STATE OF WISCONSIN

TAX APPEALS COMMISSION

ERVIN AND BEVERLY COLTON, **DOCKET NO. 15-I-023**

Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING & ORDER

DAVID D. WILMOTH, COMMISSIONER:

This case comes before the Commission for decision on a Stipulation of Facts submitted by the parties and cross motions for summary judgement. The Petitioners, Ervin and Beverly Colton, of Shorewood, Wisconsin, are represented in this matter by David E. Schultz, CPA, and Goossen & Schultz, CPAs, LLP. The Respondent, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Axel Candelaria. As part of their Stipulation, the parties agreed on the legal issue to be decided by the Commission and fully briefed the issue. For the reasons set forth below, we hold in favor of the Petitioners.

FACTS

1. By Notice of Amount Due, dated September 22, 2014, the Department assessed additional income tax against the Petitioners for calendar year 2013 in the amount of $248. (Stipulation of Facts ("Stip.") ¶ 3; Ex. 1.)

2. The Petitioners timely filed a Petition for Redetermination with the Wisconsin Department of Revenue by letter dated October 7, 2014. (Stip. ¶ 4; Ex. 2.)

3. By Notice of Action dated December 15, 2014, the Department granted in part and denied in part the Petitioners' Petition for Redetermination. (Stip. ¶ 5; Ex. 3.)

4. The Petitioners timely filed a Petition Review with the Wisconsin Tax Appeals Commission on February 9, 2015, appealing the Department's partial denial of their Petition for Redetermination. (Stip. ¶ 6; Ex. 4.)

5. During 2013, the Petitioners were full-year residents of and were domiciled in Wisconsin. (Stip. ¶ 1.)

6. In 2013, the Petitioners were subject to the federal alternative minimum tax but not to the Wisconsin alternative minimum tax. (Ex. 7.)

7. On their 2013 Wisconsin individual income tax return, the Petitioners claimed an itemized deduction credit ("IDC"). The itemized deductions used in calculating the IDC consisted of investment interest expense and charitable contributions reflected on Schedule A of the Petitioners' 2013 federal income tax return. (Stip. ¶ 8.)

8. The Department's assessment resulted from its reduction of the amount of the Petitioners' itemized deduction for charitable contributions by reason of its application of Internal Revenue Code ("IRC") § 68, which provides for an overall limitation of itemized deductions for federal income tax purposes based on specified income thresholds. (Stip. ¶ 9; Ex. 1.)

9. The Petitioners' income for 2013 exceeded the income threshold applicable to their filing status for the purposes of claiming itemized deductions. (Stip. ¶ 9; Ex. 1).

10. During the appeals process, the Petitioners made an additional payment and filed an amended 2013 return, and the Department made certain adjustments to its assessment, which are not the subject of this appeal. (Stip. ¶¶ 10, 11, 12, and 13; Exs. 6, 7, 8, and 9). As a result, the parties have stipulated that, if the Petitioners prevail, they are due a refund of $248 plus applicable interest, and, if the Department prevails, the Petitioners owe additional tax of $5.52 plus applicable interest. (Stip. ¶ 15).[1]

11. The parties stipulated that the issue of law is whether the federal overall limitation on itemized deductions should be taken into account in computing the Wisconsin IDC for the 2013 taxable period.

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[1] Because of the amount involved, this appeal was initially filed as a small claims case. On August 5, 2015, the Commission issued an order, pursuant to Wis. Stat. 73.01(b), that this case would be heard as a large claims case.

APPLICABLE LAW

A. Summary Judgment

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). The parties have submitted a stipulation of facts material to the resolution of this case and have asked the Commission to rule on the law applicable to those facts. Consequently, we treat this matter as coming before us on cross-motions for summary judgement.

B. Applicable Wisconsin Statutes

> **Wis. Stat. § 71.07(5) Itemized deductions credit.** Single persons, married persons filing separately and married persons filing jointly may claim as a credit against, but not to exceed the amount of, Wisconsin net income taxes due an amount calculated as follows:
>
> (a) Add the amounts allowed as itemized deductions under the internal revenue code except: [certain expenses, such as interest, taxes, moving costs, medical care insurance, and others, that are not germane to this case] ...
>
> (b) Subtract the standard deduction under s. 71.05 (22) from the amount under par. (a).
>
> (c) Multiply the amount under par. (b) by .05.
>
> ...
>
> **Wis. Stat. § 71.01(6)(h)** For taxable years that begin after December 31, 2012, and before January 1, 2014, for natural persons and fiduciaries, ... "Internal Revenue Code" means the federal Internal Revenue Code as amended to December 31, 2010, excluding [certain sections of public laws and certain public laws as a whole] and as amended by [certain sections of public laws] and as indirectly affected by [certain public laws]. The Internal Revenue Code applies for

Wisconsin purposes at the same time as for federal purposes, except that changes made by [certain public laws and certain sections of certain public laws] do not apply for taxable years beginning before January 1, 2013. Amendments to the federal Internal Revenue Code enacted after December 31, 2010, do not apply to this paragraph with respect to taxable years beginning after December 31, 2010, except that changes to the Internal Revenue Code made by [certain sections of public laws], and changes that indirectly affect the provisions applicable to this subchapter made by [certain sections of public laws], do not apply for taxable years beginning before January 1, 2013, and changes to the Internal Revenue Code made by sections 101 and 902 of P.L. 112-240, and changes that indirectly affect the provisions applicable to this subchapter made by sections 101 and 902 of P.L. 112-240, apply for Wisconsin purposes at the same time as for federal purposes.

C. Applicable Federal Internal Revenue Code Provisions

IRC § 68 Overall limitation on itemized deductions.

(a) General rule. In the case of an individual whose adjusted gross income exceeds the applicable amount, the amount of the itemized deductions otherwise allowable for the taxable year shall be reduced by the lesser of—
  (1) 3 percent of the excess of adjusted gross income over the applicable amount, or
  (2) 80 percent of the amount of the itemized deductions otherwise allowable for such taxable year.
(b) Applicable amount.
  (1) In general. For purposes of this section, the term "applicable amount" means—
    (A) $300,000 in the case of a joint return . . . .
(c) Exception for certain itemized deductions. For purposes of this section, the term "itemized deductions" does not include[deductions for certain items not relevant to this case]—
(d) [Subsection (d) provides that the § 68 limitation is to be applied after the application of any other limitation on the allowance of itemized deductions.]

. . .

IRC § 56 Adjustments in computing alternative minimum taxable income.

(b) Adjustments applicable to individuals. In determining the amount of the alternative minimum taxable income of any taxpayer (other than a corporation), the following treatment shall apply (in lieu of the treatment applicable for purposes of computing the regular tax):

(1) Limitation on deductions.

(F) Section 68 not applicable. Section 68 shall not apply.

D. Presumption of Correctness, Burden of Proof, and Rules of Construction

As a general matter, assessments made by the Department are presumed to be correct, and the burden is on the Petitioner to prove by clear and satisfactory evidence in what respects the Department erred in its determinations. *Calaway v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-856 (WTAC 2005), citing *Puissant v. Dep't. of Revenue*, Wis. Tax Rptr. (CCH) ¶ 202-401 (WTAC 1984).

Tax exemptions, deductions, and privileges are matters of legislative grace and are strictly construed against the taxpayer. *Ramrod, Inc. v. Dep't. of Revenue*, 64 Wis. 2d 499, 504 (1974). Tax credits are subject to the same strict construction. *L&W Construction Co., Inc. v. Dep't. of Revenue*, 149 Wis. 2d 684, 690 (Ct. App. 1989).[2]

However, statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex*

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[2] The Petitioners argue that Wis. Stat. § 71.07(5) is not a tax credit provision but, rather, a tax imposition provision which should be strictly construed against the Department. That argument is without merit. Section 71.07 is entitled "Credits." Section 71.07(5) is entitled "Itemized Deduction Credit," and provides that a taxpayer "may claim as a credit against, but not to exceed the amount of, Wisconsin net income taxes due" in the amount of the IDC. On 2013 Form 1, Wisconsin individual income tax return, the calculation of the taxpayer's Wisconsin income tax ends on line 19, where the amount of the tax is shown. The amount of the IDC is entered on line 20 as a direct credit against the tax otherwise due.

rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, 271 Wis. 2d 633, 663, 681 N.W.2d 110. When interpreting a statute, we assume that the legislature's intent is expressed in the statutory language. Statutory interpretation focuses primarily on the precise words of the pertinent statute section or subsection. We may also look to the context and to the structure of the statute so that every word has meaning when the statute is read as a whole. *Kalal* at ¶46. Where statutes are unambiguous, there is no need to consult extrinsic sources of interpretation. *Id.* Only in the face of a finding of ambiguity does the Commission or Court look to extrinsic resources, such as legislative history, to resolve such ambiguities.

ANALYSIS

Wisconsin's income tax is "federalized" in the sense that "Wisconsin adjusted gross income," the starting point for determining Wisconsin taxable income, is defined in Wis. Stat. § 71.01(13) as federal adjusted gross income, with certain modifications prescribed in various subsections of Wis. Stat. § 71.05.

In lieu of allowing itemized deductions as the provisions of the IRC do, Wis. Stat. § 71.07(5) provides individual income taxpayers a Wisconsin itemized deduction credit or IDC. The starting point for the IDC is "the amounts allowed as itemized deductions under the internal revenue code," with certain specified exceptions. Internal Revenue Code § 68 imposes a reduction of the amounts allowed as federal itemized deductions if the taxpayer's adjusted gross income exceeds certain thresholds. Although the Petitioners' income exceeds the applicable threshold, the Petitioners contend that the IRC § 68 reduction of itemized deductions does not apply

in calculating the amount of the Wisconsin IDC. The Department claims their federal itemized deductions are subject to the § 68 reductions for purposes of the Wisconsin IDC. The answer hinges on Wisconsin's statutory definition of the Internal Revenue Code.

Internal Revenue Code § 68, commonly known as the "Pease Limitation" after Ohio Congressman Donald Pease, was first instituted by the Omnibus Budget Reconciliation Act of 1990 and became effective in 1991. The measure required higher-income taxpayers to reduce the total amount of most itemized deductions by the lesser of 3 percent of adjusted gross income above specified income thresholds or 80 percent of the taxpayer's itemized deductions.

In 2001, the Economic Growth and Tax Relief Reconciliation Act called for a gradual reduction of the Pease Limitation resulting in full suspension at the end of 2009. The Pease Limitation was scheduled to return in full in 2011, but the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 extended the 2001 tax cuts, thereby postponing the return of the Pease Limitation for two years. The American Taxpayer Relief Act of 2012 made certain modifications to IRC § 68 in connection with its reimplementation, and the Pease Limitation returned to its full 3 percent reduction level effective January 1, 2013. Consequently, for tax year 2013, if a taxpayer's federal adjusted gross income exceeds the thresholds specified in IRC § 68, the amount the taxpayer is allowed as itemized deductions for regular federal income tax purposes is reduced.

For purposes of calculating the Wisconsin IDC, Wis. Stat. § 71.07(5) begins with "the amounts allowed as itemized deductions under the internal revenue code" subject to certain exceptions, none of which serve to exclude IRC § 68. The definition of "internal revenue code" for Wisconsin income tax purposes is found in Wis. Stat. § 71.01(6). The definition is modified from time to time for application to different tax periods. Subsection (h) of Wis. Stat. § 71.01(6) provides the definition of "internal revenue code" for "taxable years that begin after December 31, 2012, and before January 1, 2014," and consequently applies to the 2013 tax year at issue in this case.

Wisconsin Statute § 71.01(6)(h) states, in pertinent part: "'Internal Revenue Code' means the federal Internal Revenue Code as amended to December 31, 2010 .... Amendments to the federal Internal Revenue Code enacted after December 31, 2010, do not apply to this paragraph with respect to taxable years beginning after December 31, 2010, except ... changes to the Internal Revenue Code made by sections 101 and 902 of P.L. 112-240, and changes that indirectly affect the provisions applicable to this subchapter made by sections 101 and 902 of P.L. 112-240, apply for Wisconsin purposes at the same time as for federal purposes." Federal Public Law 112-240 is The American Taxpayer Relief Act of 2012, and section 101 contains the provisions relative to the return of IRC § 68 and the Pease Limitation. Consequently, we conclude that under the plain language of Wis. Stat. § 71.01(6)(h), IRC § 68 is included in the definition of "internal revenue code" for tax year 2013.

Likewise, we conclude that IRC § 68 applies in determining "the amounts allowed as itemized deductions" for purposes of calculating the Wisconsin IDC under Wis. Stat. § 71.07(5). As previously noted, nothing in the exceptions contained in the statute specifically excludes the application of IRC § 68. Further, neither of the parties identified, nor could we find, any purpose that the inclusion of IRC § 68 in the Wisconsin definition of "internal revenue code" could serve, other than to limit the amounts of federal itemized deductions used in calculating the Wisconsin IDC. Thus, we conclude that the plain language of Wis. Stat. § 71.07(5) provides for a reduction of the amounts of itemized deductions included in the measure of the Wisconsin IDC if the amount of those deductions is reduced for federal regular income tax purposes by IRC § 68.

The Petitioners offer several arguments that the overall limitations on itemized deductions under IRC § 68 should not apply in determining the Wisconsin IDC. First and foremost, they claim that Wis. Stat. § 71.07(5) contains no specific reference to IRC § 68 and the Department is wrongly reading the provision into the statute in order to reduce the IDC. The Petitioners argue: "Wisconsin Statute § 71.07(5) specifically references a long list of IRC deductions that are excluded from the credit. It does not reference any reduction or subtraction for IRC § 68. The Legislature could have easily chosen to amend § 71.07(5) to apply IRC § 68, but it did not do so (for example, by adding the words 'after application of IRC § 68' after the word 'allowed'). Words should not be read into a statute." While there are no specific references in Wis. Stat. § 71.07(5) to IRC § 68, it is part of the "internal revenue code" which the plain

language of the statute directs taxpayers to apply for purposes of determining the amounts of itemized deductions to which they are entitled.

The Petitioners also argued that, when IRC § 68 was in effect during the years 1991 through 2009, the Department had taken the position that it did not apply for purposes of calculating the Wisconsin IDC and that the 2013 version of IRC § 68 reads the same in all material respects. The Petitioners' claim rests solely on the Wisconsin form used for calculating the amount of the IDC. That form, which predates the initial adoption of IRC § 68, directs taxpayers to enter amounts from lines on their federal return which reflect itemized deductions before application of the overall IRC § 68 limitation. The Department, for its part, denies that it ever took such a position and affirmatively contends that Wisconsin has followed the federal limitations on itemized deductions since 1991. While this is the kind of factual disagreement that could stand in the way of summary judgment if it were material to the outcome of the case, we conclude that it is not material. Wisconsin Statutes §§ 71.07(5) and 71.01(6)(h) are clear and unambiguous. Even if the Department had taken the position the Petitioners claim via the construction of the IDC form, there is no tenet of statutory construction that would require, or even permit, the Commission to construe a statute in a manner contrary to its express language in order to conform to a contrary Department position or tax form.

Of the several other arguments advanced by the Petitioners, we find one persuasive. Section 55 of the IRC imposes a federal alternative minimum tax (AMT), which may apply to higher-income taxpayers claiming certain tax benefits which reduce

their regular federal tax. The AMT is calculated separately from regular tax, and taxpayers subject to the federal AMT pay the higher of their regular tax or their AMT. Internal Revenue Code § 56(b)(1)(F) provides that, when calculating federal AMT income, as opposed to regular income, IRC § 68 does not apply. Consequently, an individual paying federal AMT does not apply the IRC § 68 overall limitation to his or her itemized deductions in calculating the AMT.

Wisconsin similarly imposes an alternative minimum tax (WI-AMT). The state adopts the federal AMT provisions (IRC §§ 55 through 59) and makes certain modifications to them in Wis. Stat. § 71.08. Like the federal AMT system, a Wisconsin taxpayer pays the higher of his or her regular Wisconsin income tax or the WI-AMT.

The exhibits accompanying the stipulation in this case show that the Petitioners were subject to the federal AMT in 2013. Because the federal AMT provisions prevent the application of IRC § 68, the "amounts allowed as itemized deductions under the internal revenue code" for the Petitioners were not subject to the overall limitation.

The Department acknowledges that the Petitioners were subject to the federal AMT but notes that, by reason of certain modifications to the federal AMT provisions by Wis. Stat. § 71.08, the Petitioners were not subject to the WI-AMT. The Department claims that, while the Petitioners would not be subject to the IRC § 68 overall limitation had they paid the WI-AMT, their payment, instead, of Wisconsin regular income tax subjects them to the overall limitation for purposes of the Wisconsin IDC.

Again, for purposes of calculating the Wisconsin IDC, Wis. Stat. § 71.07(5) begins with "the amounts allowed as itemized deductions under the internal revenue code" subject to certain exceptions. None of those exceptions refer to Wis. Stat. § 71.08, or otherwise serve to exclude or modify the federal AMT provisions.

As we previously concluded, Wis. Stat. § 71.01(6)(h), defining the "internal revenue code" for Wisconsin tax purposes, is unambiguous. The statute is precisely constructed. It refers to the federal internal revenue code as of a particular date, and follows with a ponderously detailed list of particular federal laws, and specific sections of particular federal laws, which are either excluded, if they were part of the code as of the particular date, or included, if they were not a part of the code as of the particular date. All of the references in Wis. Stat. § 71.01(6)(h) are to provisions of federal law. There is no reference to any Wisconsin statute. Thus, the modifications to the federal AMT provisions in Wis. Stat. § 71.08 are inapplicable in determining "the amounts allowed as itemized deductions under the internal revenue code" for purposes of the Wisconsin IDC. Because the Petitioners were not subject to the IRC § 68 limitation on itemized deductions for federal income tax purposes, "the amounts allowed as itemized deductions" for purposes of calculating their Wisconsin IDC are not subject to the limitation.

CONCLUSIONS OF LAW

1. The Stipulation of Facts submitted by the parties is sufficient to address the legal issues presented. Consequently, there is no genuine issue of material fact, and this case is ripe for summary judgment.

2. For tax year 2013, the Wisconsin statutory definition of "federal internal revenue code" in Wis. Stat. § 71.01(6)(h), included IRC § 68.

3. To the extent a taxpayer is subject to the IRC § 68 overall limitation on itemized deductions for federal income tax purposes, "the amounts allowed as itemized deductions" for purposes of calculating the Wisconsin IDC under Wis. Stat. § 71.07(5) are subject to the IRC § 68 overall limitation.

4. For tax year 2013, the Petitioners' federal itemized deductions were not subject to the IRC § 68 overall limitation because the Petitioners were subject to federal AMT to which the limitation does not apply. Thus, "the amounts allowed as itemized deductions" for purposes of calculating the Petitioners' Wisconsin IDC are not subject to the limitation.

ORDER

Based upon the foregoing reasoning and caselaw and there being no remaining questions of material fact, the Department's Motion for Summary Judgment is denied and the Petitioners' Motion for Summary Judgment is granted.

Dated at Madison, Wisconsin, this 10th day of May, 2016.

WISCONSIN TAX APPEALS COMMISSION

Lorna Hemp Boll, Chair

David D. Wilmoth, Commissioner

David L. Coon, Commissioner

ATTACHMENT: **NOTICE OF APPEAL INFORMATION**

WISCONSIN TAX APPEALS COMMISSION
5005 University Avenue - Suite 110
Madison, Wisconsin - 53705

NOTICE OF APPEAL INFORMATION

NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

A taxpayer has two options after receiving a Commission final decision:

Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternatively, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

AND/OR

Option 2: PETITION FOR JUDICIAL REVIEW

Wis. Stat. § 227.53 provides for judicial review of a final decision. Several points about starting a case:

1. **The petition must be filed in the appropriate county circuit court and served upon the Tax Appeals Commission and the other party (which usually is the Department of Revenue) either in-person, by certified mail, or by courier** within 30 days of this decision if there has been no petition for rehearing, or within 30 days of service of the order that decides a timely petition for rehearing.

2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.

3. The 30-day period starts the day after personal service or the day we mail the decision.

4. **The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.**

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or the Wisconsin Statutes. The website for the courts is *http://wicourts.gov*.

This notice is part of the decision and incorporated therein.