NO. 96997-3
Court of Appeals No. 50762-5-II

SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondent,

v.

DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON,

Petitioner.

DEPARTMENT OF REVENUE'S PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER AND CITATION TO DECISION

The State Department of Revenue files this petition requesting discretionary review of the February 26, 2019, unpublished opinion of the Court of Appeals, Division II, in *Scott B. Osborne v. Dep't of Revenue*, No. 50762-5-II. A copy of that opinion is provided as Appendix A.

II. INTRODUCTION

The Court of Appeals opinion directly conflicts with this Court's recent decisions in *In re Estate of Hambleton*, 181 Wn.2d 802, 335 P.3d 398 (2014), *cert. denied*, 136 S. Ct. 318 (2015), and *Hale v. Wellpinit School District No. 49*, 165 Wn.2d 494, 198 P.3d 1021 (2009). In *Hambleton*, this Court unanimously held that the Legislature had constitutional authority to stop an unanticipated and massive loss of revenue by retroactively amending the state's estate tax code to tax qualified terminable interest property (QTIP) passing at death. In *Hale*, this Court unanimously held that the Legislature had constitutional authority to retroactively amend a statute that had previously been construed by the courts, rejecting the notion that court decisions are entitled to broader retroactive effect than laws passed by the Legislature in response.

The Court of Appeals ruling turns *Hambleton* and *Hale* on their heads by refusing to give full retroactive effect to the 2013 "*Bracken* fix"

legislation that was enacted in direct response to a prior court decision narrowly interpreting the estate tax code. The Court of Appeals concluded that estate tax and interest are due under the amended law *only from the date the amendment was enacted.* In other words, although the Supreme Court's decision in *Hambleton* expressly upheld the retroactive amendment to the estate tax code, the Court of Appeals nonetheless held that estate tax and interest are due on a prospective-only basis. The Court of Appeals refusal to follow this Court's prior decisions and retroactively apply the amended law results in a $350,000 impact on the state budget from this Estate alone, and invites additional litigation on an issue that was fully resolved in *Hambleton.*

III. ISSUE

As this Court held in *Hambleton* and *Hale*, Court decisions interpreting a statute apply retroactively, as do retroactive statutes passed by the Legislature in response. Did the Court of Appeals err as a matter of constitutional law when it gave broader retroactive effect to this Court's decision in *In re Estate of Bracken* than it gave to the 2013 "*Bracken* fix" legislation?

IV. STATEMENT OF THE CASE

A. The QTIP Controversy

The controversy surrounding the state estate tax treatment of QTIP is well summarized in *Hambleton*, 181 Wn.2d 802. The saga began in 2005 when the Legislature amended the estate tax code to create a "stand alone" estate tax that piggybacked on the federal estate tax regime. *Id.* at 810. The stand-alone estate tax was imposed on "every transfer of property" that occurred as a result of the decedent's death and applied "prospectively to estates of decedents dying on or after May 17, 2005." *Id.* at 811 (quoting Laws of 2005, ch. 516, §§ 3(1), 20).

Almost immediately after the law was passed, several estates took the position that qualified terminable interest property was not subject to the stand-alone estate tax if the QTIP election was made before the 2005 effective date of the law.[1] The Department amended its interpretive rules in 2009 to clarify that QTIP passing under Internal Revenue Code § 2044 *is included* in the Washington taxable estate, but by then several estates had already commenced litigation challenging the Department's efforts to

[1] QTIP is a life estate set up to take advantage of the marital deduction allowed under federal estate tax law. When a spouse dies, his or her estate can create a QTIP trust that provides income to the surviving spouse for life. An estate may deduct the assets contributed to the QTIP trust from the taxable estate of the spouse who made the election. I.R.C. § 2056(b)(7). However, upon the surviving spouse's death, the assets remaining in the QTIP trust are included in that spouse's taxable estate. I.R.C. § 2044.

collect tax on QTIP.

B. This Court's Decision in *Bracken* Created an Estimated $159 Million Tax Loss

The lead case was *In re Estate of Bracken*, 175 Wn.2d 549, 290 P.3d 99 (2012). In that case the estates of Sharon Bracken and Barbara Nelson asserted that they did not owe Washington estate tax on QTIP included in their federal taxable estates. In ruling for the two estates, this Court "interpreted 'transfer' narrowly" and reasoned that the "real" transfer of QTIP occurred when the first spouse died and the QTIP trust was created. *Hambleton*, 181 Wn.2d at 812 (citing *Bracken*, 175 Wn.2d at 554, 563). "Any transfers that occurred later upon the wives' deaths were fictional" and the Department could not assert tax on these "fictional" transfers. *Id.*

This Court's narrow interpretation of the Washington statute, distinguishing between "real" and "fictional" transfers of property at death, applied retroactively and opened a floodgate of litigation from other estate's seeking the same tax advantage. That decision was also of great concern to the Legislature. It allowed married couples with large estates to avoid paying Washington's estate tax, creating an estimated loss of $159 million in education funding. *See* RCW 83.100.220, .230 (directing Washington estate taxes solely to education funding).

C. This Court Upheld the Legislature's Retroactive Closure of the Tax Loophole Created by the *Bracken* Decision

The Washington Legislature acted swiftly to address the fiscal and tax policy implications of *Bracken*. In June 2013, only a few months after *Bracken* was decided, the Legislature amended the estate tax code to make clear that the tax *does* apply to QTIP passing at the death of the second spouse. *See* Laws of 2013, 2d Spec. Sess., ch. 2. The intended purpose of the legislation was "to reinstate the legislature's intended meaning when it enacted the estate tax, restore parity between married couples and unmarried individuals, restore parity between QTIP property and other property eligible for the marital deduction, and prevent the adverse fiscal impacts of the *Bracken* decision." *Id.* at § 1(5). The 2013 amendment applied retroactively to "all estates of decedents dying on or after May 17, 2005." *Id.* at § 9.

In *Hambleton*, this Court unanimously upheld the retroactive "*Bracken* fix" legislation, finding—among other things—that the act was rationally related to preventing the "unanticipated and significant fiscal shortfall" created by the *Bracken* decision. *Hambleton*, 181 Wn.2d at 827. *Hambleton* resolved all pending appeals dealing with the tax treatment of QTIP, with the exception of the appeal filed by the Mesdag Estate. *See* VRP at 18 (no other QTIP cases being litigated post-*Hambleton*).

D. After Having Its Estate Tax Refund Denied, the Mesdag Estate Sought a Refund of Assessed Interest It Paid in 2010

Barbara Mesdag's estate was one of a number of estates that sought a refund of Washington tax that it had paid on QTIP included in its federal taxable estate. Barbara Mesdag died in July 2007 and her estate's Washington estate tax return was due nine months later. After receiving a six month extension, the Mesdag Estate filed its return in October 2008. AR 2, 9. On that return, the Estate claimed a deduction for QTIP included in its federal taxable estate. AR 9.

The Department denied the QTIP deduction and assessed an additional $3,103,161.82 in tax and interest. *Id.* A few months later, the Department informed the Estate that it would not take any action on the debt until the pending *Bracken* litigation was fully resolved. AR 29. However, in 2010 the Estate chose to pay the assessed tax and interest. AR 54-56. Shortly thereafter, the Estate sued for a refund under the Administrative Procedure Act. AR 139.[2]

The APA proceedings were initially stayed pending resolution of the *Bracken* appeal. AR 139. After *Bracken* was decided, the trial court ruled in favor of the Estate. The Department promptly appealed. *Id.*

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[2] By the time the Estate paid the assessment, the interest relating to the late payment of tax on QTIP totaled $307,668.63. *See* Br. of Resp., p. 9 n.4 (providing calculation of "assessed interest").

After this Court's decision in *Hambleton*, the Court of Appeals reversed the trial court and rejected the Estate's tax refund claim. *See Osborne v. Dep't of Revenue*, 189 Wn. App. 1029, 2015 WL 4760567 (2015) (unpublished) (hereinafter *Osborne I*) (copy in the record at AR 137). But that did not end the litigation. The Estate argued that it was entitled to a refund of assessed interest it paid in 2010. Because this issue was raised for the first time in the Estate's post-*Hambleton* supplemental brief, the Court of Appeals remanded the issue to the Department for further proceedings pursuant to RCW 34.05.554(2). AR 146.

E. The Department Rejected the Estate's Claim for Refund of Assessed Interest and the Superior Court Affirmed

On remand to the Department, the Estate argued that the Department illegally collected an "interest penalty" when the Estate paid the assessed tax and interest in 2010, and "illegally took" and retained that payment during the period in which it "was obligated under *Bracken* to refund the contested amounts paid by the Estate." AR 133-34. The Department denied the Estate's refund claim because interest imposed under the estate tax code was not a "penalty" and the estate tax refund statute, RCW 83.100.130(1), permitted a refund of interest only in connection with the refund of tax. AR 169-71.

The superior court affirmed the Department's action. CP 85. The Estate again appealed. CP 87.

F. Court of Appeals Reversed and Ordered a Refund of the Assessed Interest

The Court of Appeals, without the benefit of oral argument, reversed the superior court and set aside the Department's decision. The Court reasoned that although the 2013 *Bracken* fix legislation applied retroactively, estate tax was not "due" on QTIP until the date that legislation was signed into law. *Scott B. Osborne v. Dep't of Revenue*, No. 50762-5-II, 2019 WL 949432 (Feb. 26, 2019) (unpublished) (*Osborne II*), slip op. at 6-8. Prior to that date, the *Bracken* decision's narrow interpretation of the estate tax code controlled over the 2013 *Bracken* fix because the court decision "operates as if it were originally written into" the tax code. *Osborne II*, slip. op. at 6 (quoting *Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976)). Because tax on QTIP was not "due" retroactively, the Estate did not owe the assessed interest it paid in 2010. *Id.* at 8.[3]

V. REASONS WHY REVIEW SHOULD BE GRANTED

The Court of Appeals failed to give full retroactive effect to the 2013 *Bracken* fix legislation when it concluded that tax and interest is

[3] The Court of Appeals also awarded "interest on interest," bringing the total refund to approximately $350,000. Slip op. at 8-9.

"due" under the 2013 retroactive amendment only from the date the amendment was enacted into law. The Court of Appeals' reasoning is directly contrary to this Court's analysis and holdings in *Hambleton* and *Hale* and warrants review under RAP 13.4(b)(1), (b)(3) and (b)(4).

A. The Use of a Legal Fiction to Undercut this Court's Separation of Powers Holdings in *Hambleton* and *Hale* Warrants Review

The Court of Appeals determined that this Court's holding in *Bracken* had priority over the 2013 legislation designed to rectify the severe fiscal and tax policy impact of *Bracken*. Giving a retroactive court decision priority over a subsequent retroactive amendment is directly contrary to this Court's separation of powers holdings in *Hambleton* and *Hale*.

The Court of Appeals arrived at its decision through a dubious legal fiction. Quoting this Court's opinion in *Johnson v. Morris*, 87 Wn.2d 922, 557 P.2d 1299 (1976), the Court of Appeals reasoned that the narrow construction of the estate tax set out in *Bracken* "operates as if it were originally written into" the tax code. *Osborne II*, slip. op. at 6 (quoting *Johnson*, 87 Wn.2d at 927). "In other words, there is no 'retroactive' effect of the court's construction of a statute; rather, once the court has determined the meaning, that is what the statute has meant since its enactment." *Id.* at 6-7 (quoting *Johnson*, 87 Wn.2d at 928).

Although *Johnson v. Morris* states that this Court's construction of a statute has no retroactive effect, the statement is clearly not true. In more recent cases this Court has consistently recognized that a court decision announcing a new rule of law "generally applies retroactively." *McDevitt v. Harbor View Med. Ctr.*, 179 Wn.2d 59, 75, 316 P.3d 469 (2013). More specifically, while a judicial decision may have "retroactive, prospective, or selective prospective application," retroactive application is "overwhelmingly the norm." *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 270, 208 P.3d 1092 (2009) (internal quotation and citation omitted). Stated otherwise, "once this court has applied a rule retroactively to the parties in the case announcing a new rule, we will apply the new rule to all others not barred by procedural requirements . . . ." *Robinson v. City of Seattle*, 119 Wn.2d 34, 74, 830 P.2d 318 (1992). The Court of Appeals ignored these more recent decisions.

Additionally, giving a retroactive court decision priority over a subsequent retroactive amendment is directly contrary to this Court's decision in *Hambleton*. In that case, this Court held that when the co-equal legislative branch enacts a retroactive amendment to a civil statute it is the duty of the courts to "apply that law in reviewing judgments still on appeal . . . and must alter the outcome accordingly.'" *Hambleton*, 181 Wn.2d at 822 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226, 115 S. Ct.

1447, 131 L. Ed. 2d 328 (1995)). Moreover, this Court in *Hambleton* expressly rejected the notion that *Bracken* was immune from subsequent retroactive legislation. *See Hambleton*, 181 Wn.2d at 817-23 (discussing separation of powers and holding that the Legislature "did not intrude on judicial power when it retroactively amended the . . . Act"). In short, "[t]he decision to retroactively amend the statute was a policy decision, properly in the sphere of the legislature." *Id.* at 822 n.3.

Hambleton did not chart a new course in this Court's separation of powers precedent. Rather, the *Hambleton* decision reaffirmed "the principles and reasoning announced in *Hale*." *Id.* at 820. In *Hale*, this Court "firmly rejected the contention that just because an appellate court's statutory interpretation relates back to the time when the statute was originally adopted, any retroactive amendment of that statute violates separation of powers." *Id.* (quoting *Lummi Indian Nation v. State*, 170 Wn.2d 247, 241 P.3d 1220 (2010)). The Court of Appeals should have applied that controlling precedent and respected the language and intent of the 2013 legislation. Instead, it relied on *Johnson* to impede that legislation.

Johnson is not cited in *McDevitt*, *Lunsford*, or *Robinson*, and those more recent decisions addressing the retroactive application of court decisions do not rely on the *Johnson* legal fiction. Additionally, *Johnson* is

not discussed in *Hambleton*. It is, however, discussed in *Hale*. And that discussion is telling. After quoting *Johnson*, this Court in *Hale* rephrased the holding of that case in a manner consistent with the true nature of court decisions: "In other words, it is within this court's 'appropriate sphere of activity' to determine what a particular statute means, and that determination relates back to the time of the statute's enactment." *Hale*, 165 Wn.2d at 506. Under that restated holding, there was no constitutional bar to giving full force to a subsequent legislative amendment that retroactively changed the law. *Id.* at 509-10. Stated differently, this Court in *Hale* did not use *Johnson* to impede the full retroactive force of a subsequent legislative amendment, as the Court of Appeals has done here.

In sum, *Johnson v. Morris* is an outlier. The Court of Appeals should have followed more recent and more thoroughly analyzed decisions addressing the retroactive effect of court decisions. More importantly, the Court should not have relied on *Johnson* as a means for giving *Bracken* greater retroactive force than the 2013 *Bracken* fix legislation.

In 2010, when the Estate paid the assessed interest at issue, the tax treatment of QTIP was still in doubt. The *Bracken* decision resolved that dispute, but only for a short period of time. *Bracken* applied retroactively to the date of the enactment of the stand-alone estate tax. So too did the

2013 *Bracken* fix legislation. Under this Court's precedent, there is absolutely no reason to give *Bracken* greater retroactive effect than the subsequent legislative amendment.

Whether a court decision has greater retroactive force than a legislative amendment is a significant question of constitutional law and an issue of substantial public importance. This Court should grant review under RAP 13.4(b)(1), (b)(3) and (b)(4) to address this significant issue.

B. The Court of Appeals Conclusion that Tax is "Due" on a Prospective-Only Basis Conflicts with *Hambleton*

In addition to the serious misapplication of this Court's separation of powers holdings in *Hambleton* and *Hale*, the Court of Appeals reasoning for granting the Mesdag Estate a refund of assessed interest conflicts with another key aspect of *Hambleton*. This Court in *Hambleton* gave full retroactive effect to the 2013 amendment to the estate tax code. The Court of Appeals opinion does not. Instead, the Court of Appeals held that estate tax and interest are "due" on QTIP on a prospective-only basis. For this additional reason, review is warranted.

There is no serious dispute that the Mesdag Estate would owe the assessed interest it paid in 2010 if not for the Court of Appeals conclusion that the tax on QTIP is "due" only from the date the Legislature passed the

Bracken fix legislation in 2013. *See Osborne II*, slip op. at 6.[4] The Court's reasoning is absurd. While the Legislature undeniably amended the estate tax code retroactively to *impose tax* on QTIP passing at death, the Court of Appeals reasoned that the Legislature "cannot have intended to make such a tax come due and begin accruing interest as early as eight years before its own enactment." *Id.* at 9. Inexplicably, the Court created a distinction between retroactively *imposing* a tax and making "such a tax come due."

The distinction the Court of Appeals created between retroactively imposing tax and prospectively making "such tax come due" was not part of this Court's analysis in *Hambleton*. To the contrary, this Court clearly recognized and applied the Legislature's stated intent to tax QTIP retroactively. *See Hambleton*, 181 Wn.2d at 813 ("In 2013, the legislature responded to *Bracken* by amending the Act *to tax QTIP assets upon the death of the surviving spouse*") (emphasis added); *id.* at 814 (the legislature intended for the amendments to apply both prospectively and retroactively); *id.* at 827 ("The amendment applies to *all estates* since our

[4] The accrued interest the Estate paid in 2010 was imposed under RCW 83.100.070. That code section mandates that "tax due under this chapter which is not paid by the due date" shall bear interest from the date the tax is due until the date of payment. RCW 83.100.070(1). Tax is due under the estate tax code "on or before the date the Washington return is required to be filed . . . , not including any extension of time for filing." RCW 83.100.060(1). A Washington estate tax return is required to be filed nine months after the date of the decedent's death. WAC 458-57-135(3)(a). Applying the plain language of these provisions, the Estate would owe interest on its late payment of estate tax if not for the Court of Appeals' holding that the tax is not "due" retroactively.

state enacted" the stand-alone estate tax) (emphasis added). *See also Estate of Ackerley v. Dep't of Revenue*, 187 Wn.2d 906, 913-14, 389 P.3d 583 (2017) (discussing the Legislature's express intent when it amended the estate tax code in 2013 and recognizing the full retroactive effect this Court gave to that 2013 legislation in *Hambleton*). There can be no mistake from this Court's analysis and holding in *Hambleton* that estate tax is due and owing on QTIP passing at the death of the second spouse.

The Court of Appeals opinion ignores the clear intent of the Legislature to impose the tax on "all estates" of decedents dying on or after May 17, 2005, and conflicts with this Court's analysis and holding in *Hambleton*. Consequently, review is warranted under RAP 13.4(b)(1).

VI. CONCLUSION

The Department respectfully asks this Court to accept review and reverse the Court of Appeals.

RESPECTFULLY SUBMITTED this 26th day of March, 2019.

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PROOF OF SERVICE

I certify that on March 26, 2019, I electronically filed this document with the Clerk of the Court using the Washington State Appellate Courts' e-file portal, which will send notification of such filing to all counsel of record at the following:

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

DATED this 26th day of March, 2019, at Tumwater, WA.

Jamie Falter, Legal Assistant

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

February 26, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SCOTT B. OSBORNE, Personal Representative of the Estate of Barbara Hagyard Mesdag, Appellant, v. DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON, Respondent.	No. 50762-5-II UNPUBLISHED OPINION

MELNICK, J. — Joseph Mesdag died in 2002 and his estate created a qualified terminable interest property (QTIP) for the benefit of his surviving spouse, Barbara Hagyard Mesdag.[1] When Barbara died in 2007, the applicability of Washington estate tax to QTIP was in a state of confusion. After multiple Supreme Court decisions and new legislation, we concluded in an earlier decision in this case that the Estate owed estate tax on the QTIP and remanded to the Department of Revenue (DOR) for a determination of whether the Estate additionally owed interest on the portion of the estate tax attributable to QTIP.

On remand, DOR denied the Estate a refund for the interest it paid on the QTIP estate tax. The trial court affirmed. The Estate appeals, arguing that estate tax on the QTIP did not become "due" until the legislature amended the statute in 2013 and that DOR erred by assessing interest

[1] We refer to Joseph Mesdag and Barbara Hagyard Mesdag by their first names. We intend no disrespect.

on tax it paid in 2010, before the tax was "due." We agree. Therefore, we reverse and remand to DOR for it to refund the Estate's overpaid taxes along with interest.

FACTS

Joseph died in 2002 and his estate created a QTIP for the benefit of his surviving spouse, Barbara. A QTIP is a trust "created by a deceased spouse" that "gives the surviving spouse a life interest in the income or use of trust property." *In re Estate of Hambleton*, 181 Wn.2d 802, 809, 335 P.3d 398 (2014). A QTIP can "be transferred tax free without granting the surviving spouse total control." *In re Estate of Bracken*, 175 Wn.2d 549, 555, 290 P.3d 99 (2012) *superseded by statute*, LAWS OF 2013, 2d Spec. Sess., ch. 2 (*Bracken* amendment), *as recognized in Hambleton*, 181 Wn.2d 802. Effectively, "the estate of the first spouse gets a full marital deduction, yet the property does not escape ultimate taxation" because it will eventually be taxed upon the death of the surviving spouse. *Bracken*, 175 Wn.2d at 556.

Barbara died on July 4, 2007, and her Estate filed its Washington Estate and Transfer Tax Return on October 6, 2008. The Estate did not pay any tax on the QTIP. As a result, DOR issued a deficiency notice for additional taxes owed on the value of the QTIP. On February 26, 2010, the Estate paid taxes under protest on the QTIP property, plus interest accrued between October 6, 2008 and the date of payment. The Estate then applied for a tax refund which DOR denied.

The Estate appealed the denial of its refund to the superior court, which stayed the case pending the Supreme Court's resolution of *Bracken*, 175 Wn.2d 549. After *Bracken* decided that no estate tax was owed on QTIP, the superior court ruled in favor of the Estate and DOR appealed to this court. We stayed the case pending the Supreme Court's resolution of *Hambleton*, 181 Wn.2d 802.

Once *Hambleton* issued, we applied its reasoning to the Estate's appeal and ruled that the Estate was liable for estate tax on the QTIP. *Osborne v. Dep't of Revenue*, No. 44766-5-II, slip op. at 6 (Wash. Ct. App. Aug. 11, 2015) (unpublished), http://www.courts.wa.gov/opinions/. However, we did not resolve whether the Estate also had to pay interest on the QTIP accrued between 2008, when the estate tax became due, and 2010, when the Estate paid the tax under protest. *Osborne*, No. 44766-5-II, slip op. at 5-6. Instead, we remanded to DOR to determine whether the Estate owed interest. *Osborne*, No. 44766-5-II, slip op. at 6.

DOR concluded that the Estate was not entitled to a refund on the interest it had paid. The Estate appealed the decision to the superior court, arguing that the estate tax on the QTIP had not become "due" until the legislature amended the statute in 2013 and thus, that it had not owed any tax in 2008 when it paid tax on the rest of the estate property. The superior court affirmed DOR's decision and the Estate appealed to this court.

ANALYSIS

I. LEGAL PRINCIPLES

DOR's denial of a refund request and demand for interest is "other agency action" under the Administrative Procedure Act (APA). RCW 34.05.570(4); *Wells Fargo Bank, NA v. Dep't of Revenue*, 166 Wn. App. 342, 360-61, 271 P.3d 268 (2012). We reverse DOR's decision if it was unconstitutional, outside DOR's statutory authority, or arbitrary and capricious. RCW 34.05.570(4)(c). The party challenging agency action has the burden of demonstrating the invalidity of the action. *Beatty v. Fish & Wildlife Comm'n*, 185 Wn. App. 426, 443, 341 P.3d 291 (2015).

We review whether the agency erroneously interpreted or applied the law under the error of law standard. *Beatty*, 185 Wn. App. at 443. When applying this standard, we "may substitute

[our] own judgment for that of the [agency], although [we] must give substantial weight to the agency's view of the law it administers." *Beatty*, 185 Wn. App. at 443. When reviewing administrative action, we sit in the same position as the superior court and apply APA standards directly to the agency record. *Thomas v. Emp't Sec. Dep't*, 176 Wn. App. 809, 812, 309 P.3d 761 (2013).

We review questions of statutory interpretation de novo. *Jametsky v. Olsen*, 179 Wn.2d 756, 761, 317 P.3d 1003 (2014). In interpreting statutes, we determine and give effect to the legislature's intent. *Jametsky*, 179 Wn.2d at 762. If a statute's meaning is plain on its face, we give effect to that meaning as an expression of legislative intent. *Blomstrom v. Tripp*, 189 Wn.2d 379, 390, 402 P.3d 831 (2017).

If, after the plain meaning inquiry, "the statute remains ambiguous or unclear, it is appropriate to resort to canons of construction and legislative history." *Blomstrom*, 189 Wn.2d at 390. If the statute "uses plain language and defines essential terms, the statute is not ambiguous." *Regence Blueshield v. Office of the Ins. Comm'r*, 131 Wn. App. 639, 646, 128 P.3d 640 (2006). "A statute is ambiguous if 'susceptible to two or more reasonable interpretations,' but 'a statute is not ambiguous merely because different interpretations are conceivable.'" *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009) (quoting *State v. Hahn*, 83 Wn. App. 825, 831, 924 P.2d 392 (1996)).

We "avoid [a] literal reading of a statute which would result in unlikely, absurd, or strained consequences." *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of* Eagles, 148 Wn.2d 224, 239, 59 P.3d 655 (2002). We "strictly interpret[ ] ambiguities in statutes imposing taxes in favor of the taxpayer." *Sacred Heart Med. Ctr. v. Dep't of Revenue*, 88 Wn. App. 632, 636-37, 946 P.2d 409 (1997).

II. WASHINGTON ESTATE TAX

In 2005, the legislature amended the Washington estate tax in light of changes to the federal estate taxation scheme. LAWS OF 2005, ch. 516, § 1. The new law imposed an estate tax on "every transfer of property located in Washington" and applied it prospectively but not retroactively. *Bracken*, 175 Wn.2d at 559 (quoting RCW 83.100.040(1)).

In 2012, the Supreme Court in *Bracken* interpreted the new taxation scheme to provide an exception for QTIP trusts created by people who died prior to 2005, but whose surviving spouses died after 2005. 175 Wn.2d at 553. The QTIP had been "transferred" by the first spouse prior to passage of the purely prospective tax and no "transfer" of QTIP property occurred upon the death of the surviving spouse. *Bracken*, 175 Wn.2d at 566-67. Accordingly, under the 2005 law as interpreted by *Bracken*, such QTIP trusts would never be subject to any Washington estate tax.

In 2013, in response to *Bracken,* the legislature amended the estate tax. LAWS OF 2013, 2d Spec. Sess., ch. 2, § 1. The legislature "broadened the meaning of 'transfer' to its 'broadest possible meaning consistent with established United States supreme court precedents" and intended the amendments to "'apply both prospectively and retroactively to all estates of decedents dying on or after May 17, 2005.'" *Hambleton*, 181 Wn.2d at 813-14 (quoting LAWS OF 2013, 2d Spec. Sess., ch. 2, §§ 1(5), 9.

The legislature found that *Bracken* created "an inequity never intended by the legislature because unmarried individuals did not enjoy any similar opportunities to avoid or greatly reduce their potential Washington estate tax liability" and also may have created "disparate treatment between QTIP property and other property transferred between spouses that is eligible for the marital deduction." LAWS OF 2013, 2d Spec. Sess., ch. 2, § 1(4). The Supreme Court affirmed the legislature's authority to retroactively amend the estate tax in *Hambleton.* 181 Wn.2d at 836.

III. ESTATE TAX DUE DATE

The Estate contends that estate tax on the QTIP did not become "due" until the legislature passed the *Bracken* amendment in 2013. Because the tax was not actually due in 2008, pursuant to *Bracken*, it contends that DOR lacked statutory authority to collect interest accrued between 2008 and 2010. We agree.

DOR may collect interest on overdue estate tax. RCW 83.100.070. In this case, the parties dispute on what date the tax on the QTIP came "due" and thus began accruing interest. The Estate contends the tax did not come "due" until the legislature enacted the *Bracken* amendment in 2013, while DOR contends that it came due along with the rest of the estate tax in 2008. DOR's interpretation would begin imposing interest on the Estate five years before the legislature enacted the *Bracken* amendment. Although the expressly retroactive statute imposed liability on estates of decedents who died as early as 2005, it did not expressly make such taxes "due" in the past.

Washington estate tax bases the due date for required returns on the federal estate tax scheme. RCW 83.100.050. It requires persons filing a required estate tax to file "on or before the date the federal return is required to be filed," including any extensions. RCW 83.100.050(2)(a). Regulations specify that the Washington estate tax return is due nine months after the date of the decedent's death. WAC 458-57-135(3)(a). However, the tax is imposed only on "transfers of the taxable estate" which, in 2008, did not include QTIP. WAC 458-57-015.

At the time of Barbara's death, Washington's estate taxation scheme did not tax QTIP because no "transfer" occurred at the death of the QTIP-receiving spouse. *Bracken*, 175 Wn.2d at 575-76. "It is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it." *Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976). "In other words, there is no

'retroactive' effect of the court's construction of a statute; rather, once the court has determined the meaning, *that is what the statute has meant since its enactment*." *Johnson*, 87 Wn.2d at 928. *Bracken* held that, because no "transfer" occurred on the death of the surviving beneficiary of a QTIP, the 2005 estate tax did not impose any taxation on QTIP. 175 Wn.2d at 566-67. Under *Bracken*, the estate tax did not apply to QTIP at any point from when it was drafted in 2005 until the *Bracken* amendment in 2013.

However, the *Bracken* amendment has express retroactive application and has been approved by the Supreme Court. *Hambleton*, 181 Wn.2d at 836. In the *Bracken* amendment, the legislature stated:

> [T]he legislature finds that it is necessary to reinstate the legislature's intended meaning when it enacted the estate tax, restore parity between married couples and unmarried individuals, restore parity between QTIP property and other property eligible for the marital deduction, and prevent the adverse fiscal impacts of the Bracken decision by reaffirming its intent that the term "transfer" as used in the Washington estate and transfer tax is to be given its broadest possible meaning consistent with established United States supreme court precedents, subject only to the limits and exceptions expressly provided by the legislature. . . .
>
> As curative, clarifying, and remedial, the legislature intends for this act to apply both prospectively and retroactively to estates of decedents dying on or after May 17, 2005.

LAWS OF 2013, 2d Spec. Sess., ch. 2, § 1(5), (6).

When the legislature makes clear that an act "is intended to apply retroactively, '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.'" *Hambleton*, 181 Wn.2d at 822 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995)).

Hambleton expressly upheld the retroactive effect of the *Bracken* amendment to numerous constitutional challenges, including separation of powers, due process, impairment of contracts,

and uniformity of taxation. 181 Wn.2d at 823, 829, 831-32. However, retroactive application of the statute is not inconsistent with a due date as of the statute's enactment in 2013. Making the tax "due" up to eight years before its enactment, inconsistent with the statutory scheme as it existed at the time, would be absurd and inequitable and cannot be what the legislature intended.[2] Beginning accrual of interest in 2008 would punish the Estate for failing to pay an obligation that it had no way of predicting and was in fact inconsistent with the taxation scheme in place at the time.

We interpret the *Bracken* amendment consistent with *Hambleton* to apply retroactively to all estates of persons dying on or after May 17, 2005. However, the legislature cannot have intended to make this tax due years before its own enactment. Accordingly, the tax came due when the legislature passed the amendment in 2013 and could not begin accruing interest before that date.

The Estate is entitled to a refund of the interest it paid in 2010.

IV. INTEREST ON INTEREST

In addition to recovering the interest the Estate already paid to DOR, the Estate also seeks interest on the interest from the date of its payment until passage of the *Bracken* amendment, when it contends the payment became "due." The Estate is entitled to this interest.

If DOR determines that a person has overpaid the estate tax due, it must refund the amount of the overpayment, "together with interest." RCW 83.100.130(1). The statute provides an interest

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[2] DOR brings our attention to a federal case that ruled taxpayers "liable for interest on . . . underpayments, even though the payments were proper when made" and that "[t]he congressional understanding was that interest is payable on retroactive tax increases unless Congress forgives it." *Brown & Williamson, Ltd. v. United States*, 688 F.2d 747, 749-50 (Ct. Cl. 1982). We do not find *Brown & Williamson* persuasive and we choose not to follow it.

rate computed at the same rate as interest DOR assesses for overdue payments and "shall be refunded from the date of overpayment until the date the refund is mailed." RCW 83.100.130(2).

Because the Estate overpaid its estate tax when it paid interest accrued between 2008 and 2010, it should receive its refund "together with interest" on the overpaid amount, as mandated by statute.

CONCLUSION

The legislature has authority to issue a retroactively applicable tax. However, it cannot have intended to make such a tax come due and begin accruing interest as early as eight years before its own enactment. We conclude that, while the *Bracken* amendment applies to the estates of all persons dying on or after 2005, such taxes came "due" in 2015 at the time the legislature passed the amendment and not earlier. Accordingly, we reverse and remand to DOR for it to refund the Estate the interest it paid in 2010 and interest on that interest, consistent with RCW 83.100.130(1).

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:

Maxa, C.J.

Sutton, J.

ATTORNEY GENERAL'S OFFICE - REVENUE & FINANCE DIVISION

March 26, 2019 - 10:16 AM

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