No. 44766-5-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

SCOTT B. OSBORNE, Personal Representative of
the Estate of Barbara Hagyard Mesdag,

Respondent,

v.

THE DEPARTMENT OF REVENUE OF
THE STATE OF WASHINGTON,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

Mark W. Roberts, WSBA #16843
Robert B. Mitchell, WSBA #10874
K&L Gates LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
(206) 623-7580

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
3rd Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Respondent
Scott B. Osborne

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Federal Cases

Constitutions

Statutes

Rules and Regulations

A. INTRODUCTION

Commissioner Schmidt's November 6, 2014 ruling directed the parties to "file supplemental briefing within 30 days addressing the application of the *Hambleton* decision to this appeal." The respondent Scott Osborne, the personal representative of the Estate of Barbara Mesdag ("Estate") provides this supplemental brief in compliance with the Court's directive.

The decision of our Supreme Court in *In re Estate of Hambleton*, ___ Wn.2d ___, 335 P.3d 398 (2014) is distinguishable from the present case on its facts where the Estate had a vested right that could not be affected by the Department of Revenue's ("DOR") retroactive legislation calculated to override the Supreme Court's interpretation of Washington's estate tax law in *In re Estate of Bracken*, 175 Wn.2d 549, 290 P.3d 99 (2012).

Moreover, even if this Court concludes that *Hambleton* and the DOR-generated retroactive *Bracken* repealer legislation apply here, the Court must address the issue of whether DOR was entitled to collect interest on any amounts due from the Estate where *Bracken* applied and DOR was not entitled to collect the tax from the Estate.

B. STATEMENT OF THE CASE

While the Estate adopts the Statement of the Case already set forth in its Brief of Respondent, the more critical facts relevant to the issue of *Hambleton's* importance to this case are set forth in the pleadings on the Estate's RAP 18.9(c) motion to dismiss previously filed in this Court. This recitation of facts is taken from that motion, and the Osborne and Roberts declarations supporting it, as well as the DOR's opposition to the motion, and the Hankins declaration.

Scott Osborne is the personal representative of Barbara Mesdag's estate. Barbara died on July 4, 2007. Her husband, Joseph Mesdag, predeceased her on April 27, 2012. Washington enacted a stand-alone estate tax on May 17, 2005, more than three years after Joseph's death but two years before Barbara's.

Just like the circumstances in *Bracken,* Joseph's will established a qualified terminable interest property ("QTIP") trust upon his death for Barbara's lifetime benefit and vested the trust in named beneficiaries upon her death. Upon Barbara's death, DOR disputed Osborne's position that the QTIP trust was not part of the Estate for Washington estate tax purposes in a letter dated December 11, 2008. Hankins decl., Ex. 2. After seeking a judicial declaration that the tax did not apply to the QTIP trust,

an effort that DOR resisted on procedural grounds,[1] the Estate paid the tax under protest and requested a refund from DOR on March 10, 2010. DOR denied the refund request on April 15, 2010, Hankins decl., Ex. 3, and the Estate petitioned for review of its denial.

DOR opposed the Estate's attempt to consolidate the refund case with *Bracken* when it was being heard in King County Superior Court. The Estate and DOR subsequently agreed to strike a October 8, 2010 hearing date and stay the case until "the final resolution of the Estate of Bracken appeal." Roberts decl., Ex. A. DOR and the Estate agreed that this was prudent because "[a]n *identical legal issue* is being appealed to the Washington Supreme Court by the Estate of Sharon Bracken." *Id.* (emphasis added).

In a telephone call after *Bracken,* but before the DOR's motion for reconsideration in that case,[2] DOR's counsel suggested that DOR was considering awarding refunds to estates containing QTIP trusts, including the Estate. Roberts decl., ¶ 4. But these discussions were placed on hold when the DOR sought reconsideration in *Bracken*. *Id.*

---

[1] This was but the first of many DOR efforts designed to prevent addressing the Estate's tax obligation on the merits.

[2] The *Bracken* opinion was filed on October 18, 2012, and reconsideration was denied in the case on January 13, 2013.

After the Supreme Court denied reconsideration, the Estate's and DOR's counsel spoke again on January 29, 2013. Roberts decl., ¶ 5. During this call, DOR's counsel informed the Estate's counsel that the DOR wanted to give the Legislature the opportunity to consider legislation to change the result of *Bracken* and retroactively deny refunds to the Estate and other estates with similar QTIP-related claims. *Id.* On that basis, DOR refused to consider any refund or agreed order as to the Estate, and instead stated that it did not intend to act on any refund requests involving estates in the identical position to those in *Bracken* until after the 2013 legislative session. *Id.*

In light of the proposed legislation and DOR's revelation that it would not grant any refund, the Estate moved for judgment on the pleadings. Osborne decl., ¶ 10. In opposition, DOR made an important concession in which it "agree[d] that under the holding in *Bracken* the Estate is entitled to the estate tax refund it is claiming." Roberts decl., Ex. E at 2. But DOR nevertheless asked the court to "continue the stay that was issued on August 16, 2010." *Id.* at 7. According to DOR, it "ma[de] logical sense to continue [the] stay for another two months to allow Washington Legislature to decide whether to clarify the law in light of the *Bracken* decision." *Id.* at 8.

The trial court disagreed and granted the Estate's motion on March 22, 2013, stating that "[t]he law is clear as it presently exists based on the *Bracken* decision..." Roberts decl., Ex. F at 15.[3] The court ordered that DOR "immediately refund Osborne" the amount of the estate tax overpayment with interest. Roberts decl., Ex. G at 2.

The next week, DOR's counsel informed the Estate's counsel that DOR planned to appeal. Roberts decl., ¶ 11. In response, the Estate's counsel put DOR on notice its appeal was frivolous in a letter stating that there existed "no legitimate grounds for appeal" and that "any decision by the Department to file an appeal in order to delay payment would merit sanctions." Roberts decl., Ex. H. *See* Appendix. In reply, DOR's counsel wrote that the appeal was "well within our duty to the Department to 'use legal procedure for the fullest benefit of the client's cause...'" Roberts decl., Ex. 1 (quoting RPC 3.1, cmt. 1). Specifically, the fact that the Legislature was considering HB 1920 "justifie[d] the Department's intention to exercise its normal right to appeal an adverse judgment." *Id.*

DOR appealed the trial court's March 22, 2013 order to this Court. CP 99-105.

---

[3] In the hearing, the trial court asked DOR's counsel what would occur if the court were to grant the Estate's motion, and thereafter the Legislature passed HB 1920. DOR's counsel told the court that HB 1920 would only apply retroactively to "those cases where they're still open, still being adjudicated, *which would include this case.*" Roberts decl., Ex. F at 12-13. (emphasis added).

C. ARGUMENT

(1) The Supreme Court's *Hambleton* Decision

On October 2, 2014, the Supreme Court filed its decision in *Hambleton*. It is the culmination of a process started in *In re Estate of Bracken*, 175 Wn.2d 549, 290 P.3d 99 (2012) in which the Court addressed the effect of estates employing a tax qualified terminable interest property ("QTIP") in estate planning. In *Bracken*, the Court ruled on October 18, 2012 that a QTIP, a generation-skipping trust, was not a taxable transfer. *Id.* at 554.[4] Thus, with a QTIP in place, the estate of the first spouse to die was not taxable, and the surviving spouse could use the property or receive the income it generated, unreduced by estate taxation. *Id.* at 556. The estate taxation was collectible when the second spouse died. *Id.* The Court held that DOR overstepped its authority in taxing the estates of first spouses who died before 2005, the date Washington again enacted an estate tax. *Id.* at 554.

To say DOR did not like the *Bracken* decision is an understatement. Taking up an invitation from the Court's concurring/dissenting opinion, *id.* at 594, DOR requested legislation in the 2013 legislative session to, in effect, overrule *Bracken* ("Bracken repealer

[4] DOR moved for reconsideration of the Court's unanimous opinion which was denied on January 10, 2013. That motion is but further evidence of DOR's delaying tactics.

legislation"). A bill, HB 1920, was introduced in the House of Representatives DOR's request on February 18, 2013. The legislation was adopted by the Legislature and signed into law by Governor Inslee, effective June 14, 2013. Laws of 2013, 2d spec. sess., ch. 2. The Legislature broadened the definition of a transfer and provided that its changes would apply "prospectively and retroactively to all estates of decedents dying on or after May 17, 2005." *Id.* at § 9. But the retroactive application of the statute did not reach "any final judgment, no longer subject to appeal, entered by a court of competent jurisdiction before the effective date of [the new law]." *Id.* at § 10.

In *Hambleton*, the Court addressed the issues regarding DOR's *Bracken* repealer legislation raised by two estates with QTIPs. The MacBride estate sought a refund of estate taxes paid and the trial court denied it relief; the estate appealed. In the case of the Hambleton estate, DOR disallowed a QTIP deduction and filed findings setting the tax due. The estate objected and sought declaratory relief, and the trial court agreed, granting summary judgment. That appeal was stayed by the parties' agreement.

Ultimately, our Supreme Court held that the *Bracken* repealer legislation, though retroactive, was constitutional and was not a violation of separation of powers. *Hambleton*, 335 P.3d at 406-09. Similarly, it did

not offend due process principles, *id.* at 409-12, nor did it constitute an impairment of contract, *id.* at 412-13, or a violation of article VII, § 1 of the Washington Constitution, its uniformity clause. *Id.* at 413-14.

The MacBride estate also contended that DOR was collaterally or equitably estopped by virtue of its conduct in staying proceedings in the case while *Bracken* was pending in the Supreme Court. *Id.* at 414-15. The Court rejected this argument.[5] Further, the Court rejected the estate's contention that the *Bracken* repealer legislation was barred by the statute of limitations in RCW 83.100.095. *Id.* at 415.

Finally, and most critically for the present case, the Court addressed the issue of whether the judgment as to the Hambleton estate was final and, therefore, not subject to the *Bracken* repealer legislation's retroactive sweep. With limited analysis, the Court rejected that estate's contention that DOR had no basis upon which to appeal the trial court's judgment when it filed the appeal notice. The Court stated:

> Generally, "[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome

---

[5] "DOR moved to stay proceedings pending our decision in *Bracken*. It reasoned that the current case and *Bracken* involved the same legal issues and that our decision in *Bracken* would likely resolve the estate of MacBride's appeal and make any further proceedings moot. Even if the motion is a statement or assertion, the estate did not rely upon it. Instead, the estate filed a response that opposed DOR's motion to stay. Given these facts, equitable estoppel does not apply." *Id.* at 415.

> accordingly." *Plaut,* 514 U.S. at 226, 115 S. Ct. 1447. Therefore, despite the existence of a "final" trial court ruling, retroactive amendments may apply to cases pending on appeal.
>
> A party may appeal final trial court judgments. RAP 2.2(a)(1). However, parties may not frivolously appeal or appeal simply for purposes of delay. RAP 18.9(c). Appellate courts will, on motion from the opposing party, dismiss frivolous appeals and appeals brought for purposes of delay. RAP 18.9(c).
>
> Here, the trial court entered its order granting summary judgment on April 19, 2013 and DOR filed a notice of appeal on May 16, 2013. The estate of Hambleton did not move under RAP 18.9(c) to dismiss the appeal, and the appeal was still pending when the legislature enacted the 2013 amendment. Therefore, the retroactive amendment applies to the case.

Id. at 415-16.

The Estate is not asking this Court to revisit the constitutional rulings of the *Hambleton* court. Rather, this appeal presents two key issues. The first is whether the Estate's judgment was final, barring a retroactive application of DOR's *Bracken* repealer legislation. Simply put, the facts here are entirely distinct from those in *Hambleton* on the judgment possessed by the Estate and DOR's conduct in initiating what was a frivolous appeal, taken solely for purposes of delay. Second, this case requires the Court to squarely address the interest on any taxes due to DOR, should the Court conclude DOR's *Bracken* repealer legislation applies retroactively to the Estate.

(2) *Hambleton* Does Not Apply to the Facts Here Where the Estate's Rights Were Vested[6]

Despite DOR's inordinate procedural delays in getting the Estate's tax obligation addressed on the merits by a court, the Estate secured a judgment in its favor that *predated* any DOR appeal. At the time DOR took its appeal to this Court, it had *no basis* in law for doing so, given *Bracken*. In fact, DOR was specifically warned by the Estate's counsel that its appeal was frivolous. Roberts decl., Ex. H. *See* Appendix. DOR was gambling, in bad faith, that it could rush the Legislature to enact its *Bracken* repealer legislation before this Court affirmed the trial court's judgment based on *Bracken*. DOR's appeal was subject to RAP 18.9(c) when it was filed on April 19, 2013, nearly two months before the *Bracken* repealer legislation became effective.

In *Hambleton,* the Hambleton estate argued that it had a final judgment that prohibited DOR from calculating the tax on the QTIP assets because there was no basis for the DOR appeal and since the judgment was final, the amendment did not apply. Writing for the majority, Justice Wiggins rejected this argument, focusing on the literal fact that the appeal

[6] In reviewing this issue, this Court should also be cognizant of the principle that taxing statutes, such as DOR's *Bracken* repealer legislation, are strictly construed and any doubts about the statute's meaning are construed against DOR as the taxing authority. *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 857, 827 P.2d 1000 (1992).

was pending and the Hambleton estate did not file a motion to dismiss DOR's appeal as frivolous. 335 P.3d at 416.

By contrast, *the Estate here moved for dismissal of DOR's frivolous appeal under RAP 18.9(c)*. This Court never denied the Estate's motion on its merits; rather the Commissioner ruled (prior to the enactment of DOR's *Bracken* repealer legislation) that the motion was premature until briefs were filed. *See Appendix*. On a motion to modify, the Court affirmed this ruling, but the Court changed the order of briefing to require DOR to file the opening brief as the appellant and noted that once briefs were filed, motions on the merits could be filed. This Court never addressed the Estate's motion to dismiss on the merits. But, critically, the Estate satisfied its necessary procedural predicate to being able to now argue DOR had no legitimate basis for its appeal when it was filed, rendering the refund judgment in the Estate's favor *final* and not subject to DOR's *Bracken* repealer legislation.

DOR filed its notice of appeal *solely* for purpose of delay. RAP 18.9(c) *forbids* such a purpose for an appeal. As early as *Harvey v. Unger,* 13 Wn. App. 44, 533 P.2d 403 (1975), Washington courts have sanctioned appeals filed solely for purposes of delay. In *Harvey*, the defendant appealed an adverse personal injury judgment, but only sought review of the trial court's summary judgment ruling on liability. The facts clearly

demonstrated the defendant was at fault for the automobile accident, and the defendant apologized to the plaintiff at the accident scene. The Court of Appeals found after a careful review of the record that the appeal was taken only for delaying payment of the judgment, a judgment that was stayed during the appeal's pendency. *Id.* at 48 (... we are satisfied that the appeal was taken only for delay."). The appellate court imposed monetary sanctions against the appellant. *Id.* In *Trohimovich v. Dep't of Labor & Indus.*, 21 Wn. App. 243, 249, 584 P.2d 467 (1978), this Court sanctioned appellants who claimed non-specie money was not "real" in refusing to pay industrial insurance premiums, stating they had "appealed from the Superior Court judgment solely for the purpose of delaying payment of legitimately incurred premiums."[7]

DOR's conduct here is similarly frivolous, as it merely wanted to delay the Estate's refund until, it hoped, its *Bracken* repealer legislation could be enacted. The issues in this appeal, at the time DOR filed it, *were fully controlled by Bracken.* There was no reasonable possibility that this Court would have done anything but affirm the trial court in the face of a

---

[7] *See also, Watson v. Maier,* 64 Wn. App. 889, 901, 827 P.2d 311, *review denied,* 120 Wn.2d 1015 (1992) (appellate court sanctioned attorney who had been sanctioned by trial court under CR 11; court's sanction was for filing an appeal for purpose of delay, for "using the appellate process solely as a means to delay the inevitable."). *Camer v. Seattle School Dist. No. 1,* 52 Wn. App. 531, 540, 762 P.2d 356 (1988), *review denied,* 112 Wn.2d 1006, *cert. denied,* 493 U.S. 873 (1989) (in determining if appeal is brought for purpose of delay, appellate court looks to whether issues raised are frivolous -- whether it presents no debatable issue and is so devoid of merit that there is no reasonable possibility of reversal).

controlling Supreme Court precedent. As this Court observed in *Johnson v. State*, 164 Wn. App. 740, 754, 265 P.3d 199 (2011), *review denied*, 173 Wn.2d 1027 (2012), until the Supreme Court chooses to overrule its own precedent, this Court is bound by it. Moreover, the record here clearly confirms that DOR filed its notice of appeal for delay:

> • DOR cited no error by the trial court in its opening brief other than the metaphysical assertion that the trial court failed to apply a law that had not yet been enacted at the time the trial court ruled, br. of appellant at 3;
>
> • All of the arguments advanced by DOR (other than its entirely frivolous argument that *Bracken* should be reversed), br. of appellant at 41-42,[8] were based on a statute yet to be enacted as of the time DOR's notice of appeal was filed;
>
> • DOR filed the appeal on the last day possible, CP 100;
>
> • DOR refused to timely obtain the record from the trial court; the Estate was forced to do so and paid for the record;
>
> • DOR could have sought direct Supreme Court review initially under RAP 4.2(a) if it was serious about trying to reverse *Bracken*, but it did not do so. CP 99-105;

[8] That this judicial repealer argument is frivolous is evident from two key legal points. First, this Court cannot overrule a controlling Supreme Court decision, as noted *supra*. Second, DOR simply could not meet the high burden to overturn such a recently promulgated decision under principles of stare decisis. *See, e.g., In re Stranger Creek and Tributaries in Stevens County,* 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (party must demonstrate established rule is both clearly incorrect and harmful in face of stare decisis policy that favors stability and predictability of common law rules).

- DOR indicated in its response to the Estate's RAP 18.9(c) motion at 3 an intent to seek transfer of the case to the Supreme Court under RAP 4.4; it never so moved.

- In the trial court and in response by DOR to the Estate's motion, DOR conceded that under *Bracken* the Estate was entitled to its refund and essentially admitted that its sole argument against the judgment was to allow the Legislature time to act and, if the legislation was not passed, the appeal would be dismissed. CP 55 ("... if that clarifying legislation does not pass, the Department agrees that under the holding in *Bracken* the Estate is entitled to the tax refund it is claiming."). *See also,* DOR response to RAP 18.9(c) motion at 4, 9-10.

This Court should not condone, and certainly not reward, DOR for its filing of an improper appeal. The Estate had an enforceable judgment in its favor based on *Bracken.* The Estate's position is procedurally different from that of the estates in *Hambleton.* The Hambleton estate never paid the contested taxes; the trial court judgment was a declaration that the assets in the trust were not includable in the Washington taxable estate. When the legislation was passed, DOR was not under any legal duty to refund any money to Hambleton. The MacBride estate paid the taxes, but lost at the trial court in its refund claim. The MacBride estate was the appellant in the Court of Appeals and, when the legislation was passed, DOR had the status of the prevailing party against the MacBride estate.

The Estate, on the other hand, paid the disputed taxes, plus penalty interest; exhausted its administrative remedies seeing a refund; filed suit for a refund; had a statutory right to a refund as of January 14, 2013 (when the motion for reconsideration in *Bracken* was denied); had a money judgment confirming the refund as of March 22, 2013 and was the beneficiary of a statute (RCW 83.100.130) that mandated DOR to make refunds that were lawfully due.

Because *Bracken* was controlling law, the Estate's judgment based on DOR's statutory *duty* to make refunds in accordance with law created a vested right in the Estate.[9]

DOR, in effect, asks this Court to condone its arrogant position that it does not have to comply with law that it does not like, allowing it to ignore the law until it gets around to prevailing upon the Legislature to change it. DOR is not above the law. It is not privileged to violate the

---

[9] *See, e.g., Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 733, 57 P.2d 611 (2002) (RCW 51.32.080 requiring payment of disability payments created vested right that could not be forfeited because of injured inmate's incarceration); *Caritas Servs. Inc. v. Dep't of Social*, 123 Wn.2d 391, 414, 869 P.2d 28 (1994) (retroactive amendment of reimbursement statute and regulations violated due process rights of nursing homes to receive reimbursement at prior rates during period that those rates were in effect); *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 463, 832 P.2d 1303 (1992) (retroactive application of revised lien statute violated vested lien rights of intervening creditor); *Lawson v. State*, 107 Wn.2d 444, 457-58, 730 P.2d 1308 (1986) (application of "rails to trails" statutes violated vested rights of property owners whose rights had automatically vested upon prior abandonment of railroad easement).

Estate's right to its judgment by interposing a spurious appeal.[10] Such conduct violates the Estate's due process rights.[11]

This Court should affirm the trial court's judgment where the Estate's judgment constituted a vested right, and, at the time DOR filed its notice of appeal here, its appeal was frivolous and should have been held to be of no effect.

(3) DOR Is Not Entitled to Collect Interest from the Estate

Hambleton does not address the interest allegedly due from estates, particularly where an estate as here had a judgment in its favor based on

---

[10] A government agency that chooses to routinely ignore the law and violate its citizens' constitutional rights is answerable for such conduct under 42 U.S.C. § 1983. In *Jones v. State, Dep't of Health*, 170 Wn.2d 338, 242 P.3d 825 (2010), our Supreme Court held that a pharmacist stated a cause of action under 42 U.S.C. § 1983 against the Health Department when that agency fabricated facts to justify an emergency removal of his professional license, depriving him of due process of law. Similarly, the Ninth Circuit in *Tarabochia v. Adkins*, 766 F.3d 1115 (9th Cir. 2014) held that fishers who were the subject of what they asserted was a personal vendetta against them by the state Fish and Wildlife Department stated a § 1983 cause of action when they were the subject of a suspicionless, warrantless stop of their vehicle on a public highway as part of the agency's arbitrary conduct.

[11] The United States Supreme Court observed more than a century ago in *McCullough v. Virginia*, 172 U.S. 102, 123-24, 19 S. Ct. 134, 43 L.Ed. 382 (1898) that "It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment, the power of the legislature to disturb the rights created thereby ceases." Our Supreme Court ruled similarly in *Pacific Telephone & Telegraph Co. v. Heneford*, 199 Wash. 462, 92 P.2d 214 (1939). There, our Supreme Court had enjoined collection of use tax on the basis that it impermissibly burdened interstate commerce. The United States Supreme Court then ruled in other cases to the contrary. The Legislature passed a new law, with retroactive effect, imposing a use tax. The State Tax Commissioners asked our Court to vacate its earlier injunction. The Court declined to do so, emphasizing that the conclusions of judgments is "one of the most inflexible principles of law." *Id.* at 469. In effect, this Court should construe the effect of *Hambleton* in light of this principle, particularly where our Supreme Court has not chosen to overrule *Bracken* there.

Bracken.[12] If this Court believes that the Estate owes the estate tax for the QTIP after *Hambleton*, it would be entirely inappropriate for DOR to collect interest on taxes "due" when *Bracken* specifically held they were not due until DOR's *Bracken* repealer legislation was enacted.

Below, the parties did not separate the interest argument from the main argument that the taxes were not owed. The trial court's judgment awarded the Estate $2.9 million of taxes paid on the value of assets in Joseph's testamentary trust plus interest to which the Estate was entitled. Although the amount of interest is not specified, this was the interest paid on the past due taxes, as well as whatever interest may be due on the refund amount.[13] DOR has never addressed any reason to reverse the trial court judgment awarding interest other than its assertion that the taxes were allegedly due in 2008 and were not paid until 2010 following the Kitsap County action. CP 24, 31. Of course, *Bracken,* was not overruled by *Hambleton*, and it clearly established that the Estate did not owe DOR anything more than it paid.

RCW 83.100.070 provides that interest is charged on "any tax *due* ... which is not paid by the due date under RCW 83.100.060(1)." *See*

---

[12] Because of the factual circumstances of the estates in *Hambleton*, only the MacBride estate would have paid interest on past due taxes.

[13] The amount of interest here is sizeable, exceeding $310,000. Hankins decl., Ex. 3. *See* Appendix.

Appendix. DOR's own regulations confirm that the statutory interest penalty "applies to the *delinquent tax* only, and is calculated from the due date until the date of payment." WAC 458-57-035(4); WAC 458-57-135(5).

Basically, taxes are due on the date the estate tax return is due, without regard to extensions. In 2008, when the return was due, the Estate paid *all* of the taxes due to DOR under the law and regulations then in effect, as confirmed by *Bracken* in 2012. The additional taxes claimed by DOR could not be due, at the earliest, until June 2013, when the Legislature amended the statute to impose the tax on the assets in Joe's testamentary trust. Since *Hambleton* affirmed *Bracken* as applicable prior to June 2013, the trial court judgment should be affirmed to the extent that the Estate is entitled to a refund of interest paid on tax amounts paid that were not then due. It should also recover interest on the entire amount it must pay, if *Hambleton* applies, for the period from payment until June 2013, since the funds were improperly demanded by DOR in 2010. Finally, it should receive interest on the wrongfully collected interest from June 2013 until paid.

To allow DOR to collect interest on taxes imposed retroactively under DOR's *Bracken* repealer legislation would apply a penalty

retroactively, a step forbidden under due process principles.[14] In *Dep't of Revenue v. Estate of Pohelmann*, 63 Wn. App. 263, 818 P.2d 616 (1991), this Court addressed whether DOR could collect "a penalty for the tardy filing of a state estate tax return." *Id.* at 263. Interpreting the monetary penalty provision in RCW 83.100.070(2), this Court concluded the entire contents of the statute -- a monetary penalty and interest on the taxes due – was a "penalty" to be imposed on late payment. Indeed, this Court's analysis is consistent with the decision of our Supreme Court in *In re Elvigen's Estate*, 191 Wash. 614, 71 P.2d 672 (1937), a case under Washington's former inheritance tax, that described interest on estate tax delinquencies as "interest penalty." *Id.* at 621-24.

Interest should not be retained by DOR since it would be the retroactive imposition of a penalty.[15]

Even if this Court believes *Hambleton* applies on these facts, it should decline to allow DOR to recover interest against the Estate.

---

[14] Washington courts have made clear that civil penalties do not apply retroactively -- *Adcox v. Children's Orthopedic Hosp. & Medical Center*, 123 Wn.2d 15, 30, 864 P.2d 921 (1993) (civil penalties imposed on hospitals not retroactive); *Johnston v. Beneficial Mgmt. Corp. of Am.*, 85 Wn.2d 637, 642, 538 P.2d 510 (1975), *modified on other grounds in Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 581 P.2d 1349 (1978) (treble damage remedy in CPA applied only prospectively).

[15] The fact that the statute applies retroactively to all persons dying after 2005 does not change the fact that the tax was not owed until the Legislature changed the law in 2013.

D. CONCLUSION

Hambleton does not apply on these facts to the Estate's vested rights. To hold otherwise requires this Court to condone DOR's blatant disobedience of the Supreme Court's *Bracken* decision and institution of an appeal unsupported by law for the sole purpose of delay.

Even if *Hambleton* applies, DOR is not entitled to recover interest under RCW 83.100.070 for the period when *Bracken* clearly held the Estate was not obligated to pay taxes.

DATED this 8th day of December, 2014.

Respectfully submitted,

Philip A. Talmadge

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
3rd Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Mark W. Roberts, WSBA #16843
Robert B. Mitchell, WSBA #10874
K&L Gates LLP
925 Fourth Ave, Suite 2900
Seattle, WA 98104-1158
(206) 623-7580
Attorneys for Respondent
Scott B. Osborne, personal representative
of Barbara Mesdag Estate

APPENDIX

RCW 83.100.070:

(1) For periods before January 2, 1997, any tax due under this chapter which is not paid by the due date under RCW 83.100.060(1) shall bear interest at the rate of twelve percent per annum from the date the tax is due until the date of payment.

(2) Interest imposed under this section for periods after January 1, 1997, shall be computed at the rate as computed under RCW 82.32.050(2). The rate so computed shall be adjusted on the first day of January of each year.

(3)(a) If the Washington return is not filed when due under RCW 83.100.050 and the person required to file the Washington return under RCW 83.100.050 voluntarily files the Washington return with the department before the department notifies the person in writing that the department has determined that the person has not filed a Washington return, no penalty is imposed on the person required to file the Washington return.

(b) If the Washington return is not filed when due under RCW 83.100.050 and the person required to file the Washington return under RCW 83.100.050 does not file a return with the department before the department notifies the person in writing that the department has determined that the person has not filed a Washington return, the person required to file the Washington return shall pay, in addition to interest, a penalty equal to five percent of the tax due for each month after the date the return is due until filed. However, in no instance may the penalty exceed the lesser of twenty-five percent of the tax due or one thousand five hundred dollars.

(c) If the department finds that a return due under this chapter has not been filed by the due date, and the delinquency was the result of circumstances beyond the control of the responsible person, the department shall waive or cancel any penalties imposed under this chapter with respect to the filing of such a tax return. The department shall adopt rules for the waiver or cancellation of the penalties imposed by this section.

Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)
General Orders, Calendar Dates, and General Information at http://www.courts.wa.gov/courts **OFFICE HOURS**: 9-12, 1-4.

May 29, 2013

Peter Anthony Talevich
K&L Gates LLP
925 4th Ave Ste 2900
Seattle, WA 98104-1158
peter.talevich@klgates.com

Mark Wilcox Roberts
K&L Gates LLP
925 4th Ave Ste 2900
Seattle, WA 98104-1158
mark.roberts@klgates.com

Charles E Zalesky
Attorney General of Washington
PO Box 40123
Olympia, WA 98504-0123
ChuckZ@atg.wa.gov

David M. Hankins
Atty Generals Ofc/Revenue Division
7141 Cleanwater Dr SW
PO Box 40123
Olympia, WA 98504-0123
david.hankins@atg.wa.gov

CASE #: 44766-5-II
Scott Osborne, Resp., as Personal Rep. of the Estate of B. Mesdag v. WA. State DOR, App.

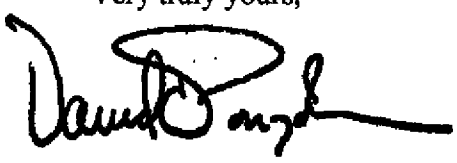
Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER SCHMIDT:

The Respondent's Motion to Dismiss the Appeal under RAP 18.9(c) is denied. Without being able to review the Appellant's brief, this court cannot determine whether the appeal is "solely for the purpose of delay" such that dismissal would be appropriate under RAP 18.9(c)(2). The Respondent may wish to consider filing a motion on the merits under RAP 18.14 after the Appellant's brief has been filed.

Very truly yours,



David C. Ponzoha
Court Clerk

K&L GATES

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WA 98104-1158
T 206.623.7580 F 206.623.7022

April 3, 2013

Mark W. Roberts
D 206.370.8119
F 206.370.6160
mark.roberts@klgates.com

David M. Hankins
Assistant Attorney General
The Attorney General of Washington
Revenue Division
P.O. Box 40123
Olympia, WA 98504-0123

Re: **Estate of Barbara H. Mesdag**
Cause No. 10-2-00929-6

Dear Mr. Hankins:

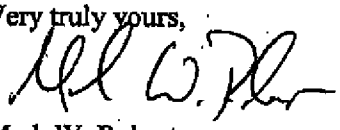
On March 22, 2013, the Thurston County Superior Court ordered the Department of Revenue to pay the Mesdag estate's estate tax refund "immediately." We were disappointed to receive your email indicating that the Department will not comply with the court's order but instead seek to appeal it. Given the holding in *Bracken*, the Supreme Court's rejection earlier this year of the Department's motion for reconsideration of that holding, the admission in your own papers that *Bracken* controls the legal question of the Mesdag estate's entitlement to a refund, and Judge Tabor's straightforward ruling, we see no legitimate grounds for an appeal.

We believe that any decision by the Department to file an appeal in order to delay payment would merit sanctions. As you know, Civil Rule 11 provides that the signature of a party or of an attorney on a pleading, motion, or legal memorandum constitutes a certificate that, to the best of the individual's knowledge, information, and belief, formed after reasonable inquiry, the pleading, motion, or memorandum is well grounded in fact; it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; and it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

In *Bethesda Lutheran Homes & Services, Inc. v. Born*, 238 F.3d 853 (7th Cir. 2001), the plaintiffs filed a suit relating to facts they had previously litigated, resulting in two published decisions. The court held that it would not reexamine those decisions, which were only two and three years old. This holding applies *a fortiori* to the *Bracken* decision. In *Mariani v. Doctors Associates, Inc.*, 983 F.2d 5 (1st Cir. 1993), the court upheld an award of sanctions in light of a party's filing of repetitive motions in order to avoid court-ordered arbitration. The circumstances here are similar: The Department is using delaying tactics rather than following the Supreme Court's decision in *Bracken*. Such conduct invites sanctions.

If you have any questions, please do not hesitate to contact me.

Very truly yours,



Mark W. Roberts

cc: Scott B. Osborne

STATE OF WASHINGTON
DEPARTMENT OF REVENUE

RECEIVED
APR 7 2010
MARK W. ROBERTS

April 5, 2010

MARK W ROBERTS
K & L GATES LLP
925 4TH AVE STE 2900
SEATTLE, WA 98104-1158

Re: Estate of **BARBARA H MESDAG**, Deceased
County: Kitsap
Cause No.: 07-4-00467-9

Dear Mr. Roberts:

We received the referenced estate's request for refund March 18, 2010. The requested refund has been approved in part and denied in part. The refund calculation is enclosed.

The amount refundable as a result of increasing the attorney fees and taking an additional deduction for interest paid to Washington has been approved; however the total interest paid to Washington is $310,937 (see enclosed calculation). This adjustment was made on Schedule K before calculating the refund.

The amount refundable as a result of your exclusion of § 2044 property on the Washington Estate and Transfer Tax Return has been denied. When reporting adjustments for the inclusion or exclusion of QTIP elected property on the Washington Estate and Transfer Tax Return, only elections made by estates of decedents whose date of death is after May 16, 2005 are allowed an adjustment.

The refund warrant is being sent separately. You should receive it within 10 days. Our amended tentative release is enclosed. Please provide a copy of the *amended* Internal Revenue Service Acceptance/Closing Document when it is received.

Sincerely,

Kari Kenall

Kari Kenall
Estate Tax Examiner
(360) 570-5524
karik@dor.wa.gov

Enclosures

State of Washington
Department of Revenue
Special Programs Division
PO Box 47488
Olympia, WA 98504-7488

FOR KITSAP COUNTY

Estate of

BARBARA H MESDAG

Deceased

AMENDED

Certificate Re: Payment of Tentative Inheritance/Estate Tax

Probate Number: 07-4-00467-9

I hereby certify that I am duly appointed and qualified by the Special Programs Division of the Washington State Department of Revenue and have custody of the records pertaining to inheritance/estate taxes. I hereby further certify as follows with reference to the payment to the State of Washington of the inheritance/estate tax on this estate.

The total amount of such tax has been tentatively determined to be as follows:

Amount paid:	$3,239,761.00 (Tax)	+	$0.00 $310,937.15 (Penalty & Interest, if any)	=	$3,550,698.15 (Total)

Date(s) of Payment: various

Final determination of the tax liability can not be made until a copy of the Audit of the Federal Estate Tax Return is received. Interest must be assessed on tax increases resulting from the Federal Audit (RCW 83.100.090). The tax release for this estate can be issued only after a copy of the Estate Tax Closing Letter confirming the amount of Federal estate tax is received.

Dated at Olympia, Washington: April 5, 2010

Kari Kenall

BY_____

Kari Kenall, Estate Tax Examiner
Special Programs Division

MARK W ROBERTS
K & L GATES LLP
925 4TH AVE STE 2900
SEATTLE, WA 98104-1158

REV 85 0015e (02-26-08)

Summary of Account
Estate of Barbara H. Mesdag, deceased
April 5, 2010

$3,239,761.00	Principal Tax Due
(320,589.14)	Paid 4/4/08
$2,919,171.86	Difference (Principal) OK
103,287.64	Interest 4/5/08-10/6/08 OK
(49,961.66)	Paid 10/6/08 OK
$2,919,171.86	Difference (Principal)
53,325.98	Difference (Interest) OK
207,649.51	Interest 10/7/08-2/26/10 (on $2,919,171.86) OK
(3,260,855.19)	Paid 2/26/10
($80,707.84)	Difference (principal overpayment) OK
(285.24)	Interest 2/26/10-4/9/10
($80,993.08)	**Balance (Refund)** OK 3%

$103,287.64 + $207,649.51 = $310,937.15 (interest paid/deduction allowed)

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited with the U.S. Postal Service for service a true and accurate copy of the Supplemental Brief of Respondent in Court of Appeals Cause No. 44766-5-II to the following parties:

Mark W. Roberts
Rob Mitchell
Peter A. Talevich
K&L Gates LLP
925 4th Ave Ste 2900
Seattle, WA 98104-1158

David Hankins, Senior Counsel
Charles Zalesky, Assistant Attorney General
Revenue Division, OID No. 91027
P. O. Box 40123
Olympia, WA 98504-0123

Original E-filed with:

Court of Appeals, Division II
Clerk's Office
950 Broadway, Suite 300
Tacoma, WA 98402-4427

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated: December 8th, 2014 at Seattle, Washington.

Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE FITZPATRICK LAW

December 08, 2014 - 9:19 AM

Transmittal Letter

Document Uploaded: 447665-Supplemental Respondent's Brief.pdf

Case Name:

Court of Appeals Case Number: 44766-5

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Supplemental Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Christine Jones - Email: roya@tal-fitzlaw.com

A copy of this document has been emailed to the following addresses:

mark.roberts@klgates.com
rob.mitchell@klgates.com
peter.talevich@klgates.com
david.hankins@atg.wa.gov
ChuckZ@atg.wa.gov