McGinnity dated July 11, 2007 ("McGinnity Aff.").

the manufacturer. They run MS-DOS and Microsoft Windows 2000, and the operating systems are accessible by the operator. The peripheral equipment to which they connect require the personal computers to operate. (Konopacki Report, § 7.3.) The manufacturer's system manual for this equipment includes a schematic that shows a personal computer and mentions an operating system. (Konopacki Dep., at 72-73; Dep. Ex. 35.)

21. Representative Example 4, the Alcon Laarvision 4000 laser equipment, is used for LASIK corrective surgery. This equipment is based on an Intel Pentium II computer running Microsoft Windows98 as an operating system. The operating system loads from disk and is completely accessible by the operator allowing the execution of other software. The laser requires the computer to operate as a LASIK. (Konopacki Report, § 7.4.) Documentation from the manufacturer shows that the equipment includes a personal computer. (Konopacki Dep., at 74-75; Dep. Ex. 37.)

22. Representative Example 5,[5] the General Electric mammography unit, has a gantry and a user control section, both with central processing units. The operator interface consists of a keyboard and a 2-line character display. The computer component is dedicated to providing functionality, and the operator has no access to that component or operating system. There is also no commercially standard operating system and no other software can be executed. The instrument is not connected to nor requires for operation any computer. (Konopacki Report, § 7.5.)

[5] Gundersen did not include category 5 equipment in its motion for summary judgment. Gundersen's expert concluded that category 5 devices were equipment with embedded computerized components, which is not exempt under Wis. Stat. § 70.11(39). Gundersen concedes this point (Gundersen Brief, p. 27 n. 4), and this equipment thus is not discussed further in this Ruling and Order.

23. Representative Example 6, the Cardiometrics Cardiassist ECP System, is used to deliver circulatory assist therapy and is designed around a standard personal computer running Microsoft Windows95. The user has access to the operating system as it boots, and it would easily allow the installation and execution of other software. The computer is connected to peripheral equipment, which requires the computer to operate. (Konopacki Report, § 7.6.)

24. Representative Example 7, the Elscint Gamma Camera in the nuclear medicine equipment category, uses a standard commercially available Hewlett Packard personal computer running a standard version of Microsoft Windows2000, which loads from disk and is accessible to the operator. The computer could easily be separated from the camera and be used for other purposes while the camera requires the computer for operation. (Konopacki Report, § 7.7.) The manufacturer's operating manual for this equipment describes the computer, the operating system, and how to interact with the operating system. (Konopacki Dep., at 79-80; Dep. Ex. 41.)

25. Representative Example 8, the Seimens Multistar digital imaging equipment, is fluoroscopy equipment designed to run a standard version of Microsoft Windows. The software that provides the functionality of the machine is a program that depends on that operating system, which means that updates to the operating system require FDA approval. This indicates that operation of the equipment is dependent on both the operating system and software. (Konopacki Report, § 7.8.) The operating system runs on a personal computer. (Konopacki Dep., at 64.)

26. Representative Example 9, the Nervus/Aura Comet diagnostic equipment, is an electroencephalograph (EEG) that uses a standard commercially available Hewlett Packard personal computer running Microsoft Windows, which the local IT staff updates. The computer can be separated from the rest of the device and used to run other programs. The rest of the instrument requires the computer for operation. (Konopacki Report, § 7.9.)

B. The Expert Opinions

27. Gundersen's designated expert is Richard Konopacki, a Masters-degreed biomedical engineer with 25 years' experience designing and building electronic devices with embedded computerized components for use in medical research. Mr. Konopacki also has experience writing software that runs on a standard personal computer designed to control medical equipment to which it is interfaced. (Konopacki Rep., p. 2; Konopacki Dep., p. 53; McGinnity Aff., Ex. 50.) He is responsible for all aspects and components of the computer network for the University of Wisconsin Medical School, including design, functionality, operations, and development. (DeLuca Dep., p. 109.)

28. The City designated Paul M. DeLuca, Jr., Ph.D.,[6] as an expert witness. Dr. DeLuca is Professor of Medical Physics, Radiology, Human Oncology, and Engineering Physics at the University of Wisconsin School of Medicine and Public Health in Madison, Wisconsin. He is also Associate Dean for Research and Graduate

[6] The deposition of Dr. DeLuca dated October 27, 2006 ("DeLuca Dep.") is attached to the Affidavit of Robert Horowitz dated October 3, 2007 ("Horowitz Aff."). Dr. DeLuca's Report ("DeLuca Report") is attached to the Affidavit of Dr. DeLuca dated October 2, 2007 ("DeLuca Aff.").

Studies and Vice Dean of the University of Wisconsin Medical School. He helped found and subsequently chaired for more than 10 years the Department of Medical Physics—nationally recognized as the finest department of medical physics in the nation. (DeLuca Aff. ¶ 2.) He received a Ph.D. in experimental physics from the University of Notre Dame in 1971. He has 35 years of experience in medical physics, which studies the application of physics to medicine, specifically in the areas of radiation sciences and imaging sciences. This includes the kind of medical devices involved in this case. (DeLuca Aff. ¶ 3.)

29. Dr. DeLuca has no training in computer engineering or computer design and has never designed or built a computer. (DeLuca Dep., at 91, 95-96, 98, 108.) Dr. DeLuca's expertise is in the application of medical devices of the type at issue. He has taught people how such medical devices function, what the data looks like that is acquired from such devices, and how to analyze the data. (Id. at 91, 94.)

30. Within the computer industry, the term "computer" means a combination of central processing unit, memory, storage and input and output interfaces that is designed to run programs under operator control. (Konopacki Report, p. 2.)

31. Within the computer industry, the term "personal computer" means a small computer designed to be used by one user at a time who is able to execute multiple computer programs as needed. Personal computers are sold with standard operating systems such as desktop versions of Microsoft Windows or Apple Mac OS X. (Id.)

32. Within the computer industry, the term "networked personal computer" means a personal computer connected to a local area network allowing it to communicate with other computers or the Internet. (Id.,)

33. Within the computer industry, the term "server" means a computer designed to interact with several users simultaneously by running an operating system like UNIX or a server version of Microsoft Windows or Apple Mac OS X. (Id., Konopacki Dep., p. 53.)

34. Within the computer industry, the term "electronic peripheral equipment" means equipment that is not normally an integral part of a computer but which can be connected to a computer to add functionality, and which is not fully functional until connected directly to a computer. (Konopacki Report, pp. 2, 5; Konopacki Dep., pp. 34-35.)

35. The McGraw-Hill Dictionary of Scientific and Technical Terms defines "peripheral equipment" as "equipment that works in conjunction with a computer but is not part of the computer itself." (DeLuca Report, p. 3.)

36. Within the computer industry, the term "embedded computerized component" means a partial component of a computer such as a microprocessor that is integrated into a piece of equipment and is not directly accessible either physically or operationally through interactive commands by the user of the equipment. (Konopacki Report, p. 3; Konopacki Dep., pp. 36-38.)

37. If a device contains a computer that boots up an operating system accessible by the user, has standard input and output devices and graphics display and

allows the user to install additional software that can operate independently of the rest of the device, it is a computer. (Id., p. 5.)

38. To determine into which of the statutory classifications of computer equipment the subject medical devices fit, Mr. Konopacki conducted a detailed review of the user manuals for each device; he personally inspected each of the Representative Examples; and he interviewed Gundersen's personnel who are responsible for operating the Representative Examples and for technical support of the equipment.

39. Based on his knowledge and experience and his work in this case, Mr. Konopacki opines to a reasonable degree of professional certainty that the Representative Examples fall within the following statutory classifications for the reasons specified:

REP. EX.	**DEVICE**	**STATUTORY CLASSIFICATION**	**RATIONALE**
1.	Acuson Seqouia Ultrasound	Server connected to electronic peripheral equipment	Includes a computer than runs UNIX, which is a standard multi-user operating system; device connects to network and allows remote access; server is connected to peripheral equipment that requires the server to function
2.	Siemens Magnetom MRI	Server connected to electronic peripheral equipment	Computer runs Numeras which is form of UNIX operating system; users able to enter commands
3.	Varian 21 EXP Radiotherapy Linear Accelerator	Personal computer connected to electronic peripheral equipment	Includes collection of personal computers, including commercially available Dell Optiplex computer, that run MS-DOS and Microsoft Windows 2000; operating systems are accessible by user; connected to peripheral equipment that requires the personal computers to operate
4.	Alcon	Personal computer	Has Intel Pentium II computer

REP. EX.	DEVICE	STATUTORY CLASSIFICATION	RATIONALE
	Ladarvision 4000 laser equipment	connected to electronic peripheral equipment	running Microsoft Windows98 as operating system; operating system is accessible to user; laser requires the computer to operate it
5.	General Electric mammography unit	Embedded computerized component	Operator has no access to the component or operating system; no commercially standard operating system and no other software can be executed; not connected to a computer and does not require a computer for its operation
6.	Cardiometrics Cardiassist ECP System	Personal computer connected to electronic peripheral equipment	Designed around standard personal computer that runs Microsoft Windows95; user has access to operating system; allows installation of other software; computer is connected to peripheral equipment that requires the computer to operate
7.	Elscint Gamma Camera	Personal computer connected to electronic peripheral equipment	Uses standard commercially available Hewlett Packard personal computer that runs a standard version of Microsoft Windows2000; accessible to operator; computer could easily be separated from camera and used for other purposes; camera is a peripheral because it requires the computer for operation
8.	Siemens Multistar digital imaging equipment	Personal computer connected to electronic peripheral equipment	Runs standard version of Microsoft Windows; operation of the equipment is dependent on both the operating system and software
9.	Nervus/Aura Comet diagnostic equipment	Personal computer connected to electronic peripheral equipment	Uses standard commercially available Hewlett Packard personal computer running Microsoft Windows; local IT staff updates the operating system; computer can be separated from the rest of the device and used to run other program; rest of instrument requires the computer for operation

(Konopacki Report, pp. 6-7; Konopacki Dep., pp. 40-41, 46-47, 50-51, 58-65, 71-82, 89-90.)

40. Mr. Konopacki considered the Computer Exemption Guidelines in connection with his work in this case, particularly the way they categorized equipment as to whether they are connected to computers or not. (Konopacki Report, p. 3; Konopacki Dep., pp. 65-66.) He agrees with the conclusions in the Guidelines regarding the classifications of medical devices. (Konopacki Dep., p. 69.)

41. Dr. DeLuca's assignment in this case was to determine with respect to each of the nine Representative Examples whether it was (1) a computer, (2) electronic peripheral equipment, or (3) equipment with embedded computerized components. He was instructed to put everything into one of those three categories if it fit. (DeLuca Dep., p. 68.)

42. For purposes of his work in this case, Dr. DeLuca relied upon common usage definitions of the statutory terms, not technical definitions. (Id. at p. 68-69.) At the suggestion of the City's attorney, Mr. Horowitz, Dr. DeLuca used the American Heritage Dictionary of the English Language (hereinafter "American Heritage Dictionary") as a resource, although that is not a dictionary he would normally use. (DeLuca Dep., at 105; DeLuca Report, pp. 2-3..) Dr. DeLuca also quoted in his report definitions from the McGraw-Hill Dictionary of Scientific and Technical Terms but elected to rely upon the American Heritage Dictionary definitions instead. (DeLuca Report, pp. 2-3.)

43. The American Heritage Dictionary defines "peripheral" in the computer science context as "an auxiliary device, such as a printer, modem, or storage

system, that works in conjunction with a computer." (DeLuca Report, p. 2.) The American Heritage College Dictionary defines "conjunction" as "the state of being joined. . . . one resulting from or embodying a union; a combination." (DeLuca Dep., pp. 84-88.)

44. The term "embedded computerized component" is not defined in the American Heritage Dictionary. (DeLuca Report, p. 2.)

45. Dr. DeLuca has no prior experience differentiating between electronic peripherals and equipment with embedded computerized components. (DeLuca Dep., p. 109.) In fact, Dr. DeLuca has never seen the term "embedded computerized component" and does not use that term. (Id., pp. 99, 104.)

46. Dr. DeLuca testified that electronic peripheral equipment and equipment with embedded computerized components may be the same thing because most peripherals include computerized components. (Id., p. 120.)

47. For purposes of this case, Dr. DeLuca equated "equipment with embedded computerized components" with "embedded computers." (Id., pp. 99-100, 134.) Relying on a common use dictionary definition, he considered "embedded" to mean "integral," which in turn meant "essential or necessary for completeness." (DeLuca Report, p. 2.) If a personal computer was fundamental to the functioning of a medical device, he termed it equipment with embedded computerized components. (Id., pp. 142-45.)

48. According to Dr. DeLuca, a computerized component has a computer to give it some or all of its functionality, so if you have equipment with

embedded computerized components, there must be a computer somewhere. (Id., p. 149.)

49. Dr. DeLuca opined that all nine Representative Examples are equipment with embedded computerized components and that none are computers or electronic peripheral equipment. (DeLuca Report, pp. 5-6.)

50. Dr. DeLuca recognized that his opinions in this case are contrary to the Computer Exemption Guidelines. He did not give any consideration to the Exemption Guidelines in formulating his opinions in this case and made no effort to harmonize his opinions with the Exemption Guidelines. (Id., pp. 34-36, 159.)

APPLICABLE LAW

Wis. Stat. § 70.11(39) provides in pertinent part:

> **70.11 Property exempted from taxation**. The property described in this section is exempted from general property taxes . . . Property exempted from general property taxes is:
>
> (39) COMPUTERS. . . . mainframe computers, minicomputers, personal computers, networked personal computers, servers, terminals, monitors, disk drives, electronic peripheral equipment, tape drives, printers, basic operational programs, systems software, and prewritten software. The exemption under this subsection does not apply to . . . equipment with embedded computerized components or telephone systems . . . .

The Exemption Guidelines in effect for 2002 provided in pertinent part:

Item	Description	Taxable/Exempt	Comments
Medical devices	Certain electronic imaging and monitoring devices	Exempt	Computer or electronic peripheral equipment – For example, an ultrasound imaging device.

	X-Ray imaging	Taxable	Not a computer or connected to and operated by a computer

(2002 Computer Exemption Guidelines for Assessors and Property Owners; Gundersen Brief, App. 3.)

The Exemption Guidelines in effect for 2003 similarly provided:

Item	**Description**	**Taxable/Exempt**	**Comments**
Medical devices	Certain electronic imaging and monitoring devices	Exempt	Computer or electronic peripheral equipment – Examples include: ultrasound imaging device, magnetic resonance imaging device (MRI), and computerized axial tomography
	X-Ray imaging	Taxable	Not a computer or connected to and operated by a computer

(2003 Computer Exemption Guidelines for Assessors and Property Owners; Gundersen Brief, App. 6.)

> Wis. Stat. § 70.34 provides in pertinent part:
>
> **Personalty.** All articles of personal property shall, as far as practicable, be valued by the assessor upon actual view at their true cash value; . . . . In carrying out the duties imposed on the assessor by this section, the assessor shall act in the manner specified in the Wisconsin property assessment manual provided under s. 73.03(2a) . . . .
>
> Wis. Stat. § 73.03(2a) provides in pertinent part:
>
> **73.03 Powers and duties defined.** It shall be the duty of the department of revenue, and it shall have the power and authority:
>
> * * *
>
> (2a) To prepare, have published and distribute to each property tax assessor and to others who so request assessment manuals. The manual shall discuss and illustrate accepted assessment methods, techniques and practices with a view to more nearly uniform and more consistent

> assessments of property at the local level. The manual shall be amended by the department from time to time to reflect advances in the science of assessment, court decisions concerning assessment practices, costs, and statistical and other information considered valuable to local assessors by the department. . . .

CONCLUSIONS OF LAW

1. There are no genuine issues of material fact in dispute, and these matters are appropriate for summary judgment as a matter of law.

2. The City has the burden of proof in these matters.

3. The City has failed to satisfy its burden of proof.

4. The Computer Exemption Guidelines are authoritative regarding the treatment of the medical devices at issue in these cases under Wis. Stat. § 70.11(39).

5. The medical devices at issue in these matters were exempt from property tax under Wis. Stat. § 70.11(39), as interpreted in the Computer Exemption Guidelines and held by the Board, during the period at issue.

RULING

I. Summary Judgment

Summary judgment is warranted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). Gundersen has moved for summary judgment in these matters, and the City has requested summary judgment in its favor. (City Brief, p. 4.) Thus, there is no genuine issue as to any material fact,

and these matters are appropriate for summary judgment as a matter of law.

II. Standard of Review

The Department's assessment is presumed to be correct, and it is the petitioner's burden to demonstrate that the assessment is incorrect. *See Hormel Foods Corp. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-741 at 32,962 (WTAC 2004), *aff'd*, Case No. 04-CV-1278 (Dane Co. Cir. Ct. 2004). If there is credible evidence that may in any reasonable view support the assessor's valuation, that valuation must be upheld. *Universal Foods Corp. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-316 at 31,111 (WTAC 1997).

In this case, the Department's assessments of the medical devices at issue are zero. The City challenges those assessments, but argues that Gundersen, as the taxpayer, has the burden of proof in these matters under Wis. Stat. § 70.109.[7] (City Brief pp. 23-25.)

The Commission recently addressed this very issue in *City of Green Bay v. Dep't of Revenue and Green Bay Packaging, Inc.*, Wis. Tax Rptr. (CCH) ¶ 401-070 (WTAC Dec. 21, 2007), and determined that the City's position is without merit. *See also, City of West Allis v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶ 203-043 (WTAC Mar. 27, 1989). As in *Green Bay Packaging*, the City cites § 70.109 and various cases in which a taxpayer sought to overturn a municipality's denial of a claim of exemption, but that is not the situation in this case. The Board has issued its assessments in these matters, and the City has challenged those assessments. By defending its exemptions, Gundersen is

[7] "Exemptions under this chapter shall be strictly construed in every instance with a presumption that the property in question is taxable, and the burden of proof is on the person who claims the exemption."

not "claiming" exemptions; the exemptions have been granted by the Board.

Like the taxpayer in *Green Bay Packaging*, Gundersen is not a necessary party to these matters. Had Gundersen stayed on the sidelines, the City's petitions for review would have proceeded with the Department as respondent. According to the City's argument, the Department then would have had the burden of proving the correctness of the Board's assessments, contrary to long-standing precedent and practice. Indeed, the Department continues to defend the assessments in these matters and supports Gundersen's motion.

As the party challenging the Board's assessments, the City has the burden of proof in these matters. To satisfy that burden of proof, the City must present "competent, credible and unambiguous evidence" that the Board erred in setting the assessments at issue. *City of West Allis, supra; see also, State ex rel. Ft. Howard Paper Co. v. Lake Dist. Bd.*, 82 Wis. 2d 491, 501, 263 N.W.2d 178 (1978).

III. Rules of Statutory Construction

Statutes conferring tax exemptions are to be strictly construed. Wis. Stat. § 70.109; *Columbus Park Housing Corp. v. City of Kenosha,* 267 Wis. 2d 59, 671 N.W.2d 633 (2003). Wisconsin courts apply a "strict but reasonable construction" in interpreting tax exemption statutes. *FH Healthcare Dev., Inc. v. City of Wauwatosa*, 276 Wis. 2d 243, 254, 687 N.W.2d 582 (Ct. App. 2004). An exemption statute need not be given the narrowest possible construction. *See Columbia Hospital Assn. v. City of Milwaukee*, 35 Wis. 2d 660, 668, 151 N.W.2d 750, 754 (1967); *Friendship Village of Greater Milwaukee, Inc. v. City of Milwaukee*, 181 Wis. 2d 207, 219, 511 N.W.2d 345, 350 (Ct. App. 1993) (pet. den'd).

When interpreting a statute, we assume that the legislature's intent is expressed in the statutory language. Statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Circuit Court*, 271 Wis. 2d 633, 663, 681 N.W.2d 110 (2004). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.; see also,* Wis. Stat. § 990.01(1). Context and structure are also important factors, and construction should strive to avoid absurd or unreasonable results. "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." *Id*.

The definition of a statutory term is not determined by expert testimony but rather by legal authorities. "We question whether an expert is qualified to give testimony on the meaning of a statute or administrative rule. This is an exercise for judges and lawyers; not others." *Town of East Troy v. Town & Country Waste Service, Inc.*, 159 Wis. 2d 694, 707 n.7, 465 N.W.2d 510 (Ct. App. 1990). The requirement to give "technical or specially-defined words or phrases . . . their technical or special definitional meaning" under Wis. Stat. § 990.01(1) "applies to technical words and phrases that have a peculiar meaning in the law--not in some other field." *Id.* (emphasis in original). Consequently, while expert testimony may be helpful in defining a statutory term, it is not determinative.

IV. Wis. Stat. § 70.11(39)

In addressing the construction of Wis. Stat. § 70.11(39), the City argues that the language of the statute does not create two mutually exclusive categories of exempt and taxable computer equipment, as argued by Gundersen. Instead, the City maintains that the first clause of § 70.11(39) establishes the exemption, and the second clause indicates which items included in the first clause nevertheless are taxable. (City Br., pp. 27-30.) The City analogizes its preferred construction to the construction of Wis. Stat. § 70.11(4m) recently followed in *FH Healthcare, supra.* Applying the City's construction of the statute, the medical devices at issue would be exempt only if each passed a two-part test requiring it to be (1) a personal computer, server or electronic peripheral equipment, and (2) not equipment with embedded computerized components.

The Commission declines to adopt the City's construction of Wis. Stat. § 70.11(39). First, the City's analogy to § 70.11(4m) as interpreted in *FH Healthcare* simply does not work. Section 70.11(4m) concerns the property of nonprofit hospitals, and the exception to exemption within that statute relates to the use of the property (in that case, nonexempt use for commercial purposes), not to any physical characteristic of the property. Here, the statute is distinguishing between two different types of personal property based on their physical characteristics, indicating that these categories are mutually exclusive. Second, the Commission previously has interpreted Section 70.11(39) as creating mutually exclusive categories of exempt printers and nonexempt

copiers in the *Xerox Corporation* cases.[8] The Commission will apply the same construction of Section 70.11(39) here.

V. The Computer Exemption Guidelines and the Experts

The Computer Exemption Guidelines are incorporated into the Property Assessment Manual for Wisconsin Assessors (the "Manual"). Assessors must follow the Manual unless it is clearly contrary to the Wisconsin Statutes. *See,* Wis. Stat. §§ 17.14(1)(g), 70.32(1), 70.34; *Metropolitan Holding Co. v. Board of Review of Milwaukee*, 173 Wis. 2d 626, 632-33, 495 N.W.2d 314 (1993). The Manual may be relied upon as an authoritative aid in interpreting Wisconsin's property taxation statutes. *See, e.g., Ahrens v. Town of Fulton*, 240 Wis. 2d 124, 621 N.W.2d 643 (Ct. App. 2000); *TDS Realestate Inv. Corp. v. City of Madison*, 151 Wis. 2d 530, 539-40, 445 N.W. 2d 53 (Ct. App. 1989) (court should give "considerable weight" to Manual's advice to assessors); Wis. Stat. § 73.03(2a). In *Xerox,* the Commission consulted the Guidelines as an "authoritative aid." *Xerox, supra* (WTAC Feb. 17, 2005).

The City first argues that the Guidelines should be disregarded because they have been inconsistent. (City Brief, p. 32.) As proof of their inconsistency, the City points to revisions made to the Guidelines prior to the period at issue. The City does not claim that the Guidelines' relevant provisions were inconsistent during the period at issue. In any event, the City's argument proves too much. The Guidelines must be

[8] *Xerox Corp. v. Wis. Dep't of Revenue et. al.,* Wis. Tax Rptr. (CCH) ¶ 400-814 (WTAC Feb. 17, 2005), *rem'd*, Wis. Tax Rptr. (CCH) ¶ 400-919 (Dane Co. Cir. Ct. July 18, 2006)), *on remand*, Wis. Tax Rptr. (CCH) ¶ 400-999 (WTAC Mar. 23, 2007), *aff'd*, Wis. Tax Rptr. (CCH) ¶ 401-042 (Dane Co. Cir. Ct. Sep. 21, 2007), *appeal pending*.

updated frequently to keep pace with rapidly evolving technology and current terminology. As part of the Manual, the Guidelines were created to bring greater uniformity and consistency to the interpretation of § 70.11(39) statewide. Arguing in favor of greater consistency and uniformity in taxation supports following the Guidelines, not disregarding them.

The City further argues that the Guidelines must be disregarded because they are based on an erroneous interpretation of § 70.11(39). To prove its point, the City provides the expert opinion of Dr. DeLuca. However, the value of Dr. DeLuca's opinion in these matters is questionable, primarily because it does not appear to be based upon on his relevant expertise.

The City agrees that the terms used in § 70.11(39) should be defined according to their common and approved usage. (City Brief, pp. 39-40.) In preparing his opinion, Dr. DeLuca relied upon common usage definitions of the statutory terms, not technical definitions. At the suggestion of the City's attorney, Dr. DeLuca used the American Heritage Dictionary of the English Language as a resource, although that is not a dictionary he would normally use. Dr. DeLuca also quoted in his report definitions from the McGraw-Hill Dictionary of Scientific and Technical Terms, but elected to rely upon the American Heritage Dictionary definitions instead. Gundersen's expert, Mr. Konopacki, based his opinion on the Guidelines and his professional experience.

Both Mr. Konopacki and Dr. DeLuca are highly qualified to deliver opinions concerning matters within their areas of expertise. However, Mr. Konopacki's experience and qualifications are directly related to the issues at hand, whereas Dr. Deluca's expertise stems from a related, but different, field. Mr. Konopacki is a biomedical engineer with 25 years' experience designing and building electronic devices with embedded computerized components for use in medical research, and he also has experience writing software that runs on a standard personal computer designed to control medical equipment to which it is interfaced. Dr. DeLuca is an eminent medical physicist, but has no training in computer engineering or computer design. Dr. DeLuca's expertise is in the application and use of medical devices of the type at issue.

Dr. DeLuca opined that all nine Representative Examples were equipment with embedded computerized components and that none were computers or electronic peripheral equipment. However, he gave no consideration to the Exemption Guidelines in formulating his opinions in this case and made no effort to harmonize his opinions with the Exemption Guidelines. In contrast, Mr. Konopacki considered the Computer Exemption Guidelines in connection with his work in these cases, particularly the way they categorized equipment as to whether they are connected to computers or not. He concluded that eight of the nine Representative Examples were computers or electronic peripheral equipment, as defined in the Guidelines.

The City does not explain why an expert opinion is necessary or relevant when its proffered expert opinion is based upon the common and approved usage of the terms at issue according to a standard dictionary. Thus, the City provides no compelling reason for the Commission to give Dr. DeLuca's opinion greater weight than the conclusions of the Board or the opinion of Mr. Konopacki. Since the City has the burden of proof in these matters, this is a critical flaw in the City's case.

The Commission finds that the Guidelines are authoritative with respect to these matters, and that they do not conflict with the statute they interpret, Wis. Stat. § 70.11(39). Rather, they give effect to that statute by further defining the distinctions between the exempt and taxable categories of equipment established by the statute. The Board properly followed the Guidelines in determining that Gundersen's medical devices are exempt. Dr. DeLuca's opinion in these matters does not constitute the "competent, credible and unambiguous evidence" required to overturn the Board's assessments. In contrast, Gundersen has provided exactly such evidence in support of the Board's assessments.

Conclusion

The City has failed to satisfy its burden of proof in these matters and Gundersen is entitled to summary judgment as a matter of law.

IT IS ORDERED

1. Gundersen's motion for summary judgment in these matters is granted.

2. The State Board of Assessors' assessments of the medical devices at issue in these matters are affirmed.

3. Further proceedings regarding the MFDs at issue in these matters shall remain held in abeyance pending final resolution of the *Xerox Corporation* cases (Commission Docket Numbers 02-M-66 and 02-M-67).

Dated at Madison, Wisconsin, this 9th day of June, 2008.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

(Did Not Participate)
Roger W. LeGrand, Commissioner

ATTACHMENT: **"NOTICE OF APPEAL INFORMATION"**