

No. 70514-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

U.S. BANK, Personal Representative of the Estate of ELAINE B.
GREEN-ELDRIDGE,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Appellant.

**SUPPLEMENTAL BRIEF OF RESPONDENT
ON IMPACT OF *HAMBLETON***

Rhys M. Farren (WSB #19398)
Dirk Giseburt (WSB #13949)
Richard A. Klobucher (WSB #6203)
Malcolm Moore (WSB #275)
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I. INTRODUCTION

This Supplemental Brief is filed in response to the Court's Notation Ruling dated November 17, 2014, directing the parties to file supplemental briefs addressing the impact of *In re Estate of Hambleton*, ___ Wn.2d ___, 335 P.3d 398 (2014), on the issues in this case.

Respondent U.S. Bank does not address the merits of the Court's question at this time but instead requests that the Court retain the case without further action or scheduling and re-institute the stay lifted by the Court on October 28, 2014, while the cases involving the two estates in *Hambleton* remain open.

II. STATEMENT OF ISSUE

Should the Court retain this case on its docket and defer action (1) while the State Supreme Court considers a motion for reconsideration in *Hambleton* and while the estate parties in *Hambleton* consider whether to petition for a writ of certiorari from the U.S. Supreme Court, given the likely impact of an eventual decision of the U.S. Supreme Court on the federal issues in this case; and (2) thereafter, (a) to consider the direct impact of *Hambleton* on the issues in this case, and (b) to afford Respondent the opportunity to seek remand to the trial court for additional fact-finding relating to the retroactive amendments of the estate tax under Engrossed House Bill 2075, 63rd Leg., 2d Sp. Sess. (Laws of 2013, 2d Sp. Sess., ch. 2) (the "2013 Amendments"), in the event that the Due Process claims of the estate parties in *Hambleton* are not resolved in their favor through an appeal to the U.S. Supreme Court?

III. STATEMENT OF THE CASE

1. The Issues in *Hambleton* Remain Open for Further Appeal.

The decision in *Hambleton* was issued on October 2, 2014. The Personal Representatives of the Estate of Jessie Campbell Macbride (the “Macbrides”), appellants in the matter of Macbride et al. v. State (S. Ct. Docket No. 89500-7, consolidated with and decided by *Hambleton*) filed a timely Motion for Reconsideration. The Motion is based on a claim that judicial estoppel should be applied in the Macbrides’ case because of conduct by the Washington Department of Revenue (“DOR”) and that a refund to the Macbride Estate should be ordered on this ground. The Supreme Court directed DOR to answer the Motion, which DOR has done. The Supreme Court has not issued its decision on the motion as of this date. Declaration of R. Farren ¶¶ 2-3.

Both estate parties in *Hambleton* are considering filing a petition for writ of certiorari with the U.S. Supreme Court. Farren Decl. ¶ 4. The Court would have jurisdiction with respect to the federal issues in the case. *See Hambleton*, 335 P.3d at 406 (identifying certain federal issues in the case). The U.S. Supreme Court’s rules allow potential petitioners 90 days following the final decision of the state court to file a petition for certiorari.

Under Supreme Court Rule 13.3, the applicable final decision is the decision on any motion for rehearing or reconsideration, both for parties that have sought reconsideration and parties that have not:

The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or sua sponte considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment.

Given the pending Motion for Reconsideration in *Hambleton*, the 90-day period for a petition for certiorari has not yet begun to run. Consequently, the estate parties in *Hambleton* still have a right to seek review at the U.S. Supreme Court. The Estate of Hambleton would have such a right even if the Washington Supreme Court grants the Macbrides' Motion for Reconsideration and grants relief.

2. There is Substantial Overlap Among the Issues in *Hambleton* and This Case.

The overlap in issues between *Hambleton* and this case is shown by a comparison of the issues identified in *Hambleton*, 335 P.3d at 406, and the Brief of Respondent herein at page 3. Any eventual decision by the U.S. Supreme Court in a *Hambleton* appeal would likely have a significant impact on the disposition of overlapping issues this case.

3. Respondent U.S. Bank Estate Has Paid the Tax in Question on Behalf of the Estate.

A decision by the Court to re-institute the stay would have no negative impact on the State's fiscal concerns, as Respondent U.S. Bank

has paid the tax in question and is seeking a refund. *See* DOR Br. of Appellant at 1, 4-5.

4. The *Hambleton* Decision Was Not Fully Informed of the Facts Pertinent to the Due Process Issue Because the Retroactive 2013 Amendments Were Enacted After the Case Records Were Closed.

Both of the consolidated cases in *Hambleton* were in the Court of Appeals when the 2013 Amendments were enacted. Farren Decl. ¶ 5. In the middle of briefing at the Court of Appeals, both cases were certified to the State Supreme Court at DOR's request. Given this procedural context, neither estate party had an opportunity to conduct additional discovery of DOR's processes or nonpublic legislative processes that are relevant to the Due Process analysis of retroactive tax legislation. *See, e.g., United States v. Carlton*, 512 U.S. 26, 31-33, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994) (summarizing agency and congressional actions taken promptly after discovery of disputes with estates and holding they demonstrated "legitimate legislative purpose" and "rational means").

Respondent U.S. Bank believes that substantial additional evidence of agency and legislative actions relevant to Due Process compliance in this case could be adduced with an opportunity for further discovery. Farren Decl. ¶ 6. Such discovery may well show that the State Supreme Court was under-informed of the relevant facts, through no one's fault, but possibly to the detriment of a full Due Process analysis.

IV. ARGUMENT

Retaining this case on the Court's docket and re-instituting the stay will serve the interests of justice, which is the standard for issuing a stay of proceedings under RAP 18.8(a).

Re-instituting the stay would serve the interests of justice because the Macbrides' pending Motion for Reconsideration in *Hambleton* has preserved the case on the State Supreme Court's docket and extended the time for a petition for writ of certiorari. The *Hambleton* decision therefore remains open for further review by the U.S. Supreme Court, and such review could have a significant impact on the overlapping issues of federal law in this case.

There will be no prejudice to the Department in staying the case for six months while the State Supreme Court considers the Motion for Reconsideration and the estate parties in *Hambleton* determine whether to seek further review. At the end of six months, if either of the *Hambleton* estate parties has filed a petition for certiorari, it would be appropriate and serve the ends of justice to extend the stay.

Following the stay, even if the estate parties in *Hambleton* take no further appeal or are unsuccessful in proceedings at the U.S. Supreme Court, this Court should provide Respondent U.S. Bank an opportunity to identify grounds for distinguishing its case from *Hambleton* and/or seek remand at an appropriate time for further discovery of facts relevant to its claims that the 2013 Amendments fail the Due Process requirements for retroactive tax legislation. The decision of the State Supreme Court on

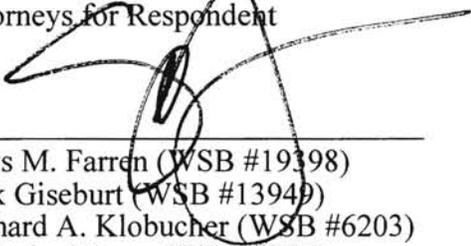
this issue was potentially deprived of substantial relevant facts, which the parties in *Hambleton* did not have a chance to explore.

V. CONCLUSION

The Court should retain this case on its docket, renew the stay that was lifted on October 28, 2014, for a period of six months, and direct the parties to notify the Court at the conclusion of that period of further actions by the State Supreme Court in *Hambleton* and of any filing by the estate parties in *Hambleton* of a petition for certiorari.

RESPECTFULLY SUBMITTED this 17th day of December, 2014.

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PROOF OF SERVICE

I, Susan Bright, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

On this date, I caused to be delivered a true copy of the foregoing document to be sent by First Class U.S. Mail and electronic mail on the following:

Washington State Department of Revenue
David M. Hankins, WSBA #19194
Charles Zalesky, WSBA #37777
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Executed at Bellevue, Washington this 17th day of December, 2013.


Susan Bright

No. 70514-8-I

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U.S. BANK, Personal Representative of the Estate of ELAINE B.
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v.

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Appellant.

**DECLARATION OF RHYS M. FARREN IN SUPPORT OF
SUPPLEMENTAL BRIEF OF RESPONDENT**

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Dirk Giseburt (WSB #13949)
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DECLARATION

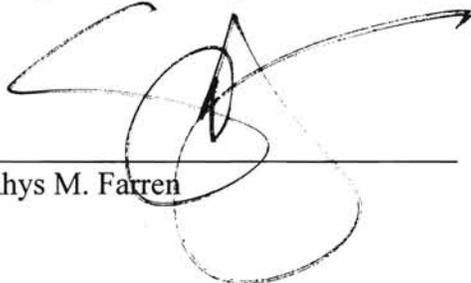
The undersigned declares as follows:

1. I am one of the attorneys representing the above-captioned Estate. I make this declaration based upon my personal knowledge or knowledge of regularly maintained business records.
2. My firm also represents the Estate of Jessie Campbell Macbride, appellants in the matter of *Macbride et al. v. State* (S. Ct. Docket No. 89500-7, consolidated with and decided by *Hambleton*) (the “Macbrides”). The decision in *Hambleton* was issued on October 2, 2014.
3. On behalf of the Personal Representatives of the Macbrides, we filed a timely Motion for Reconsideration. The Motion is based on a claim that judicial estoppel should be applied in the Macbrides’ case because of conduct by the Washington Department of Revenue (“DOR”) and that a refund to the Macbride Estate should be ordered on this ground. The Supreme Court directed DOR to answer the Motion, which DOR has done. The Supreme Court has not issued its decision on the motion as of this date.
4. It is important to note that both estate parties in *Hambleton* are considering filing a petition for writ of certiorari with the U.S. Supreme Court.
5. Both of the consolidated cases in *Hambleton* were in the Court of Appeals when the 2013 Amendments were enacted. In the middle of briefing at the Court of Appeals, both cases were certified to the State Supreme Court at DOR’s request.

6. One of the issues in the appeal relates to Due Process. Respondent believes that substantial additional evidence of agency and legislative actions relevant to Due Process compliance in this case could be adduced with an opportunity for further discovery. Such discovery may well show that the State Supreme Court was under-informed of the relevant facts, through no one's fault, but possibly to the detriment of a full Due Process analysis.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

EXECUTED at Bellevue, Washington this 17th day of December, 2014.


Rhys M. Farren

PROOF OF SERVICE

I, Susan Bright, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

On this date, I caused to be delivered a true copy of the foregoing document to be sent by First Class U.S. Mail and electronic mail on the following:

Washington State Department of Revenue
David M. Hankins, WSBA #19194
Charles Zalesky, WSBA #37777
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Executed at Bellevue, Washington this 17th day of December, 2013.


Susan Bright