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DIVISION II
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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,

Petitioner,

v.

THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON,

Respondent.

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

The petitioner is Scott B. Osborne, personal representative of the Estate of Barbara Hagyard Mesdag ("Estate").

B. COURT OF APPEALS DECISION

Petitioner Osborne seeks review of the Court of Appeals opinion filed on August 11, 2015. A copy of that opinion is in the Appendix at pages A-1 through A-11.

C. ISSUES PRESENTED FOR REVIEW

1. Where this Court's decision in *Hambleton* on the constitutionality of any legislation retroactively repealing *Bracken* under due process principles is being reviewed by the United States Supreme Court, would the Court of Appeals' opinion be obviated should that Court grant certiorari and reverse *Hambleton*?

2. If *Hambleton* remains good law, does the Court of Appeals decision on the impact of whether the judgment in the Estate's favor was final contradict this Court's *Hambleton* decision where DOR's appeal, when filed, was frivolous or taken for purposes of delay under RAP 18.9, and the Estate filed a motion to dismiss it in the Court of Appeals that was improperly denied by that court?

3. Did the Court of Appeals facilitate further DOR delay when it remanded the legal question of whether interest paid by the Estate on tax amounts not yet delinquent to DOR in light of *Bracken* could be recovered by the Estate when such interest is a penalty under Washington law and penalties may not be applied retroactively under due process principles?

D. STATEMENT OF THE CASE

The recitation of the facts in the Court of Appeals opinion is largely correct, op. at 2-4, but it bears emphasis that DOR has done everything in its power to frustrate the application to the Estate of this Court's decision in *In re Estate of Bracken*, 175 Wn.2d 549, 290 P.3d 99 (2012).

Barbara Mesdag died on July 4, 2007. Her husband, Joseph Mesdag, predeceased her on April 27, 2002. Washington enacted its stand-alone estate tax on May 17, 2005, more than three years after Joseph's death but two years before Barbara's.

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. Hankins decl., Ex. 2.[1] After seeking a judicial declaration that the tax did not apply to the QTIP trust, an effort that DOR resisted on procedural grounds, the Estate paid the tax under protest and requested a refund from DOR on March 10, 2010. DOR

[1] Because of the procedural posture of this case in the Court of Appeals with the stays, motion on the merits, and the supplemental briefs, the statement of the case is derived, at least in part, from the factual submissions made in connection with those various appellate pleadings.

denied the refund request on April 15, 2010, Hankins decl., Ex. 3, and the Estate petitioned for judicial review of its denial.

When that judicial review was being heard in King County Superior Court, DOR opposed the Estate's attempt to consolidate its refund case with *Bracken*. The Estate and DOR subsequently agreed to strike an 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 this Court decided *Bracken,* but before DOR moved 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.*

After this Court denied reconsideration, counsel for the Estate and DOR 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

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

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 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, agreeing "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

[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).

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 that its appeal was frivolous, 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. 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 the Court of Appeals. CP 99-105. The Estate promptly moved to dismiss DOR's appeal under RAP 18.9(a), but the Court of Appeals Commissioner denied the motion. The Estate moved to modify that ruling. The Court of Appeals denied that motion as well.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

(1) The Washington Supreme Court's *Hambleton* Decision Remains Unsettled Law

In *Bracken*, this Court addressed the effect of estates employing a tax qualified terminable interest property ("QTIP") in estate planning, ruling on October 18, 2012 that a QTIP 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. This 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.

DOR requested legislation in the 2013 legislative session to, in effect, overrule *Bracken* ("Bracken repealer legislation"), and such 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

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

longer subject to appeal, entered by a court of competent jurisdiction before the effective date of [the new law]." *Id.* at § 10.

In *In re Estate of Hambleton*, 181 Wn.2d 802, 335 P.3d 398 (2014), this Court largely upheld DOR's retroactive *Bracken* repealer legislation against constitutional challenges raised by two estates with QTIPs, concluding that the *Bracken* repealer legislation, though retroactive, was constitutional; it did not violate separation of powers principles. *Hambleton*, 335 P.3d at 406-09. Nor did it offend due process principles, *id.* at 409-12, 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.

One of the two estates 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 this Court. *Id.* at 414-15. The Court rejected this argument. 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, 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. 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, but specifically noted that the Estate had not sought to dismiss DOR's appeal as frivolous. *Id.* at 415-16. By contrast, there is no question that the Estate did so here. Op. at 3.

Review is merited here because the United States Supreme Court is considering a petition for a writ of certiorari in *Hambleton* by the affected estates in Supreme Court Cause No. 14-1436. Should that Court grant certiorari and reverse this Court, the Court of Appeals' decision in applying DOR's *Bracken* repealer legislation retroactively would not be viable under constitutional due process principles, making review under RAP 13.4(b)(3) appropriate.

(2) *Hambleton* Does Not Apply to the Facts Here Where the Estate's Rights Were Vested[5]

A second basis for review here is that the Court of Appeals opinion contradicts this Court's decision in *Hambleton* when DOR's appeal, *when filed*, was frivolous, and the Estate had moved to dismiss it on that basis. Moreover, the court's discussion of what is a frivolous appeal contradicts well-established principles. RAP 13.4(b)(1).

At the time DOR took its appeal to Division II, the decision was final because DOR had *no basis in law* its appeal, given *Bracken*. In fact,

[5] 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).

DOR was specifically warned by the Estate's counsel that its appeal was frivolous. Roberts decl., Ex. H. To claim that the Court of Appeals should disregard or overrule this Court's recent decision in *Bracken* was patently frivolous. 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.

The Court of Appeals discussed what constitutes a frivolous appeal in its opinion at 7, but imports an entirely new element to the analysis – the appellant's subjective good faith belief the law might change to make its otherwise baseless appeal non-frivolous. In effect, the court implicitly blessed the notion that an appeal, frivolous upon its filing, could become non-frivolous by subsequent actions outside the litigation.[6] Filing an appeal that was baseless *when it was filed* on the belief that the Legislature *might* change the law is obviously risky.[7]

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[6] The Legislature is neither a fourth division of the Court of Appeals, nor a substitute for this Court.

[7] There is no guarantee that the Legislature will, in fact, change the law any more than our appellate courts might decide to change the common law. A party filing an otherwise frivolous appeal, under the Court of Appeals' analysis, may seemingly contend that there is some prospect, albeit uncertain, for the Legislature or the appellate courts to change clear, existing law, and thereby escape RAP 18.9 sanctions.

The 4-part test for a frivolous appeal articulated in *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187 (1980) and *Miller Cas. Ins. Co. v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983), and subsequently applied in innumerable Washington appellate decisions is an *objective* one. To allow appellants this latitude in filing frivolous appeals fundamentally undercuts Washington courts' ability to prevent frivolous cases from clogging our appellate courts.

The Court of Appeals also ignored the fact that an appeal can be sanctionable if taken to delay. DOR filed its notice of appeal *solely* for purpose of delay. It appealed to delay the effectiveness of *Bracken* until it could lobby the Legislature to retroactively repeal *Bracken*.

RAP 18.9(c) *forbids* such a purpose for an appeal. In *Harvey v. Unger,* 13 Wn. App. 44, 533 P.2d 403 (1975), the court sanctioned an appeal filed solely for purposes of delay. There, the defendant appealed an adverse personal injury judgment, but sought review only 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."). In *Trohimovich v. Dep't of Labor & Indus.*, 21 Wn. App. 243, 249, 584 P.2d 467 (1978), the 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."[8]

DOR's conduct here is similarly frivolous, as it merely wanted to delay the Estate's refund until it could use its lobbying power to persuade the Legislature to overturn *Bracken* by enacting the *Bracken* repealer legislation. The issues in this appeal, *at the time DOR filed it*, were fully controlled by *Bracken*. There was no reasonable possibility that the Court of Appeals could have done anything but affirm the trial court in the face of a *controlling* Supreme Court precedent. As the 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, the Court of Appeals was bound by it.

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[8] *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).

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,[9] 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 review by this Court initially under RAP 4.2(a) if it was serious about trying to reverse *Bracken*, but it did not do so. CP 99-105;
>
> • 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 its response by DOR to the Estate's motion, DOR conceded that under *Bracken* the Estate was entitled to its refund and essentially admitted

[9] That this judicial repealer argument is frivolous is evident from two key legal points. First, the Court of Appeals 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).

> 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. DOR, in effect, asks this Court to bless 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 Estate's right to its judgment by interposing a spurious appeal.

Moreover, the Court of Appeals opinion changes the law arising under RAP 18.9 by allowing frivolous appeals, when filed, to avoid sanctions when activities outside the litigation subsequent to the filing of the notice of appeal fortuitously give the appellant a basis for an appeal. No prior Washington case has so held. Review is merited. RAP 13.4(b)(1), (4).

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

The Court of Appeals erred additionally in consigning the Estate to the added delay of DOR's administrative process in addressing the interest issue. Simply put, interest is a penalty that under due process principles

may not be applied retroactively, even if *Hambleton* and the Court of Appeals' decision here are otherwise sustained. That is a question of law. Review is merited under RAP 13.4(b)(3) on this important constitutional issue.

If this Court concludes 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.[10]

Estate taxes are due on the date the estate tax return is due, without regard to extensions.[11] 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

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[10] 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. DOR has never given 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. CP 24, 31. Of course, *Bracken* was not overruled in *Hambleton*, and it clearly established that the Estate did not owe DOR anything more than it paid.

[11] 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* 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).

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 must 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.[12] Washington courts have *twice* held that such interest assessments on estate taxes due, albeit under an earlier version of Washington's estate tax, constitute a penalty. *See In re Elvigen's Estate*, 191 Wash. 614, 621-24, 71 P.2d 672 (1937) (interest on estate tax delinquencies as "interest penalty."); *Dep't of*

[12] 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).

Revenue v. Estate of Pohelmann, 63 Wn. App. 263, 818 P.2d 616 (1991) (referencing interest as penalty).

The Court of Appeals should have addressed the interest issue directly. As if *the years of delay*,[13] an injustice to the Estate, were not enough, the constitutional issue at stake is not one that is for administrative agencies to resolve. Administrative bodies generally lack authority to determine the constitutionality of a statute. *Yakima County Clean Air Authority v. Glascam Builders, Inc.*, 85 Wn.2d 255, 257, 534 P.2d 33 (1975). DOR is being asked by the Court of Appeals to assess the constitutionality of the retroactive application of its *Bracken* repealer legislation as to interest. DOR is patently self-interested on that question. This is a matter for a court. If the Court of Appeals' concern is one of procedure, this Court can waive the RAP to serve the ends of justice. RAP 1.2(c). The Court should do so here to have the interest issue addressed by the trial court. Review is merited under RAP 13.4(b).

F. CONCLUSION

Hambleton may not be good law. Moreover, it does not apply on these facts to the Estate's judgment against DOR. To hold otherwise condones DOR's blatant disobedience of this Court's *Bracken* decision and

[13] Delay that DOR was clearly a party to effectuating.

the institution of an appeal unsupported by law, when filed, for the sole purpose of delay.

Even if the *Bracken* repealer legislation applies to the Estate, 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.

This Court should grant review under RAP 13.4(b), reverse the Court of Appeals, and affirm the trial court judgment. Alternatively, this Court should grant review, reverse the Court of Appeals, and remand the case to the trial court to determine the extent to which the Estate may recover for any improper interest-related payments it made to DOR.

DATED this 4th day of September, 2015.

Respectfully submitted,

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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SCOTT B. OSBORNE, as Personal Representative of the ESTATE OF BARBARA MESDAG, Respondent, v. THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON, Appellant.	No. 44766-5-II UNPUBLISHED OPINION

MELNICK, J. — The Department of Revenue (Department) appealed a superior court order requiring it to issue a refund of principal estate tax overpayment and interest to the Estate of Barbara Mesdag (Estate). That order relied on our Supreme Court's opinion in *In re Estate of Bracken*, 175 Wn.2d 549, 290 P.3d 99 (2012). In response to *Bracken*, in 2013, the legislature amended the Estate and Transfer Tax Act, chapter 83.100 RCW, and made the change retroactive to the estates of decedents, like Mesdag, who died on or after May 17, 2005. Challenges to the amendment were considered by the Supreme Court in *In re Estate of Hambleton*, 181 Wn.2d 802, 809, 335 P.3d 398 (2014), *petition for cert. filed*, No. 14-1436 (U.S. June 5, 2015). We stayed this appeal pending the *Hambleton* decision, which issued on October 2, 2014. The Supreme Court upheld the validity of the 2013 amendment. *Hambleton*, 181 Wn.2d at 836.

The Department argues that the *Hambleton* opinion resolves this appeal in its favor and that the superior court's order should be reversed. The Estate argues that the *Hambleton* decision does not apply to this case because the Estate had a final judgment for which no lawful basis to appeal existed and because it had a vested right to its refund. In addition, the Estate argues that even if it owes the disputed principal tax, the additional tax was not due until the legislature

amended the law effective June 14, 2013; therefore, we should order the Department to refund the interest the Estate paid under protest, to pay interest on the interest paid under protest, and to pay interest on the principal tax paid under protest from the payment date until the amendment.

We hold that the 2013 amendment applies to the Estate because the Department's appeal of the superior court's order was pending at the time the amendment became effective and the Estate did not have a vested right to its refund that would have been impaired by the retroactive provisions of the amended statute. Further, Washington's Administrative Procedure Act (APA)[1] requires us to remand to the Department for determination of the interest issues. We reverse the superior court's order in the Estate's favor. We remand this case to the superior court with instructions for it to enter a judgment in the Department's favor on the principal tax issue and then remand the case to the Department for determination of the additional issues.

FACTS

Barbara Mesdag died on July 4, 2007. On October 6, 2008, her Estate filed its Washington Estate and Transfer Tax Return, which included a deduction for qualified terminable interest property (QTIP)[2] included in the Estate's federal taxable estate. The Department disallowed the Estate's QTIP deduction and issued a deficiency notice for additional taxes owed on the value of the QTIP property. On February 26, 2010, the Estate paid the additional tax plus interest under

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[1] Ch. 34.05 RCW.

[2] A QTIP trust is a testamentary trust that allows a deceased spouse to control the final disposition of the trust property, while giving the surviving spouse a life estate in the income or use of the trust property. *Hambleton*, 181 Wn.2d at 809, 811. The benefit of QTIP trusts is that trust property is not taxed when the first spouse dies; trust property is taxed only when the second spouse dies and the remainder beneficiaries become present interest holders. *Hambleton*, 181 Wn.2d at 809, 811.

protest. The Estate then applied for a tax refund. The Department denied the Estate's refund request with respect to the QTIP property.

The Estate petitioned the superior court for judicial review of the Department's denial of its refund. The parties jointly moved for a stay until the Supreme Court resolved *Bracken*. The court granted the motion. On October 18, 2012, *Bracken* issued and the court ruled in favor of the taxpayers. 175 Wn.2d at 575-76. On February 15, 2013, the Estate moved for judgment on the pleadings, and argued that *Bracken* resolved all issues in its favor. Three days later, legislation was introduced that amended the definitions of "transfer" and "Washington taxable estate" to expressly include QTIP property in the Washington taxable estate of a decedent. *See* LAWS OF 2013, 2d Spec. Sess., ch. 2, § 2. The legislation contained an express retroactivity clause that applied the amendment to estates of decedents, who died on or after May 17, 2005. *See* LAWS OF 2013, 2d Spec. Sess., ch. 1, § 1.

The Department opposed the Estate's motion for judgment on the pleadings and argued that the superior court should continue to stay the action so the legislature could consider the fiscal impact of *Bracken*, and because our Supreme Court should overrule *Bracken*. The superior court refused to stay the action and granted the Estate's motion, ordering the Department to immediately refund the Estate's principal overpayment of estate tax and interest.

On April 19, 2013, the Department appealed the superior court's order. The Estate immediately moved to dismiss the appeal under RAP 18.9(c), alleging that the appeal was frivolous and filed solely for the purpose of delay. On May 29, our commissioner denied the motion, and ruled that this court could not determine whether the appeal is "solely for the purpose of delay" without being able to review the Department's brief. Commissioner's May 29, 2013 ruling. We subsequently denied the Estate's motion to modify the commissioner's ruling. When

we ruled on the Estate's motion to modify, the pending legislation had been signed into law. On June 14, 2013, the amendment took effect. LAWS OF 2013, 2d Spec. Sess., ch. 2, § 14.

Our Supreme Court considered challenges to the amendment in *Hambleton*, 181 Wn.2d 809. We stayed this case pending the Court's ruling in *Hambleton*. *Hambleton* upheld the retroactive application of the 2013 amendment. 181 Wn.2d at 836-37. We lifted the stay and ordered the parties to file additional briefing on the applicability of the *Hambleton* decision. The Department argues that the *Hambleton* opinion resolves this appeal in its favor. The Estate disagrees and argues that the *Hambleton* decision does not apply to this case because the Department had no lawful basis to appeal the superior court's order and the Estate had a "vested right" to a refund.

ANALYSIS

The Estate argues that the 2013 amendment to the Estate and Transfer Tax Act should not apply to this case because the Estate had a final judgment not subject to appeal under existing law. The Estate also argues that because its right to a refund had vested, retroactive application of the 2013 amendment would violate due process. We disagree.

In addition, the Estate argues that even if the amendment applies, the Estate did not owe the disputed tax until the amendment became law. Therefore, the Estate urges us to order the Department to refund the interest the Estate paid prior to the change in the law, and to order the Department to pay interest on the collected interest and interest on the principal tax collected before it was due. The APA requires us to remand the interest issues to the agency for determination.

I. STANDARD OF REVIEW

The superior court granted the Estate's motion for judgment on the pleadings. In reviewing such an order, we examine the pleadings "to determine whether the claimant can prove any set of facts, consistent with the complaint, that would entitle the claimant to relief." *Parrilla v. King County*, 138 Wn. App. 427, 431, 157 P.3d 879 (2007). Here, the Department notes that the motion should have been treated as one for summary judgment because the parties presented matters outside the pleadings to the superior court, *e.g.*, the pending legislation. Summary judgment is appropriate where, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 271, 285 P.3d 854 (2012).

Here, the superior court's decision to grant judgment on the pleading rather than summary judgment does not affect the outcome of this appeal. In a tax case, we review a superior court's legal conclusions de novo. *Bracken*, 175 Wn.2d at 562; *Home Depot USA, Inc. v. Dep't of Revenue*, 151 Wn. App. 909, 916, 215 P.3d 222 (2009).

II. APPLICABILITY OF 2013 AMENDMENT

A. Final Judgment

The Estate argues that the retroactive amendment is inapplicable because the superior court's judgment ordering a refund was final. The Estate's argument is predicated on its allegation that it had a judgment for the refund amount that should have been final but for the Department's frivolous appeal filed solely for the purpose of delay.

Hambleton rejected a similar argument. 181 Wn.2d at 835-36. The Hambleton Estate argued that the superior court's ruling was final at the time the legislature enacted the legislation, and therefore, the amendment should not apply to it. *Hambleton*, 181 Wn.2d at 835. The

Hambleton Estate arrived at this conclusion by arguing that the Department had no basis in law to appeal the order granting summary judgment because the Department appealed the order before the amendment was enacted. *Hambleton*, 181 Wn.2d at 835-36. The Supreme Court found the Hambleton Estate's reasoning unpersuasive:

> 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 accordingly." [*Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995)]. 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 [the Department] 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.

Hambleton, 181 Wn.2d at 836.

Here, the Estate acknowledges that the Supreme Court rejected a similar argument in *Hambleton*, but it argues that this case is distinguishable on its facts from *Hambleton*. Unlike in *Hambleton*, here the Estate moved to dismiss the Department's appeal under RAP 18.9(c). The Estate argued that the appeal was frivolous and filed solely for the purpose of delay. Our commissioner denied the Estate's motion to dismiss. The Estate moved to modify the commissioner's ruling, but we denied that motion. The Estate argues that by filing the motion to dismiss, it "satisfied its necessary procedural predicate to being able to now argue [that the Department] 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 [the retroactive amendment]." Supp. Br. of Resp't at 11.

RAP 18.9(c) provides that we "will, on motion of a party, dismiss review of a case . . . if the application for review is frivolous, moot, or solely for the purpose of delay." An appeal is frivolous if, considering the entire record, it presents no debatable issues upon which reasonable minds might differ and it is so devoid of merit that there is no reasonable possibility of reversal. *In re Guardianship of Wells*, 150 Wn. App. 491, 504, 208 P.3d 1126 (2009).

The Estate argues that the Department's appeal was solely for the purpose of delay because its only aim was to prevent the judgment from becoming final before the legislature enacted the amendment. The Department argues that its appeal was not frivolous because it had a good-faith belief that *Bracken* was wrongly decided and should be overruled by the Supreme Court and that the legislature would amend the controlling law based on pending legislation.

We agree with the Department that its appeal was not frivolous when filed because the Department made a good-faith argument for overruling *Bracken*. The Department argued that *Bracken* should be overruled at every opportunity. It also noted that it may request a transfer to the Supreme Court under RAP 4.4. Furthermore, the Department anticipated "that the controlling law may be retroactively amended by the Washington Legislature during the 2013 legislative session." Department's Opposition to Motion to Dismiss (filed May 13, 2013) at 4. As noted in its response to the motion to dismiss, legislation had already been introduced. Under these circumstances, we conclude that the Department's appeal was not frivolous or filed solely for the purposes of delay.

The Estate urges us to hold that the judgment in this case should be deemed final as of the date the superior court ordered the refund. But the Estate does not cite persuasive authority for

this proposition[3] and we decline its invitation. "'Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.'" *State v. Logan*, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000) (quoting *DeHeer v. Seattle Post–Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)). We cannot ignore the fact that because of the appeal, the judgment was not final. Accordingly, we reject the Estate's final judgment argument.

B. Due Process/Vested Right

The Estate argues that applying the retroactive amendment violates due process by depriving the Estate of its vested right to a refund. We disagree.

A party alleging a due process violation must first establish a legitimate claim of entitlement to the life, liberty, or property at issue. *Willoughby v. Dep't of Labor & Indust.*, 147 Wn.2d 725, 732, 57 P.3d 611 (2002). "'A statute may not be applied retroactively to infringe a vested right.'" *Hambleton*, 181 Wn.2d at 828 (quoting *In re Pers. Restraint of Carrier*, 173 Wn.2d 791, 810, 272 P.3d 209 (2012)).

> "This notion finds root in the due process clauses of the Fifth and Fourteenth Amendments. While due process generally does not prevent new laws from going into effect, it does prohibit changes to the law that retroactively affect rights which vested under the prior law. . . .

[3] The Estate relies on *Hambleton*, but *Hambleton* does not support it. The Estate relies entirely on the Supreme Court having mentioned that the Hambleton Estate did not file a motion to dismiss the appeal. *See Hambleton*, 181 Wn.2d at 836. The Supreme Court referred to RAP 18.9(c) to explain that a mechanism exists for litigants to seek dismissal of frivolous appeals. The Hambleton Estate did not take advantage of it, and thus, the appeal was still pending. *Hambleton*, 181 Wn.2d at 836. Here, the Estate used RAP 18.9(c), but it was not successful in having the appeal dismissed; thus, the appeal was still pending. The dispositive fact in *Hambleton* was that the appeal was still pending when the legislature amended the statute. And the same is true here.

> [A] vested right, entitled to protection from legislation, must be something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another."

Hambleton, 181 Wn.2d at 828-29 (second alteration in original) (quoting *Carrier*, 173 Wn.2d at 811 (quoting *Godfrey v. State*, 84 Wn.2d 959, 963,530 P.2d 630 (1975))). It is undisputed that under the amended tax statutes, the QTIP property at issue must be included in the Estate's taxable estate. *See* RCW 83.100.020(14), (15); *Hambleton*, 181 Wn.2d at 809. Therefore the Department does not owe the Estate a refund for taxes it paid on the QTIP property. We reverse the superior court's order and remand to the superior court for entry of judgment in the Department's favor on the principal tax issue.

III. INTEREST ISSUES

The Estate argues that even if it is not entitled to a refund of any of the principal estate tax paid under protest, the tax attributable to the QTIP property was not *due* until the legislature amended the law on June 14, 2013. Therefore, the Estate urges us to order the Department to refund the interest paid under protest by the Estate, to pay interest on the interest paid under protest, and to pay interest on the principal tax paid under protest from the payment date until the effective date of the amendment. The Department argues that we should not address these interest issues because they were not raised before the agency. We conclude that the Estate is entitled to raise these new interest issues, but it must first present its arguments and requests for interest to the Department for its consideration.

Generally, under the APA, issues not raised before the agency may not be raised on appeal. RCW 34.05.554. However, a party may raise a new issue on appeal if "[t]he interest of justice would be served by resolution of an issue arising from . . . [a] change in controlling law occurring

after the agency action." RCW 34.05.554(1)(d)(i). Under those circumstances, "[t]he court shall remand to the agency for determination." RCW 34.05.554(2).

Here, the interest issues raised in the Estate's supplemental brief were not presented to the Department.[4] But justice would be served by resolving the interest issues, which arose from a retroactive change in law after the Department denied the Estate's refund request. Therefore, once the superior court enters judgment in favor of the Department on the principal tax issue, we instruct the superior court to remand this case to the Department for determination of the interest issues raised in the Estate's supplemental brief.

IV. ATTORNEY FEES

The Estate requests reasonable attorney fees and costs under RAP 18.9 and RCW 4.84.185 for defending a frivolous appeal. An action is frivolous if, considering the action in its entirety, it cannot be supported by any rational argument based in fact or law. *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 785, 275 P.3d 339 (2012). The Department successfully appealed the superior court's judgment ordering it to refund taxes paid on the Estate's QTIP property. Therefore, this action was not frivolous, and we deny the Estate's attorney fee request.

We reverse the superior court's order in the Estate's favor, and remand to the superior court with instructions for it to enter a judgment in the Department's favor on the principal tax issue and then remand the case to the Department for determination of the additional issues.

[4] The Estate requested that the Department refund the tax and interest paid and that it pay interest on those amounts, based on its argument that the principal tax was not owed and would be refunded. The Estate now requests the Department (1) refund the interest paid, (2) pay interest on the interest paid, and (3) pay interest on the principal tax paid despite that the principal tax is owed and will not be refunded. Because of the fundamentally different underlying bases for relief, the interest issues the Estate raised on appeal constitute new issues that it must present to the Department.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Worswick, J.

Johanson, C.J.

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

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

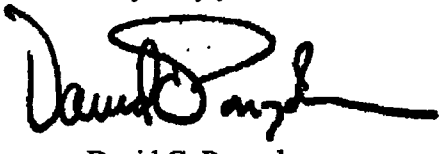
Counsel:

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 LLP
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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:

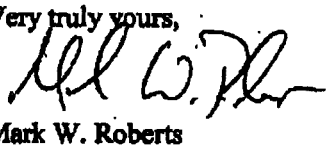
On March 22, 2013, the Thurston County Superior Court ordered the Department of Revenue to pay the Mesdag estate's estate tax refund "immediately." We were disappointed to receive your email indicating that the Department will not comply with the court's order but instead seek to appeal it. Given the 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

BY Kari Kenall

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)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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

Respondent,

v.

THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON,

Appellant.

No. 44766-5-II

ORDER DENYING MOTION TO MODIFY AND SUSPENDING GR 2010-01

RESPONDENT Scott B. Osborne, as personal representative of the Estate of Barbara Mesdag, has moved to modify the Commissioner's ruling denying his motion to dismiss the Department of Revenue's appeal in this case. Upon consideration, this court denies the motion to modify but suspends the briefing schedule set forth in General Rule 2010-01. The Department is hereby ordered to file the opening brief in this appeal within 30 days of this ruling. Osborne shall file the respondent's brief within 30 days after service of the appellant's brief. It is

SO ORDERED.

DATED this 17th day of July, 2013.

PANEL: Jj. Hunt, Quinn-Brintnall, Penoyar

FOR THE COURT:

Hunt P.J.

PRESIDING JUDGE

FILED
COURT OF APPEALS
DIVISION II
2013 JUL 17 AM 9:16
STATE OF WASHINGTON
BY CM
DEPUTY

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 Petition for Review in Court of Appeals Cause No. 44766-5-II to the following parties:

Mark W. Roberts
Rob Mitchell
K&L Gates LLP
925 Fourth Ave, Suite 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 delivered by ABC Legal Messenger to:

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: September 4th, 2015 at Seattle, Washington.

Matt J. Albers, Legal Assistant
Talmadge/Fitzpatrick/Tribe

For conformed copy

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,

Petitioner,

v.

THE DEPARTMENT OF REVENUE OF
THE STATE OF WASHINGTON,

Respondent.

PETITION FOR REVIEW

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