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

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

Appellant,

vs.

THE DEPARTMENT OF REVENUE OF  
THE STATE OF WASHINGTON,

Respondent.

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BRIEF OF APPELLANT

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## A. INTRODUCTION

This case presents an anomalous situation arising out of the lengthy litigation that addressed Washington's estate tax beginning with *Clemency v. State*, 175 Wn.2d 549, 290 P.3d 99 (2012) ("*Bracken*"). At the insistence of the Department of Revenue ("DOR"), the Legislature enacted legislation in 2013 effectively overruling our Supreme Court's *Bracken* decision. That legislation was challenged by various affected estates and upheld by the Supreme Court in *In re Estate of Hambleton*, 181 Wn.2d 802, 335 P.3d 398 (2014). Although the practical effect of the legislation was to overrule *Bracken*, the Court specifically noted that the Legislature was careful not to formally reverse the Court's *Bracken* decision, thereby avoiding a separation of powers issue. *Id.* at 817, 819.

The Estate of Barbara Mesdag ("Estate") was an estate with the identical issue as in *Bracken* and this Court concluded in *Osborne v. Dep't of Revenue*, 189 Wn. App. 1029, 2015 WL 4760567 (2015), *review denied*, 184 Wn.2d 1037 (2016) ("*Osborne I*") that the 2013 legislation applied to the Estate. Despite the fact that under *Bracken* and until the Legislature enacted Laws of 2013, 2d Spec. Sess., ch. 2, the Estate owed no estate tax to DOR, DOR collected interest on taxes *not due* in 2010. *Osborne I* remanded the interest issue to DOR.

This case requires the Court to construe RCW 83.100.070 and

.100. A proper interpretation of those statutes compels the refund to the Estate of \$310,937.15 paid in 2010 as interest on contested estate taxes DOR improperly collected. The Estate also contends that DOR is statutorily obligated to pay interest on the improperly collected taxes for the period DOR was obligated to refund the taxes.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering its August 18, 2017 order affirming DOR's determination on interest.

(2) Issues Pertaining to Assignments of Error

1. Is DOR authorized to collect interest on alleged delinquent estate taxes if no delinquency actually existed when the Estate's estate tax return was due in 2008 in light of *Bracken* and any Estate tax obligation did not actually exist until June 14, 2013 when legislation was adopted by the Legislature to subject the Estate to Washington's estate tax? (Assignment of Error Number 1)

2. Is DOR required to pay interest at the statutory rate on estate taxes collected by the Department but not actually owed by the taxpayer? (Assignment of Error Number 1)

C. STATEMENT OF THE CASE

The facts giving rise to the litigation between the Estate and DOR are not disputed and are summarized in this Court's unpublished opinion in *Osborne I*. See Appendix.

Briefly, Barbara Mesdag died on July 4, 2007. Barbara was,

during her life, the beneficiary of a QTIP testamentary trust<sup>1</sup> established by her husband, Joseph Mesdag, on his death in 2002. When Barbara died, DOR contended the assets of the QTIP trust were part of Barbara's taxable estate for Washington estate tax purposes. The Estate disagreed. On February 26, 2010, the Estate paid under protest \$2,919,171.86 in disputed taxes imposed on the QTIP's assets. The Estate also paid

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<sup>1</sup> The federal estate tax is imposed on a decedent's "taxable estate." I.R.C. § 2001(b). In computing that taxable estate, Internal Revenue Code § 2506 allows a deduction for "the value of any interest in property which passes or has passed from the decedent to his surviving spouse." I.R.C. § 2056(a). The deduction is limited by § 2056(b), which provides that "terminable interests" in property – such as a life estate or other interest that will lapse due to the passing of time or the occurrence or non-occurrence of an event – do not qualify for the marital deduction.

As originally enacted, the marital deduction was limited to fifty percent of the decedent's separate property passing outright to the surviving spouse. Transfers of "terminable interest" property such as a life estate did not qualify. That deduction provided an important estate planning tool for married couples. Separate property passing outright to the surviving spouse, up to the fifty percent limitation, was excluded from the estate tax base of the first spouse to die.

In 1981, Congress changed the marital deduction by making the deduction unlimited in amount and by creating a special category of terminable interest property – so-called "qualified terminable interest property" ("QTIP") – that would qualify for the deduction. See *Bracken*, 175 Wn.2d at 577 n.4 (Madsen, C.J., concurring/dissenting) (quoting Boris I. Bittker and Lawrence Lokken, *Federal Taxation of Income, States and Gifts*, 1997 WL 440177 at \*17). Thus, Congress created an "exception-to-the-exception" that permitted certain terminable interest property to pass untaxed to the surviving spouse.

In order for a QTIP to qualify for the marital deduction, the property must pass from the decedent to the surviving spouse, the surviving spouse must have the right to receive the income from the property for life, and the executor of the decedent's estate must make an election to have the property treated as QTIP. I.R.C. § 2056(b)(7)(B)(i). While the estate of the first spouse to die gets to claim the deduction, any QTIP still remaining when the surviving spouse dies is included in his or her gross estate. I.R.C. § 2044. In this way, a QTIP did not escape taxation entirely. Instead, the estate tax applies to the remaining QTIP that passed when the surviving spouse died. I.R.C. § 2044(c).

\$310,937.15 in interest assessed by DOR on the alleged delinquency.<sup>2</sup> DOR's interpretation of the Estate's tax liability was rejected in *Bracken*. The Thurston County Superior Court entered a judgment against DOR ordering the refund of the disputed taxes and interest. DOR appealed. During the pendency of the appeal, the Legislature enacted Laws of 2013, 2d spec. sess. ch. 2, (the "*Bracken* Amendment"). § 14 of the measure made it effective June 14, 2013, changing the definition of taxable estate for purposes of the Washington estate tax. The *Bracken* Amendment was applied to all estates of all decedents who died after May 17, 2005, which included the Estate. Applying this new definition of taxable estate, this Court reversed the judgment in favor of the Estate in *Osborne I*, but the issue of the Estate's right to recover interest was remanded to DOR for further consideration.

The Estate again asked DOR for a refund of the \$310,937.15

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<sup>2</sup> The \$310,937.15 payment does not meet the definition of "interest" adopted by the Court in *HomeStreet, Inc. v. State, Dep't of Revenue*, 166 Wn.2d 444, 452-53, 210 P.3d 297 (2009):

"Interest is merely a charge for the use or forbearance of money." *Security Sav. Soc'y v. Spokane County*, 111 Wash. 35, 37, 189 P. 260 (1920). "[F]or an amount to constitute interest, it must be paid or received on an existing, valid, and enforceable obligation." *Thompson v. Comm'r*, 73 T.C. 878, 1980 WL 4596 (1980) (citing *Meilink v. Unemployment Reserves Comm'n*, 314 U.S. 564, 570, 62 S. Ct. 389, 86 L. Ed. 458 (1942)).

There was no "existing, valid, and enforceable obligation" on the part of the Estate to pay the disputed taxes prior to the enactment of the *Bracken* Amendment, as *Bracken* had held the disputed taxes were not due.

interest payment and to pay interest on the amount of taxes DOR wrongfully collected from the date of payment to the effective date of the *Bracken* Amendment, June 13, 2013. DOR denied that request by letter dated July 13, 2016. AR 169-71. The Estate timely petitioned the Thurston County Superior Court, seeking a review of DOR's interest refund decision. CP 4-19. After a hearing consisting solely of argument by counsel, the trial court entered an order affirming DOR's action. CP 85-86. The trial court, however, labored under the patent misconception that the 2013 legislation was a retroactive overruling of *Bracken*, making the Estate's tax obligation due in 2008. RP 30-32.<sup>3</sup> This timely appeal followed. CP 87-91.

#### D. SUMMARY OF ARGUMENT

DOR collected estate taxes and interest in 2010 based on an erroneous interpretation of law. After our Supreme Court in *Bracken* unanimously rejected DOR's position on taxation of QTIPs, the Legislature enacted a new definition of taxable estate resulting in the imposition of a new tax obligation equal to the amount of the contested taxes previously paid by the Estate. Based on *Bracken*, the Estate did not

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<sup>3</sup> As will be noted *infra*, DOR's briefing below contradicted its position in *Hambleton* and in the first appeal on this point. If the Legislature in 2013 had retroactively overruled *Bracken*, separation of powers issues are implicated. Rather, the Legislature redefined the taxable estate in 2013, making that definition retroactively effective.

owe any delinquent taxes between 2010 and 2013, however, at no time was the Estate ever delinquent in the payment of any tax obligation, justifying a penalty of interest. DOR had the benefit of approximately \$3.2 million of disputed taxes and interest to which it was not entitled for over three years. This Court should conclude that the Estate is entitled to a refund.

Moreover, the trial court ignored plain Supreme Court precedent stating that interest on delinquent estate taxes is a penalty. The Legislature could not retroactively impose a penalty.

Finally, as the Estate was entitled to a refund, it is entitled to interest on the refund.

E. ARGUMENT<sup>4</sup>

(1) DOR Has No Statutory Authority to Collect \$310,937.15 from the Estate

This is a straightforward case of statutory interpretation. Under well-understood principles of statutory interpretation, the trial court's decision here was wrong.

First, the core requirement of our Supreme Court's statutory

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<sup>4</sup> This is an appeal from an agency action under the Washington Administrative Procedures Act, RCW 34.05 ("APA"). The Estate is entitled to relief if the agency action is (i) unconstitutional, (ii) outside the statutory authority of the agency, or authority conferred by provisions of law, or (iii) arbitrary and capricious. The trial court's review of an agency's legal conclusions was *de novo*. *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 148, 3 P.3d 741 (2000). Thus, this Court reviews the agency decision giving no deference to the agency or trial court decision.

interpretation regimen is that courts must execute the intent of the Legislature by implementing the plain language of a statute. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). “If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself.” *Id.* Courts look to the statute as a whole, giving effect to all of its language. *Dot Foods, Inc. v. Wash. Dep't of Revenue*, 166 Wn.2d 912, 919, 215 P.3d 185 (2009). Courts must look to what the Legislature said in the statute and related statutes to determine if the Legislature’s intent is plain. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If the language of the statute is plain, that ends the courts’ role. *Cerrillo v. Esparza*, 158 Wn.2d 194, 205-06, 142 P.3d 155 (2006). Critically, in the context of taxing statutes, if a statute is found to be fairly susceptible of more than one reasonable interpretation, “this court strictly interprets ambiguities in statutes imposing taxes in favor of the taxpayer. The opposite analysis, however, applies to tax exemption statutes.” *Sacred Heart Medical Center v. Dep't of Revenue*, 88 Wn. App. 632, 637, 946 P.2d 409 (1997).

DOR’s sole authority to collect interest from the Estate is found in RCW 83.100.070 and WAC 458-57-035. RCW 83.100.070 states:

(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. RCW 83.100.070(1), (2).

WAC 458-57-035 states in pertinent part:

(4) Interest is imposed on late payment. The department is required by law to impose interest on the tax due with the state return if payment of the tax is not made on or before the due date. RCW 83.100.070. Interest applies to the delinquent tax only, and is calculated from the due date until the date of payment. Interest imposed for periods after December 31, 1996, will be computed at the annual variable interest rate described in RCW 82.32.050(2). . . . WAC 458-570-035(4).

These provisions only allow the imposition of interest if taxes *have not been paid* by their due date. According to DOR, the final date for filing the Washington estate tax return was October 4, 2008.<sup>5</sup> AR 58. Interest may be charged only if the Estate had not paid all taxes *due* on that date.

The Estate and DOR disagreed as of October 4, 2008, whether the Estate's tax liability had been satisfied because of the dispute over whether the QTIP assets should have been included in the Estate's assets for Washington estate tax purposes. That disagreement was resolved by

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<sup>5</sup> The "due date" for payment is the date the Washington estate tax return is due. RCW 83.100.060(1). The Washington estate tax return is due on the same day the federal estate tax is due, giving effect to any permitted extensions of time. RCW 83.100.050(2)(a).

*Bracken* in the Estate's favor. As of October 4, 2008 (or for that matter in 2010 when the Estate paid the tax and interest under protest), *the Estate did not owe the disputed taxes and the Estate was not delinquent in any tax obligation to DOR* on October 4, 2008, as the *Bracken* court's decision made clear.

Of critical significance is the fact that the *Bracken* court's interpretation of Washington's estate tax was the law from the time the statute was first enacted:

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. *In re Elliott's Estate*, 22 Wash.2d 334, 156 P.2d 427 (1945); *Yakima Valley Bank & Trust Co. v. Yakima County*, 149 Wash. 552, 271 P. 820 (1928). 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 v. Morris*, 87 Wn.2d 922, 927-28, 557 P.2d 1299 (1976). Thus, as of October 4, 2008, until 2013, the Estate had no taxes due and owing to DOR.

Although the trial court did not provide a detailed written opinion in support of its decision, it is clear from its oral ruling that the court ignored this long-standing and binding rule of construction, erroneously concluding that the Estate was legally obligated to pay the disputed taxes in 2008:

The tax was certainly owed in 2008, and it is owed now as was confirmed in the case of the *Estate of Hambleton*. The estate here received the benefit of the *Bracken* decision, but very quickly also had that benefit taken away by the legislative change. The interest, however, was paid because that amount was due. The fact that there was a short time period years later when the amount was not due does not change the fact that the tax was due earlier than it was paid.

RP 31.<sup>6</sup> The trial court's conclusion that a tax was owed in 2008 and interest was due for failure to pay in 2008 misperceived the law as to *Bracken's* legal effect. The Estate did not owe tax on the QTIP assets in 2008 or at any time thereafter until the *Bracken* Amendment created a new definition of taxable transfer to encompass the QTIP assets. The disputed

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<sup>6</sup> The trial court likely arrived at this conclusion that *Bracken* was legislatively overruled, based on DOR's argument to that effect below. CP 49, 50, 52-54, 57-59. DOR was previously careful to avoid saying that the *Bracken* Amendment overruled *Bracken*, to avoid separation of powers problems. In its brief in Cause No. 44766-5-II, DOR wrote at 26-27:

applying the amended law to the transfer of QTIP occurring at the death of Barbara Mesdag does not threaten the independence or integrity of the judicial branch by dictating how a court should determine an issue of fact. Instead, the Legislature "acted wholly within its sphere of authority to make policy, to pass laws, and to amend laws already in effect" when it passed the retroactive fix to the Washington estate tax. *Hale*, 165 Wn.2d at 509. The Legislature did not "reverse" or "annul" the Supreme Court's decision in *Bracken*. Instead, the Legislature changed the statutory definitions of "transfer" and "Washington taxable estate" to ensure that QTIP passing under Internal Revenue Code § 2044 will not escape the Washington tax.

In *Hambleton*, the court noted in its separation of powers discussion that separation of powers principles are not violated if the Legislature does not intrude upon judicial power by retroactively reversing the courts' interpretation of a statute. 181 Wn.2d at 819. DOR asserted below that *Bracken* was "effectively overruled." CP 49-50, 57. DOR cannot have it both ways. Either *Bracken* was never overruled, and was the law in Washington until the 2013 legislation and no estate tax was due, or it was, and DOR misrepresented what it was doing when it was trying to enact the *Bracken* Amendment.

tax was not due in 2008 and the Estate could not be delinquent in the payment of a tax it did not yet owe. In the absence of a delinquency, DOR was without statutory authority to impose and collect any interest.

Moreover, the Estate's interpretation of the statutes at issue avoids a manifest constitutional problem. Under procedural due process principles, taxpayers must be provided a "clear and certain" remedy for the illegal imposition of taxes. *See, e.g., Reich v. Collins*, 513 U.S. 106, 108, 115 S. Ct. 547, 130 L. Ed. 2d 454 (1994); *Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 442, 443-44, 118 S. Ct. 904, 139 L. Ed. 2d 888 (1998). It is a violation of a person's due process rights to have to pay an illegal tax. *Sintra v. City of Seattle*, 119 Wn.2d 1, 24, 829 P.2d 765 (1992), *cert. denied*, 506 U.S. 1026 (1992) (imposition of legally invalidated development fees may constitute violation of developer's due process rights); *Patel v. City of San Bernadino*, 310 F.3d 1134 (9th Cir. 2002) (city's continued collection on unconstitutional tax violated due process and action under 42 U.S.C. § 1983 was available).<sup>7</sup> The *Bracken* Amendment does not negate the fact DOR collected taxes and interest in

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<sup>7</sup> Indeed, collecting unauthorized taxes may also violate a taxpayer's Fifth Amendment and Washington Constitution, article I, § 16, rights by being a taking. *United States v. Pittman*, 449 F.2d 623, 626 (7th Cir. 1971) (IRS tax levy and consequent seizure of property that fails to give taxpayer proper credit for property seized is a Fifth Amendment taking); *Behrens v. Commercial Waterway Dist. No. 1 of King County*, 107 Wash. 155, 157-58, 181 Pac. 892 (1919) (illegal special assessment constitutes a taking under article I, § 16); *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 233-34, 119 P.3d 325 (2005) (same).

2010 the Estate was not legally obligated to pay as of 2008. A proper interpretation of RCW 83.100.130 avoids these constitutional issues and provides the Estate an adequate remedy for DOR's erroneous interpretation of the Estate's tax liability.

Below, DOR ignored contrary Washington Supreme Court authority in its denial letter to claim that interest could be collected from the Estate, even though no delinquency existed, and interest is not a penalty. AR 169-71. Instead, DOR referenced two Court of Claims opinions, *Brown & Williamson Ltd. v. United States*, 688 F.2d 747 (Fed. Cir. 1982) and *Norwich Products, Inc. v. United States*, 221 Ct. Cl. 83, 602 F.2d 270 (1979), *cert. denied*, 445 U.S. 927 (1980), to justify its position. DOR cited these cases in support of its claim that retroactive imposition of interest was appropriate when tax liabilities were retroactively imposed. First, a close reading of the cases cited does not support DOR's position. *See* CP 38-41. Second, and more significantly, DOR has never cited any provision of the *Bracken* Amendment imposing retroactive interest. The Estate's obligation to pay estate taxes on the QTIP trust assets did not arise until the *Bracken* Amendment became effective on June 14, 2013. DOR has never contended otherwise. As of June 14, 2013, the taxes had in fact already been paid. The *Bracken* Amendment contains no reference to interest owed on the newly imposed

taxes. As noted above, statutes imposing tax liability are to be construed in favor of the taxpayer. *Sacred Heart Med. Ctr., supra*.

In sum, for the period 2008-13, the Estate did not owe any tax obligation to DOR, given the Supreme Court's construction of our estate tax law.<sup>8</sup> DOR lacked authority to impose interest on an obligation that the Estate did not owe in light of *Bracken*.

(2) DOR's Imposition of \$310,937.15 in Interest Is a Retroactive Penalty

The trial court's ruling upheld DOR's imposition of interest on taxes created in 2013 because the taxes had not been paid when the original estate tax return was due in 2008. This is the retroactive imposition of a civil penalty. The court erroneously concluded the payment did not constitute a penalty. RP 32.

*Hambleton* upheld the retroactive application of the *Bracken* Amendment, but retroactive application of *penal laws* is impermissible under due process principles. The *Hambleton* court did not address this issue, nor did this Court in *Osborne I*.

Retroactive civil penalties are unenforceable in Washington. *Adcox v. Children's Orthopedic Hosp. & Medical Center*, 123 Wn.2d 15,

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<sup>8</sup> As the Supreme Court held in *Hambleton*, the Legislature did not overrule *Bracken*. If it did, separation of powers issues were implicated. Simply put, the *Hambleton* court made clear that the Legislature could not retroactively reverse *Bracken* to make a tax due that the Court held was not due without intruding upon a judicial function.

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).

The trial court ignored precedent on this point. In *Dep't of Revenue v. Estate of Pohelmann*, 63 Wn. App. 263, 818 P.2d 616 (1991), this Court addressed whether DOR could collect “a penalty for the tardy filing of a state estate tax return.” *Id.* at 263. Interpreting the monetary penalty provision in RCW 83.100.070(2), this Court concluded the entire contents of the statute – a monetary penalty and interest on the taxes due – was a “penalty” to be imposed on late payment. Indeed, this Court’s analysis is consistent with the decision of our Supreme Court in *In re Elvigen’s Estate*, 191 Wash. 614, 71 P.2d 672 (1937), where the Court stated that interest imposed on past-due estate tax payments is a “penalty.”

It is true that a tax does not bear interest unless imposed by statute. [citations omitted]. ‘The purpose of imposing penalties for tax delinquencies is to compel all property owners to bear their equal share of the public burden, to pay their taxes promptly, and to punish taxpayers for frauds, evasions, and neglect of duty.’ 61 C.J. 1484, § 2109. In the event one is delinquent in paying an inheritance tax, by the express terms of Rem.Rev.Stat. § 11210, an interest penalty is imposed.

*Id.* at 620-21.<sup>9</sup>

The *Elvigen's Estate* court defined interest due on estate taxes as a penalty; such interest served no other purpose than to punish the Estate for challenging its tax liability in 2008. The trial court erred in allowing DOR to impose a retroactive penalty on the Estate.

(3) The Estate Is Entitled to Receive Interest on the Overpayment of Taxes for the Period February 26, 2010 to June 14, 2013

The trial court failed to apply RCW 83.100.130(1), which provides in part, “the department shall refund the amount of the overpayment, together with interest.” The statute is *mandatory*. DOR contended, and the trial court agreed, if DOR does not refund any tax overpayment, there is no obligation to pay interest. That is not what the statute says. The phrase “together with” means “in addition to or with the addition of.” *See Gray v. Tarbox*, 14 Wn.2d 237, 240, 127 P.2d 669 (1942). RCW 83.100.130 requires DOR to refund overpayments *and* pay interest on overpayments. The fact DOR was ultimately able to impose additional taxes on the Estate as a result of the *Bracken* Amendment does not diminish DOR’s obligation to pay interest on the overpayment of interest

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<sup>9</sup> DOR asserted that interest on taxes due is not a penalty, citing an unemployment compensation taxes case, *Ernst v. Hingeley*, 11 Wn.2d 171, 118 P.2d 795 (1941). AR 170. In that case, the Court devoted exactly one sentence of analysis to the issue. *Id.* at 183. The case has not been cited on the interest issue since its filing. DOR totally ignored this Court’s *Pohelmann* decision and the Supreme Court’s decision in *Elvigen's Estate*, cases addressing interest on estate taxes.

for the period of time DOR held the overpayment not due from the Estate. Nothing in the *Bracken* Amendment absolved DOR from its obligation to pay interest on the overpayment it previously collected from the Estate.

This Estate's interpretation of RCW 83.100.130(1) is also consistent with other statutory provisions. RCW 83.100.130(3) contemplates separate refund applications for overpaid taxes, penalties and interest, which is consistent with the independent obligations to refund overpayments and pay interest.

In sum, this Court should order DOR to pay interest on the refund due to the Estate.

#### F. CONCLUSION

This is an unusual case. *Bracken* made clear that DOR improperly collected estate taxes from the Estate. The salt in the wound was DOR's collection of added interest from the Estate as a penalty. Although the Legislature changed the law in 2013 to make the Estate retroactively subject to estate taxes, that does not alter the fact that DOR is not entitled to penalize the Estate; DOR may not collect interest as a penalty on taxes that *were not due* when they were collected.

This Court should reverse the trial court's ruling and order DOR to pay the Estate a refund of \$310,937.15. DOR, in turn, owes interest to the Estate on the overpayment of disputed taxes under the unambiguous

language of RCW 83.100.130(1). Costs on appeal should be awarded to the Estate.

DATED this 13<sup>th</sup> day of December, 2017.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick/Tribe  
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Mark W. Roberts, WSBA #16843  
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(206) 623-7580  
Attorneys for Appellant  
Scott B. Osborne

# APPENDIX

RCW 83.100.070:

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

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

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

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

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



STATE OF WASHINGTON  
DEPARTMENT OF REVENUE

EST/COR

July 13, 2016

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

Estate Name: Barbara H Mesdag, Deceased  
Date of Death: 7/4/2007  
File Number: 000719425

**Refund Denial**

Dear Mr. Roberts:

The Department has received your letter dated December 19, 2014, requesting a refund of interest on behalf of the Mesdag Estate in the amount of \$310,937.15, as well as your letter of February 23, 2016, providing additional argument in support of the refund request. The Department has also received the Order entered by Thurston Superior Court Judge Gary Tabor on June 24, 2016, remanding this matter to the Department for further consideration.

Having considered all of the Estate's arguments in support of its refund claim, the Department finds and concludes that the Estate is not entitled to the refund it is seeking.

Your letter of February 23, 2016, appears to assert that the Department assessed both interest and penalty with respect to the late payment of estate tax on the value of qualified terminable interest property (QTIP) passing under I.R.C. §2044. Specifically, you state that "The Estate contends that, notwithstanding the passage of the Bracken Amendment, the Estate was entitled to a refund of the \$310,397.15 interest penalty assessed by DOR and paid by the Estate on February 26, 2010 . . . ." 2/23/16 letter at p. 1. The assessment referenced in your February 23, 2016, letter did not include any penalties. Only estate tax and interest was assessed. Therefore, to the extent the Estate is seeking a refund of penalties (or "interest penalty" to use your terminology); the claim is denied because no penalty has been assessed.

Interest on unpaid estate tax is imposed pursuant to RCW 83.100.070(2) "at the rate as computed under RCW 82.32.050(2)." The rate of interest imposed under that section is equal to "an average of the federal short-term rate as defined in 26 U.S.C. Sec. 1274(d) plus two percentage

Estate Tax Section

PO Box 47488 ♦ Olympia, Washington 98504-7488 ♦ Phone (360) 534-1503 ♦ Fax (360) 534-1489 ♦ estates@dor.wa.gov

points." Interest imposed under RCW 82.32.050(2) and RCW 83.100.070(2) is not a penalty for the reasons explained in the Department's Answer to the Estate's Petition for Review:

Whether interest imposed under a statute is, in fact, a "penalty" is primarily a question of legislative intent. *United States v. Childs*, 266 U.S. 304, 309, 45 S. Ct. 110, 69 L. Ed. 299 (1924). In addressing the question, courts start from the position that interest does not equate to a penalty. "A penalty is a means of punishment; interest a means of compensation." *Childs*, 266 U.S. at 307; see generally 36 Am. Jur. 2d *Forfeitures and Penalties* § 6 (Feb. 2015) ("A penalty is distinguishable from a charge of interest, inasmuch as a penalty is a means of punishment, whereas interest is a means of compensation.") To overcome this general presumption, the Estate must show that interest imposed under the Washington estate tax code is designed to punish estates that fail to timely pay their estate taxes.

Answer to Pet, at 11-12.

You have provided no argument or authority suggesting that the Washington Legislature intended interest imposed on the late payment of estate taxes to be a "penalty" designed as "a means of punishment." And the Department is aware of no authority that would support that position. The Washington Supreme Court has held that interest imposed on unemployment compensation taxes at the rate of one percent per month (12% per annum) was not a penalty. *Ernst v. Hingeley*, 11 Wn.2d 171, 183, 118 P.2d 795 (1941). The rate imposed under RCW 82.32.050(2) and RCW 83.100.070(2) is much less than 1% per month. [The interest rate for the periods at issue is available on-line at: <http://dor.wa.gov/docs/reports/interstatesexcisetx.pdf>]

For these reasons, the Department concludes that the Estate has not been assessed a penalty, or an "interest penalty," and the Estate's claim for refund of "interest penalty" is denied.

The Department also concludes that the fact that the estate tax at issue was imposed as a result of a retroactive amendment to the estate tax code does not support the Estate's claim for refund of interest. Interest applies to a tax assessment or tax refund resulting from a retroactive amendment to the tax code, absent clear evidence of an opposite legislative intent. See *Morton-Norwich Products, Inc. v. United States*, 602 F.2d 270, 276 (Ct. Cl. 1979) (taxpayer owed interest on tax deficiency even though pertinent regulations were applied retroactively for the first three years of the audit period); *Brown & Williamson, Ltd. v. United States*, 688 F.2d 747, 750 (Ct. Cl. 1982) (after discussing the general rule that interest is owed on a retroactive increase in tax, the Court held that interest is also owed by the government when a retroactive amendment results in a refund).

You have not presented any argument or authority suggesting that the Washington Legislature intended to waive or forego interest when it retroactively amended the Washington estate tax code to prevent QTIP from escaping the tax. As a result, the Estate has not met its obligation to establish that it is entitled to the refund of interest that it seeks.

Mark W Roberts  
Page 3

Finally, the controlling statute, RCW 83.100.130(1), provides for the payment of interest only in connection with the refund of an overpayment of tax. Since there was no overpayment of tax by the Estate, no interest is due. The statute is explicit, and the Estate has provided no argument suggesting that the Department can overlook the plain language of RCW 83.100.130(1). In addition, the Department has no ability to waive or cancel interest under the circumstances presented here. See WAC 458-57-135(7).

For these reasons, the request for refund of interest is denied. If you disagree with this decision, you may seek judicial review by filing a petition for review under the Administrative Procedures Act (APA). The APA time limit begins running from the date of this letter, which is our final Department of Revenue agency action on this matter.

We are unable to send a final release until we receive a copy of the amended Federal Estate Tax Closing Document.

Sincerely,



Susan M. Shore  
Estate Tax Examiner  
(360) 534-1440  
susans@dor.wa.gov

cc: Scott B Osborne

We've updated our Privacy Statement. Before you continue, please read our new Privacy Statement and familiarize yourself with the terms.

## WESTLAW

189 Wash.App. 1029

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

**Osborne v. Department of Revenue of State**

Court of Appeals of Washington, Division 2. August 11, 2015. Not Reported in R 3d. 189 Wash.App. 1029 2015 WL 4760567 (Approx. 7 pages)

Division 2.

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.

Aug. 11, 2015.

Appeal from Thurston Superior Court; Honorable Gary R. Tabor, J.

#### Attorneys and Law Firms

Charles E. Zalesky, Attorney General of Washington, David M. Hankins, Atty. Generals  
Office, Olympia, WA, for Appellant.

Mark Wilcox Roberts, Peter Anthony Talevich, Robert Bertelson Mitchell, Jr., K & L Gates  
LLP, Philip Albert Talmadge, Talmadge/Fitzpatrick, Seattle, WA, for Respondent.

#### UNPUBLISHED OPINION

MELNICK, J.

\*1 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)<sup>1</sup> 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

#### SELECTED TOPICS

Taxation

Legacy, Inheritance and Transfer Taxes  
Refunds of Erroneous Inheritance Tax  
Payments

#### Secondary Sources

APPENDIX IV: ADMINISTRATIVE  
LETTER RULINGS: DOL, WAGE AND  
HOUR DIVISION

FLSA Emp. Exemption Hdbk. Appendix IV

...(The following article appeared in the July 1995 update to the Employer's Guide to the Fair Labor Standards Act, published by Thompson Publishing Group. It is intended to provide basic information on c...

Deduction of Federal estate tax before  
computing state tax

44 A.L.R. 1461 (Originally published in 1926)

...The earlier cases on this question are discussed in the annotations in 7 A.L.R. 714; 16 A.L.R. 702; 23 A.L.R. 849; and 31 A.L.R. 992. As shown in the earlier annotations, the decisions are in conflict ...

APPENDIX IV: ADMINISTRATIVE  
LETTER RULINGS: DOL, WAGE AND  
HOUR DIVISION

Public Employer's Guide to FLSA Emp.  
Class. Appendix IV

...(The following article appeared in the July 1995 update to the Employer's Guide to the Fair Labor Standards Act, published by Thompson Publishing Group. It is intended to provide basic information on c...

See More Secondary Sources

#### Briefs

Brief for Respondents.

1932 WL 33387

The United States, Petitioner, v. Barnim KOMST, Gertrude Luckhardt and Iika Wichmann, and Howard Sutherland, Alien Property Custodian.  
Supreme Court of the United States  
Mar. 09, 1932

...This is a suit to recover Federal estate taxes in the sum of \$23,583.03, together with interest thereon, and the basis of the action is the refusal of the Commissioner of Internal Revenue to allow as a...

Brief in Behalf of Appellee.

1932 WL 33697

GUARANTY TRUST COMPANY, Executor, Appellant, v. William H. BLODGETT, Tax Commissioner, Appellee.  
Supreme Court of the United States  
Dec. 01, 1932

...Harriet D. Sewall died May 20, 1930, domiciled in Greenwich, Connecticut (R. 3). On December 28, 1926, she transferred to Guaranty Trust Company of New York (appellant herein) certain stocks and bonds,...

Brief for the United States

1932 WL 33386

THE UNITED STATES, Petitioner, v. Barnim KOMBST, Gertrude Luckhardt, Iika Wichmann and Howard Sutherland, Alien Property Custodian.

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)<sup>2</sup> 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 protest. The Estate then applied for a tax refund. The Department denied the Estate's refund request with respect to the QTIP property.

\*2 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.

\*3 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

Supreme Court of the United States  
Apr. 1932

...The opinion of the Court of Claims (R. 14-17) is reported in 52 F. (2d) 1030. The judgment of the Court of Claims was entered on January 27, 1932. (R. 21.) The petition for a writ of certiorari was fil...

See More Briefs

#### Trial Court Documents

##### U.S. v. Presley

2000 WL 35621261  
UNITED STATES OF AMERICA, v. Theodore PRESLEY, (Name of the Defendant).  
United States District Court, W.D. New York.  
Nov. 29, 2000

...(For Offenses Committed On or After November 1, 1987) THE DEFENDANT: pleaded guilty to count(s) \_ pleaded no/c contendere to count(s) \_ which was accepted by the court X was found guilty on counts I. ...

##### U.S. v. Townsend

2017 WL 924780  
UNITED STATES OF AMERICA, v. John Dean TOWNSEND.  
United States District Court, E.D. Missouri.  
Feb. 01, 2017

... Plead guilty to count(s) 1 of the Superseding Indictment on October 21, 2016. pleaded no/c contendere to count(s)\_ which was accepted by the court. was found guilty on count(s)\_ after a plea of no...

##### U.S. v. Chitwood

2017 WL 924781  
UNITED STATES OF AMERICA, v. Jesse Ray CHITWOOD.  
United States District Court, E.D. Missouri.  
Jan. 04, 2017

... pleaded guilty to count(s) 1 of a seven-count Superseding Indictment on September 28, 2016. pleaded no/c contendere to count (s) \_ which was accepted by the court. was found guilty on count(s) \_ after...

See More Trial Court Documents

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. Dept. 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.

\*4 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.

\*5 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<sup>3</sup> 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....

[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.

\*6 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.<sup>4</sup> 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.

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.

We concur: WORSWICK, J., and JOHANSON, C.J.

#### All Citations

Not Reported in P.3d, 189 Wash.App. 1029, 2015 WL 4760567

#### Footnotes

- 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.
- 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.
- 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.

**End of  
Document**

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Brief of Appellant* in Court of Appeals, Division II Cause No. 50762-5-II to the following parties:

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Clerk's Office

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

DATED: December 13, 2017 at Seattle, Washington.



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Matt J. Albers, Paralegal  
Talmadge | Fitzpatrick | Tribe

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**Superior Court Case Number:** 16-2-03181-9

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