COURT OF APPEALS
DECISION
DATED AND FILED

October 17, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2310

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

VERIFONE FINANCE, INC.,

PLAINTIFF-RESPONDENT,

V.

CITY OF GLENDALE, WISCONSIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. The City of Glendale (City) appeals from the trial court's grant of summary judgment to Verifone Finance, Inc. (Verifone). The trial court's decision obligated the City to refund personal property taxes Verifone mistakenly paid to the City. The City argues both that WIS. STAT. § 70.43

contains a time limit that bars Verifone's cause of action and that Verifone is not entitled to a refund because it failed to establish that the assessment and collection of the disputed personal property taxes was the result of a "palpable error" a prerequisite for recovery under both WIS. STAT. §§ 70.43 and 74.33(1)(d).[1] We disagree and, therefore, we affirm.

I. BACKGROUND.

¶2 Verifone, a Delaware corporation with its principal place of business in Portland, Oregon, leases electronic data processing equipment to companies in all fifty states. One of Verifone's customers, Deluxe Electronic Payment Systems, Inc. (Deluxe), has facilities in both Glendale and Baltimore, Maryland. Deluxe leased equipment from Verifone from 1993 through 1996.

¶3 In 1994, Verifone reported to the City that it owned personal property in Glendale leased to Deluxe that was subject to personal property taxes. Based on Verifone's report, the City sent a personal property tax bill to Verifone for the tax owed on the property. The tax bill included 1993 personal property taxes, which had been omitted from Verifone's previous return, as well as 1994 personal property taxes. Verifone subsequently paid the bill.

¶4 As was Verifone's practice, it then billed Deluxe for the personal property taxes it paid to the City for the leased property. Deluxe refused to reimburse Verifone, asserting that the leased property in question was located in Baltimore, Maryland, not Glendale, and that it had already paid the Maryland property tax assessment for the leased property. Verifone reviewed its records and

[1] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise indicated.

discovered that Deluxe was correct. Verifone then filed a claim with the City, requesting that the City refund the property taxes it mistakenly paid. In an effort to verify Verifone's the allegations, the City contacted the Baltimore, Maryland assessor and asked for Verifone's personal property assessments. The assessor notified the City that Verifone had reported that it had minimal personal property located in Baltimore in 1993 and it had no personal property in Baltimore in 1994-95. The City subsequently denied Verifone's claim for a refund.

¶5 Verifone then sued the City in the circuit court, seeking a refund pursuant to WIS. STAT. §§ 70.43 and 74.33(1)(d). Both Verifone and the City filed motions for summary judgment. Following a hearing, the trial court found that WIS. STAT. § 70.43 did not impose a time limit barring Verifone's refund claim. The trial court also found that Verifone's property was never located in Glendale and, therefore, pursuant to § 74.33(1)(d), the City's assessment and collection of personal property taxes constituted a "palpable error" entitling Verifone to a refund. Therefore, the trial court denied the City's motion for summary judgment and granted Verifone's motion requiring the City to refund $182,661.73, plus taxable costs as well as prejudgment and postjudgment interest.

II. ANALYSIS.

¶6 Our review of the trial court's grant of summary judgment is *de novo*. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-16, 401 N.W. 2d 816 (1987). This court follows the same summary judgment methodology as the trial court. *See* ***id.*** That methodology has been described in many cases, *see e.g.* ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980), and, therefore, need not be repeated here. Ultimately, summary judgment must be granted if the evidentiary material demonstrates "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. RULE 802.08(2).

¶7 The City first argues that Verifone's cause of action is barred by a time limit contained in WIS. STAT. § 70.43.[2] The City submits that § 70.43 limits to one year the time within which a refund can be sought. The City asserts that because Verifone brought its action under § 70.43, it "imposed a one year reach back period upon itself." It argues that § 70.43's wording that the discovery of an inaccurate assessment for "*the preceding year*," and the correction of the inaccuracy "by adding to or subtracting from the assessment for *the preceding year*," precludes any refunds for earlier inaccurate assessments. WIS. STAT. § 70.43 (emphasis added). The City avers that, "[t]he statute's repeated references to '*the* preceding year' or '*the* previous year,' rather than *a* preceding or previous year indicates that the statute applies specifically to only the one immediately preceding or previous year." From this statutory language, the City concludes that Verifone is barred from seeking a refund of the 1993 and 1994 property taxes it paid because it did not seek a refund until 1997.

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[2] The relevant portion of WIS. STAT. § 70.43 provides:

> **Correction of errors by assessors. (1)** In this section, "palpable error" means an error under s. 74.33 (1).
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> **(2)** If the assessor discovers a palpable error in the assessment of a tract of real estate or an item of personal property that results in the tract or property having an inaccurate assessment for the preceding year, the assessor shall correct that error by adding to or subtracting from the assessment for the preceding year. The result shall be the true assessed value of the property for the preceding year. The assessor shall make a marginal note of the correction on that year's assessment roll.

¶8 The construction of a statute involves a question of law, which we review *de novo*. *See* ***State v. Ambrose***, 196 Wis. 2d 768, 776, 540 N.W.2d 208 (Ct. App. 1995). After reviewing the language of WIS. STAT. § 70.43, we reject the City's argument that Verifone's claim is time barred because we conclude that § 70.43 limits only the assessor's ability to correct errors.

¶9 A cursory review of the statutory language contained in § 70.43 indicates that the statute addresses the assessor's ability to correct palpable errors that occurred in "the preceding year."

¶10 During the summary judgment motion hearing, the City conceded that § 70.43 was not a statute of limitations barring suit:

> I'm not in any way talking about statutes of limitations for bringing suit. I'm talking about very substantive statute [sic] upon which they rely to seek relief and what I'm saying to invoke that statute you have to invoke it whether there's a lawsuit or not within the time that the assessor has authority to act.
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> ….
>
> So if you think there was an error, you better get them something to fix it with or as the statute recognizes, it's not going to happen. So what happened is they never got anything to the assessor. So what difference does it make if they sued or when they sued if jurisdictionally the assessor is no longer without the ability to have acted on their claim of palpable error.

Thus, accepting the City's argument that the assessor was powerless to act on Verifone's claim because the alleged error did not occur in the preceding year, we look to see if Verifone could properly challenge the assessment on other grounds.[3]

[3] We note that, in fact Verifone contacted the City as early as 1995 and notified the City of its mistake and attempted to resolve the situation. In its summary judgment submissions, Verifone included its telephone records from November 1995 indicating that it made seven calls to the City, which, Verifone asserts, pertained to the tax refund.

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Nothing in WIS. STAT. § 70.43 precluded Verifone from filing its refund claim against the City pursuant to WIS. STAT. § 74.33(1)(d). WISCONSIN STAT. § 70.43 is not the only avenue available to obtain a refund; WISCONSIN STAT. § 74.33 permits Verifone's suit. Section 74.33 states, in relevant part:

> **Sharing and charging back of taxes due to palpable errors. (1)** GROUNDS. After the tax roll has been delivered to the treasurer of the taxation district under s. 74.03, the governing body of the taxation district may refund or rescind in whole or in part any general property tax shown in the tax roll, including agreed-upon interest, if:
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> ....
>
> (d) The property is not located in the taxation district for which the tax roll was prepared.

Verifone's refund claim falls within this statute. Verifone petitioned the City to refund the paid taxes because the property was not in Glendale. When the City refused, Verifone sought an appeal. In its letter notifying Verifone that its claim had been denied, the City indicated that the applicable statute of limitations was contained in WIS. STAT. § 893.80 (1997-98).[4] The notice provided that: "Under

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Further, the City never raised the argument that WIS. STAT. § 70.43 barred the claim as a basis for denying Verifone's refund claim filed with the City. Instead, the City simply denied the claim and informed Verifone that it had six months to file suit.

[4] WISCONSIN STAT. § 893.80 (1997-98), in relevant part, provides:

> **893.80 Claims against governmental bodies or officers, agents or employes; notice of injury; limitation of damages and suits. (1)** Except as provided in subs. (1g), (1m), (1p) and (8), no action may be brought or maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employe of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:
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> (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim

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the provisions of Section 893.80(1)(b) of the Wisconsin Statutes, this disallowance will permit you a period of six (6) months in which to bring suit, if you so desire." The City's notice of disallowance was dated June 23, 1998. Verifone's complaint is dated November 25, 1998. Thus, Verifone properly commenced its cause of action within the six months allowed by § 893.80 (1997-98).

¶11 Next, the City argues that Verifone was not entitled to a refund because it failed to establish that the assessment and collection of personal property taxes was a "palpable error." As noted, a "palpable error" under WIS. STAT. § 74.33 may constitute grounds for recovery of taxes. The City submits that

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> signed by the party, agent or attorney is served on the volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employe under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employe; and
>
> (b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the claim is disallowed.
>
> **(1g)** Notice of disallowance of the claim submitted under sub. (1) shall be served on the claimant by registered or certified mail and the receipt therefor, signed by the claimant, or the returned registered letter, shall be proof of service. Failure of the appropriate body to disallow a claim within 120 days after presentation of the written notice of the claim is a disallowance. *No action on a claim under this section against any defendant fire company, corporation, subdivision or agency nor against any defendant officer, official, agent or employe, may be brought after 6 months from the date of service of the notice of disallowance, and the notice of disallowance shall contain a statement to that effect.*

(Emphasis added.)

neither the statutes nor the applicable case law specifies what evidence must be provided, or what burden of proof must be borne by the taxpayer to establish that a palpable error has been made entitling the taxpayer to a refund. As a result, the City maintains that because its assessment enjoys a presumption of correctness and "Verifone ... has never supported that allegation with evidence challenging the presumption of the correctness of the assessor's valuation," Verifone is not entitled to a refund and the trial court should have granted its motion for summary judgment instead of Verifone's. We disagree.

¶12 A review of the record satisfies us that Verifone submitted sufficient evidence in the form of uncontradicted affidavit testimony and business records that established that the property was not located in Glendale. In support of its motion for summary judgment, Verifone submitted the affidavit testimony of its accounting manager, Lizette Cha. Cha testified that "the Leased Property was not located in the city or the State of Wisconsin during 1993-96 based upon my review and verification of Plaintiff's business records." Cha explained that Verifone mistakenly reported that the property was located in Glendale because Verifone's "computer misread the 'bill to' and 'ship to' fields relating to the Leased Property when it generated the annual personal property tax report." In other words, the computer read that property was shipped to Deluxe in Glendale, when actually the property was shipped to Deluxe in Baltimore. Consequently, Cha asserted that none of the property Verifone leased to Deluxe was located in Glendale during the applicable time period. Also, Cha's affidavit attached Verifone's business records, demonstrating that Verifone had indeed shipped the property to Deluxe in Baltimore, Maryland. Verifone also submitted the affidavit testimony of Deluxe's accounting manager, Paul S. Williams. Williams testified that, based upon his

examination of his company's business records, he was satisfied that the leased property was never in Glendale.

¶13 After Verifone submitted its evidence in support of its position that the taxes were assessed and paid in error, the City failed to present contradictory affidavit testimony or records indicating that the property was, in fact, in Glendale. In opposition to Verifone's submissions, the City, as evidence that no refund was due Verifone, could only point to Verifone's original letter reporting that it owned personal property subject to assessment in Glendale, and to Verifone's check for the taxes assessed on the property. Thus, instead of presenting evidence that the property was located in Glendale, the City argued that, under Wisconsin law, the assessment is presumed correct.

¶14 The City's assertion is accurate that "[t]he assessor's opinion is prima facie correct and is binding on the board of review in the absence of evidence showing it to be incorrect." ***Waste Mgmt. v. Kenosha County Review Bd.***, 177 Wis. 2d 257, 262, 501 N.W.2d 883 (Ct. App. 1993), *affirmed*, 184 Wis. 2d 541 (1994). While we agree that the assessor's opinion regarding the valuation of property enjoys the presumption of correctness, here the assessor's opinion was incorrect because it was based upon inaccurate information submitted by Verifone. The City has provided no authority "to conclude that a trial court must apply such a presumption with respect to a fundamental fact, e.g., whether property is in Glendale or Baltimore." Moreover, even if the presumption were to apply to factual determinations made by the City, we are satisfied that Verifone has provided sufficient evidence to rebut the presumption.

¶15 The City attacks the evidence submitted by Verifone, asserting that "[a]t the most, Verifone has belatedly shown that it transferred property from

Oregon to Deluxe ... in Maryland." The City contends that Verifone has not demonstrated that the property it originally reported to the City was never there. The City maintains that the Maryland tax bills and lease agreements for property in Maryland "do not prove that there was not simultaneously other property in ... Glendale" during the relevant time, and that Verifone has "provided little more information" to establish a palpable error.[5] We reject the City's arguments. Given the absence of contradictory evidence submitted by the City, the only evidence, the sworn affidavit testimony and business records presented by Verifone, established that the property was located in Baltimore. Indeed, in its decision the trial court remarked that the City was unable to provide any contradictory evidence demonstrating that the property was, in fact, located in Glendale. We agree.

¶16 Next, the City argues that the trial court's inquiries impermissibly shifted the burden of proof to it from Verifone. As noted, the trial court inquired whether the City had "any evidence or information" to support its position that the property was in Glendale. In light of Verifone's submissions in support of its motion for summary judgment that demonstrated that the property was never in Glendale, the City was obligated to present contradictory evidence to create a genuine issue of material fact to avoid summary judgment in Verifone's favor. It

[5] The City also points to the Baltimore Assessor's letter in response to its attempts to substantiate Verifone's claims that the property was never located in Glendale. Even if we were to consider the letter, which as Verifone argues, "is inadmissible hearsay that cannot be considered on summary judgment," the letter fails to demonstrate that the property was not located in Baltimore. Verifone indicated that Deluxe refused to reimburse it for the taxes paid to the City because Deluxe had already paid taxes on the property in Baltimore. Because Verifone mistakenly believed that the property was located in Glendale, it logically would not have reported the property to the Baltimore Assessor. Therefore, it is not surprising that the Assessor informed the City that Verifone had reported minimal property located in Baltimore in 1993 and 1994. Logic dictates that the City should have inquired whether Deluxe, not Verifone, had reported substantial amounts of property located in Baltimore during the applicable time.

did not do so. Thus, we are satisfied that the trial court properly inquired whether the City was able to present any such contradictory evidence. The trial court's inquiry did not erroneously shift the burden of proof from Verifone to the City. Further, we note that the City never objected to the court's inquiry as to whether the City could substantiate that the property was in Deluxe's Glendale office.

¶17 For all of these reasons, we conclude that there is no genuine issue of material fact and, therefore, the trial court properly granted summary judgment in Verifone's favor.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.