STATE OF WISCONSIN

TAX APPEALS COMMISSION

L. WILLIAM STAUDENMAIER, DOCKET NO. 17-I-022

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

RULING AND 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 judgment. The Petitioner, L. William Staudenmaier, of Wauwatosa, Wisconsin, is represented in this matter by David E. Schultz, CPA, of 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 Respondent.

FACTS

The parties submitted a joint Stipulation of Facts, dated May 21, 2018, much of which the Commission adopts as the relevant facts in this case.[1]

1. During calendar year 2015, the Petitioner was a full-year resident of and domiciled in Wisconsin. (Stipulation of Facts ("Stip.") ¶ 1.)

2. By Notice of Amount Due, dated July 21, 2016, the Department assessed additional income tax against the Petitioner for calendar year 2015 in the amount of $322.00, along with interest of $11.02, for a total of $333.02. (Stip. ¶ 3; Ex. 1.)

3. The Petitioner timely filed a Petition for Redetermination with Department objecting to the assessment. (Stip. ¶ 4; Ex. 2.)

4. By Notice of Action dated November 28, 2016, the Department denied the Petitioner's Petition for Redetermination. (Stip. ¶ 5; Ex. 3.)

5. Along with correspondence dated December 6, 2016, the Petitioner made a deposit of the unpaid portions of the amount assessed. (Stip. ¶ 6; Ex. 4.)

6. Petitioner timely filed a Petition for Review with the Commission appealing the Department's action on the Petition for Redetermination. (Stip. ¶ 7; Ex. 5.)

7. On his 2015 Wisconsin individual income tax return, the Petitioner claimed a Wisconsin itemized deduction credit ("IDC") in the amount of $5,136. He arrived at this number by reference to the amounts reflected on his federal Schedule A

[1] The fact set forth herein are taken from the parties' Stipulation, with certain non-substantive revisions made for form and consistency.

(From 1040) for interest ($119) and gifts to charity ($102,603), multiplied by the 5% IDC. (Stip. ¶ 10.)

8. The Department's assessment revised the amount of charitable contributions to $94,161. The Department claimed that the change resulted in an IDC of $4,714, or a difference of $422. (Stip. ¶ 11; Ex. 1.)[2]

9. Should the Commission rule in favor of the Petitioner, he is due a refund of $440.09, plus applicable interest. Should the Commission rule in favor of the Department, the Petitioner owes the Department nothing. (Stip. ¶ 13.)

10. The parties stipulated that the issue of law is whether the federal overall limitation on itemized deductions should be taken into account when computing the Petitioner's Wisconsin IDC on his 2015 Wisconsin individual income tax return.

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

[2] Because of the amount involved, this appeal was initially filed as a small claims case. At a status conference held March 10, 2017, the Department stated that it had determined that this case is of state-wide importance and should be treated as a large claim case. Pursuant to Wis. Stat. § 73.01(1)(b), the Commission ordered that this case would be heard as a large claims case.

Commission to rule on the law applicable to those facts. Consequently, we treat this matter as coming before us on cross-motions for summary judgment.

B. Applicable Wisconsin Statutes

Wis. Stat. § 71.01(6)(j)

1. For taxable years beginning after December 31, 2013, and before January 1, 2017, for individuals and fiduciaries, except fiduciaries of nuclear decommissioning trust or reserve funds, "Internal Revenue Code" means the federal Internal Revenue Code as amended to December 31, 2013, except as provided in subds. 2. and 3. and subject to subd. 4.

2. For purposes of this paragraph, "Internal Revenue Code" does not include the following provisions of federal public laws for taxable years beginning after December 31, 2013: section 13113 of P.L 103-66; sections 1, 3, 4, and 5 of P.L. 106-519; sections 101, 102, and 422 of P.L 108-357; sections 1310 and 1351 of P.L. 109-58; section 11146 of P.L. 109-59; section 403 (q) of P.L. 109-135; section 513 of P.L. 109-222; sections 104 and 307 of P.L. 109-432; sections 8233 and 8235 of P.L. 110-28; section 11 (e) and (g) of P.L. 110-172; section 301 of P.L. 110-245; sections 15303 and 15351 of P.L. 110-246; section 302 of division A, section 401 of division B, and sections 312, 322, 502 (c), 707, and 801 of division C of P.L. 110-343; sections 1232, 1241, 1251, 1501, and 1502 of division B of P.L. 111-5; sections 211, 212, 213, 214, and 216 of P.L. 111-226; sections 2011 and 2122 of P.L. 111-240; sections 753, 754, and 760 of P.L. 111-312; section 1106 of P.L. 112-95; and sections 104, 318, 322, 323, 324, 326, 327, and 411 of P.L. 112-240.

3. For purposes of this paragraph, "Internal Revenue Code" does not include amendments to the federal Internal Revenue Code enacted after December 31, 2013, except that "Internal Revenue Code" includes the provisions of the following federal public laws:

a. P.L. 113-97.
b. P.L. 113-159.
c. P.L. 113-168.
d. Section 302901 of P.L. 113-287.
e. Sections 171, 172, and 201 to 221 of P.L. 113-295.
f. Sections 102, 105, and 207 of division B of P.L. 113-295.
g. P.L. 114-14.

h. P.L. 114-26.
i. Section 2004 of P.L. 114-41.
j. Sections 503 and 504 of P.L. 114-74.
k. Sections 103, 104, 124, 168, 184, 185, 190, 204, 303, 306, 336, and 341 of division Q of P.L. 114-113.
l. P.L. 114-239.

4. For purposes of this paragraph, the provisions of federal public laws that directly or indirectly affect the Internal Revenue Code, as defined in this paragraph, apply for Wisconsin purposes at the same time as for federal purposes.

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, 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.

...

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.]

...

D. Presumption of Correctness and Burden of Proof

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).

ANALYSIS

The parties stipulated that the issue of law presented by this case is whether the federal overall limitation on itemized deductions should be taken into account in computing the Wisconsin IDC for 2015. The federal overall limitation on itemized deductions is found in Internal Revenue Code § 68, which requires higher-income taxpayers to reduce the total amount of most itemized deductions by the lesser of (1) 3% of their adjusted gross income above a specified "applicable amount" or (2) 80% of the taxpayer's itemized deductions otherwise allowable.

In his Petition for Review, which pursuant to the parties' agreement serves as the Petitioner's initial brief in this matter, the Petitioner advances eight primary arguments in support of his claim that IRC § 68 is inapplicable in calculating his Wisconsin IDC for 2015. Some of these arguments stand on their own and others are versions or extrapolations of other arguments made. We address each of them in the order presented.

1. **As a result of the *Colton* decision, the Petitioner, in calculating his Wisconsin IDC, need not reduce the amount of his itemized deductions by the federal overall limitation under IRC § 68.**

One thing the parties agree on is that the Commission's ruling and order in *Colton v. Dep't of Revenue,* Wis. Tax Rptr. (CCH) ¶ 402-076 (WTAC 2016), provides the answer to the legal question presented in this case. The problem is that they disagree on what that answer is.[3]

Like this case, *Colton* was submitted to this Commission on a joint stipulation of facts. Other than the fact that the year at issue in *Colton* was 2013 rather than 2015, the stipulated legal issue for consideration in *Colton* was worded identically to the one in this case - whether the federal overall limitation on itemized deductions under IRC § 68 should be taken into account in computing the Wisconsin IDC.

In the *Colton* decision, we began by noting that Wisconsin's income tax is "federalized" in the sense that "Wisconsin adjusted gross income," the starting point for determining Wisconsin taxable income, is defined as federal adjusted gross income, with

[3] The lawyers representing the parties in this case also represented the parties in *Colton,* so they are quite familiar with the case.

certain modifications. Instead of allowing itemized deductions as federal tax law does, Wis. Stat. § 71.07(5) allows individual income taxpayers a Wisconsin itemized deduction credit or IDC equal to "the amounts allowed as itemized deductions under the internal revenue code," with certain specified exceptions, minus the standard deduction, with the product multiplied by .05. As noted above, IRC § 68 imposes a reduction of the amounts allowed as federal itemized deductions if the taxpayer's adjusted gross income exceeds the statutorily defined "applicable amount." So, the question is whether IRC § 68 is part of the "internal revenue code" as that term is used in Wis. Stat. § 71.07(5), so that the itemized deductions to which a taxpayer is entitled are subject to the federal overall limitation when calculating the Wisconsin IDC.

In the *Colton* decision, we laid out the history of IRC § 68 in some detail. In short, IRC § 68 first became effective for federal tax purposes on January 1, 1991. Federal legislation in 2001 implemented a gradual reduction of the limitations on itemized deductions with a full suspension of the IRC § 68 limitations at the end of 2009. Under the American Taxpayer Relief Act of 2012, IRC § 68 became effective again for federal tax purposes on January 1, 2013 and remained effective through 2017.[4]

Wisconsin Statute § 71.01(6) defines the "internal revenue code" for Wisconsin income tax purposes. The definition is typically updated and amended from one tax period to another. In *Colton*, we reviewed the definition of internal revenue code

[4] For federal tax purposes, P.L. 115-97, § 11046, suspended the IRC § 68 overall limitation of itemized deductions for taxable years 2018 to 2025.

in Wis. Stat. § 71.01(6)(i)[5] applicable to the 2013 tax year. That statutory section provides that "Internal Revenue Code" means the federal IRC as amended to December 31, 2010, and that amendments to the IRC enacted after December 31, 2010, are inapplicable, except, among other provisions, "... 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. Thus, we concluded that under the plain language of the statute, IRC § 68 was included in the definition of "internal revenue code" for tax year 2013. We went on to state in *Colton*:

> 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 definition of "internal revenue code" applicable to tax year 2015, is found in Wis. Stat. § 71.01(6)(j)1 which states, "For taxable years beginning after

[5] In *Colton*, we erroneously cited Wis. Stat. § 71.01(6)(h), which was applicable to tax years 2011 and 2012, but correctly quoted, analyzed, and applied the language of Wis. Stat. § 71.01(6)(i), applicable to tax year 2013.

December 31, 2013, and before January 1, 2017, ... 'Internal Revenue Code' means the federal Internal Revenue Code as amended to December 31, 2013, except as provided in subds. 2. and 3. and subject to subd. 4." Internal Revenue Code § 68 was part of the federal Internal Revenue Code during 2015, and nothing in subdivisions 2, 3, or 4 serves to exclude IRC § 68.[6] Consequently, the plain language of Wis. Stat. § 71.07(5) continues to provide 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 by IRC § 68 for federal regular income tax purposes.

The taxpayer in the *Colton* case, however, did not pay federal regular income tax in 2013, but instead paid the federal alternative minimum tax. 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.

Although the Petitioner in this case paid the federal regular income tax in 2015, he claims that *Colton* concluded that his itemized deductions are not subject to the

[6] Subdivision 2 of § 71.01(6)(j) excludes a series of sections of numerous federal public laws for taxable years beginning after 2013. The last federal public law the Wisconsin Legislature enumerated is P.L. 112-240, The American Taxpayer Relief Act of 2012. However, § 101, which had reinstated § 68, is not among the enumerated sections. Subdivision 3 adopts certain federal provisions that were enacted after December 31, 2013. Subdivision 3, paragraph e, references P.L. 113-295, which made revisions to P.L. 112-240, § 101, but not to the provisions of § 101 which reinstated IRC § 68. The fact that the Wisconsin legislature adopted federal revisions to certain portions of P.L. 112-240, § 101, while leaving intact those provisions which reinstated IRC § 68, underscores the purposefulness of the legislature's inclusion of IRC § 68 in the definition of "Internal Revenue Code" applicable for 2015.

limitations under IRC § 68. In support of this position, the Petitioner, in his Petition for Review, quoted the Commission's final conclusion of law in *Colton*:

> 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.

The Petitioner then argues that all taxpayers compute their federal income tax using both the regular tax system and the AMT system, paying whichever is higher. Thus, he contends, *all* taxpayers are "subject to" both systems. He then concludes that "Since all taxpayers are subject to the federal alternative minimum tax, no taxpayer need reduce the amount eligible for the IDC by a portion of the overall itemized deduction limitation."

This contrived and misguided reading of *Colton* simply ignores large portions of the decision including one of our fundamental holdings, "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." Once again, if a taxpayer, like the Petitioner, is paying the federal regular tax as opposed to the federal AMT, the taxpayer's itemized deductions are subject to the limitations of IRC § 68.

2. **Wis. Stat. § 71.07(5)(a) states, "Add the amounts allowed as itemized deductions...." The word *add* is relevant and should not be edited out of the statute.**

The Petitioner argues that, because Wis. Stat. § 71.07(5)(a) begins with the phrase "Add the amounts allowed as itemized deductions," the Commission is ignoring the word "add" in the statute when we hold that federal itemized deductions are subject to the IRC § 68 limitations even though there is no specific reference to the IRC § 68 reduction in the statute. But, as we held in *Colton*, IRC § 68 is included in the definition of the "internal revenue code" and Wis. Stat. § 71.07(5)(a) says, "Add the amounts allowed as itemized deductions *under the internal revenue code*." (emphasis added). What is added together are the itemized deductions allowed for federal tax purposes. If a taxpayer, like the Petitioner here, is paying the federal regular tax, the amount of those itemized deductions is limited by IRC § 68. Those amounts are added together to calculate the Wisconsin IDC. The word "add" in the statute is not ignored but, rather, given its clear meaning.

3. **Reading IRC § 68 into Wis. Stat. § 71.07(5) constitutes an illegal tax on the Petitioner's U.S. government interest income.**
4. **Reading IRC § 68 into Wis. Stat. § 71.07(5) imposes an improper tax on the Petitioner's Social Security income. Social Security benefits should have no impact on Wisconsin net income tax.**
5. **Reading IRC § 68 into Wis. Stat. § 71.07(5) could create an improper tax related to state tax refunds. State income tax refunds are an item of federal income that should have no impact on Wisconsin net income tax.**

These three arguments have some common themes. It is true that Wisconsin adjusted gross income does not include interest on federal obligations,[7] Social Security benefits,[8] or state tax refunds.[9] The Petitioner's beef here is that, even though these items are not part of Wisconsin adjusted gross income and therefore not subject to tax in Wisconsin, IRC § 68 calculates the limitation on itemized deductions using federal adjusted gross income, which does include these items. Consequently, if a Wisconsin taxpayer who pays the federal regular tax has any of these items included in their federal adjusted gross income, any IRC § 68 limitation of their federal itemized deductions will be measured, in part, by the amount of these items. Correspondingly, the measure of their Wisconsin IDC is reduced.[10] The Petitioner characterizes a reduction in the measure of Wisconsin IDC as a tax on these items. A limitation of a credit, which is granted by the state as a matter of legislative grace, is not a direct imposition of a tax on income.

Ultimately, the issue in this case, as stipulated by the parties, is one of statutory interpretation. The Petitioner offers these three arguments urging us to interpret Wis. Stat. § 71.07(5) as not requiring application the federal overall limitations of IRC § 68 in order to avoid what he considers illegal or unintended results. The Petitioner claims that including interest on federal obligations in the measure of the

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[7] Wis. Stat. § 71.05(6)(b)1.
[8] Wis. Stat. § 71.05(6)(b)21c.
[9] Wis. Stat. § 71.05(6)(b)5.
[10] The Petitioner does have some interest income on federal obligations as well as Social Security. He had no state tax refund in 2015. In the Petitioner's brief in this matter, his representative estimates that the use of federal adjusted gross income as the measure of the limitation of his itemized deductions results in a $27 IDC reduction attributable to his federal government interest income and a $23 IDC reduction attributable to Social Security income. These are included in the Petitioner's brief but are not in the stipulated facts.

limitation violates both federal law and the United States Constitution,[11] and that a "cardinal rule of statutory interpretation is that the legislature intended to adopt a constitutional statute."[12] Similarly, the Petitioner contends that interpreting Wis. Stat. § 71.07(5) as requiring the inclusion of Social Security benefits and state income tax refunds in the measure of the Wisconsin IDC limitation, when those items are not otherwise subject to Wisconsin income tax, goes against the legislative intent to exclude these items from taxation.

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 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. A statute is ambiguous only if it is capable of being understood by reasonably well-informed persons in two or more senses. It is not enough that there is a disagreement about the statutory meaning; statutory interpretation involves the ascertainment of meaning, not a search for ambiguity. *Id.*

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[11] The bar against state taxation of federal obligations is set forth in 31 U.S.C. § 3124(a) and was described by the U.S. Supreme Court as a "restatement of the constitutional rule of tax immunity established in *McCulloch v. Maryland. Memphis Bank & Trust Co. v. Garner,* 459 U.S. 392, 397, 103 S.Ct. 692, 695 (1983).

[12] Citing *American Family Mutual Ins. Co. v. Dep't of Revenue,* 222 Wis. 2d 650, 667, 586 N.W.2d 872 (1998).

As we held in *Colton*, and again hold here, the plain, express, language of Wis. Stat. § 71.07(5) states that the calculation of the Wisconsin IDC begins with "the amounts allowed as itemized deductions under the internal revenue code." The definition of "internal revenue code" specifically includes IRC § 68 and the federal overall limitation on itemized deductions it imposes for federal regular income tax. It is not, as the Petitioner asserts, a matter of "reading IRC 68 into § 71.07(5);" it is there, and the Wisconsin legislature put it there. If the legislature intended to avoid the results that the Petitioner considers illegal or absurd, the legislature could have addressed those situations, and still can. The Petitioner is not asking us to interpret the statute, he is asking us to rewrite it. It is not our place to rewrite a statute which is otherwise unambiguous – that is within the exclusive purview of the legislature. "[C]ourts cannot go beyond the province of legitimate construction . . ., and where the meaning is plain, words cannot be read into it or out of it for the purpose of saving one or other possible alternative." *State v. Hall*, 207 Wis. 2d 54, 82, 557 N.W.2d 778 (1997).

6. The Department is interpreting § 71.07(5) in a manner inconsistent with the decision in *Colton* in its instructions to the 2016 tax forms published post-*Colton*.

This argument is simply the Petitioner's complaint that the Department's tax form used for the calculation of the Wisconsin IDC for 2016 does not comport with his misguided interpretation of the *Colton* decision. He is correct. The instructions are not consistent with his misreading of the decision. The Department's instruction properly direct taxpayers to apply the federal overall limitation on itemized deductions

when computing the Wisconsin IDC if the taxpayer paid federal regular tax, as opposed to federal AMT.[13]

7. **The Department violated Wis. Stat. § 227.01(13), issuing a "rule" under Wis. Stat. § 227.01(13) without public notice and public hearing under Wis. Stat. § 227.16(1).**
8. **To the extent valid (see 7. Above), the Department's change in previously issued written guidance only allows the Department to apply the change prospectively under Wis. Stat. § 73.16(2).**

These two arguments are variants of arguments made and rejected in the *Colton* case. The arguments are based on the Petitioner's contention 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. As noted in *Colton*, the contention rests solely on the Wisconsin form used for calculating the amount of the IDC. That form 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 denies that it ever took such a position and affirmatively contends, as it did in the *Colton* case, that Wisconsin has followed the federal limitations on itemized deductions since 1991.

[13] When IRC § 68 became effective again in 2013, the Department revised the tax form for the calculation of the Wisconsin IDC to require the application of the overall limitation on itemized deductions. After the *Colton* decision was issued in 2016, the Department again revised the form to require only those taxpayers who paid regular federal income tax, as opposed to federal AMT, to apply the IRC § 68 limitation. The Petitioner's argument 6, presumably focuses on 2016, rather than 2015, based on his erroneous contention that *Colton* held that the IRC § 68 limitation did not apply to any taxpayer in calculating the Wisconsin IDC, whether the taxpayer had paid the federal regular income tax or the federal AMT.

It is far from clear that the form issued by the Department for the calculation of the Wisconsin IDC constitutes either an administrative rule or a written position. But, as we stated in *Colton*, "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." The same would be true for any administrative rule issued by the Department. "An administrative rule, even of long duration, may not stand at variance with an unambiguous statute." *Basic Products Corp. v. Dep't of Taxation*, 19 Wis. 2d 183, 186 (1963). "The rule-making power does not extend beyond the power to carry into effect the purpose as expressed in the enactment of the legislature. 'A rule out of harmony with the statute is a mere nullity.'" *Plain v. Harder*, 268 Wis. 507, 511, 68 N.W.2d 47 (1955), quoting *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134 (1936). For the same reasons that we rejected this line of argument in *Colton*, we reject it here.

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 2015, the Wisconsin statutory definition of "federal internal revenue code" in Wis. Stat. § 71.01(6)(j)1 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 2015, the Petitioners' federal itemized deductions were subject to the IRC § 68 overall limitation because the Petitioners paid federal regular income tax to which the limitation applies. Thus, "the amounts allowed as itemized deductions" for purposes of calculating the Petitioner's Wisconsin IDC are 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 granted, and the Petitioners' Motion for Summary Judgment is denied.

Dated at Madison, Wisconsin, this 22nd day of January, 2019.

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.