No. 96997-3

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondent,

vs.

THE DEPARTMENT OF REVENUE OF
THE STATE OF WASHINGTON,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

DOR simply cannot accept this Court's decision in *Clemency v. State*, 175 Wn.2d 549, 290 P.3d 99 (2012) ("*Bracken*"), battling *Bracken*'s application at every turn.[1] At DOR's insistence, the Legislature enacted legislation in 2013 effectively overruling *Bracken*. 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), *cert. denied*, 136 S. Ct. 318 (2015). 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 Division II 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. The Estate has paid the tax, pursuant to the 2013 legislation and the court's decision in *Osborne I.*

The only question remaining after *Osborne I*, is whether DOR properly collected interest penalties on the tax from 2008 to 2010. Despite

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[1] DOR's entirely self-serving re-argument of *Bracken* in its petition at 3-5 bears witness to that fact. In the Court of Appeals, DOR even objected to the Estate's cost bill being "excessive" by $40.

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 argued, and the trial court agreed, that DOR properly collected $310,937.15 in interest penalties on the taxes. Division II, reversed and properly construed RCW 83.100.070 and .100, holding that the Estate was entitled to a refund of the $310,937.15 in interest penalties paid in 2010 as interest on contested estate taxes DOR improperly collected for several years. *Osborne v. Dep't of Revenue of State*, 2019 WL 949432 (2019) ("*Osborne II*").

Unable to put this saga to rest, DOR petitions this Court for review, while failing to establish any sufficient basis for review under RAP 13.4(b). By rule, Division II's unpublished opinion has no precedential value, and, by DOR's own admission, it has no effect beyond the *single* estate involved in this case. Division II's opinion does not involve a misapplication of statutory retroactivity principles, nor does it conflict with this Court's decision in *Hambleton* or in *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 198 P.3d 1021 (2009), as DOR erroneously contends. This Court should deny review of Division II's proper and equitable decision.

B. ISSUE PRESENTED FOR REVIEW

Is DOR authorized to collect interest on allegedly 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 the Legislature enacted legislation to subject the Estate to Washington's estate tax?

C. STATEMENT OF THE CASE

The facts giving rise to the litigation between the Estate and DOR are not disputed and are summarized in both Division II opinions. *See* Appendix.

Briefly, Barbara Mesdag died on July 4, 2007. Barbara was, during her life, the beneficiary of a QTIP testamentary trust[2] established

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[2] 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

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 $310,937.15 in interest assessed by DOR on the alleged delinquency. 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, ("*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, Division II reversed the judgment in favor of the Estate in *Osborne I*, but it remanded the issue of the Estate's right to recover interest that it had

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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).

paid on taxes not yet due to DOR for further consideration.

The Estate again asked DOR for a refund of the $310,937.15 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. The trial court affirmed DOR's action. CP 85-86. But that court 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.[3] Division II reversed the trial court's decision in an unpublished opinion. *See* Appendix.

D. ARGUMENT WHY REVIEW SHOULD BE DENIED

(1) DOR Fails to Establish a Sufficient Basis for Review Under RAP 13.4(b)

DOR cites RAP 13.4(b)(1), (3), and (4) as bases for review, while refusing to discuss those criteria in any depth. This is no wonder because this case, which affects a single private estate, does not meet the

[3] As will be noted *infra,* DOR's briefing below contradicted its position in *Hambleton* and in *Osborne I.* If the Legislature in 2013 had retroactively overruled *Bracken,* separation of powers issues would be implicated. Rather, the Legislature redefined the taxable estate in 2013, making that definition retroactively effective. This distinction is critical.

requirements for review under RAP 13.4(b).

This is not a significant question of constitutional law or "issue of substantial public interest" worthy of review under RAP 13.4(b)(3) or (4). Indeed, DOR fails to cite any constitutional provision, state or federal, in its petition for review. It merely alludes to separation of powers principles which have been conclusively addressed as to QTIP estates by this Court in both *Bracken* and *Hambleton*. Moreover, because Division II's decision is unpublished, it has no precedential value beyond this case. GR 14.1(a). As DOR admits both in its petition at 5 and in the trial court, *only this single estate* is affected in anyway by Division II's opinion:

> THE COURT: And so again, I know that there are many other cases, even though I'm only deciding this case. So the benefit of *Bracken* was given to many other folks as well and then taken away just as quickly.
>
> MR. ZALESKY: That's right. That's correct. And you were asking about whether or not there's other QTIP remanent cases in the courts. *This is the only one. The Mesdag estate is the only case that's still in court that sort of touches back or reaches back to that whole QTIP debate. Every other case has been dismissed after the 2013 legislation was upheld in Hamilton.*

RP 18 (emphasis added).

DOR's only attempt to show significant public importance, is its argument that the decision "results in a $350,000 impact on the state budget." Pet. at 2. That is not the standard for review by this Court. If it

were, every simple tort verdict against the State or its agencies exceeding $349,999 would be subject to Supreme Court review. DOR's arguments fail where this is an insular matter, involving the fair treatment of one private Estate. Review is not warranted under RAP 13.4(b)(3) or (4).

Nor can DOR show that Division II's opinion conflicts with any decision of this Court, as required for review under RAP 13.4(b)(1). As discussed in detail below, the Court of Appeals properly found that the Estate should not be subject to interest penalties (even though it is subject to the estate tax) when a tax was not "due" to DOR in 2008. DOR has studiously refused in its petition to explain how the tax was "due" in 2008, given *Bracken*. The Estate's tax only became "due" when the Legislature enacted the *Bracken* Amendment in 2013. Rather, Division II's opinion is consistent with the laws of this State and the precedent of this Court. This case does not warrant review.

(2) DOR Had No Statutory Authority to Collect $310,937.15 in Interest Penalties from the Estate

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.[4] 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 *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*

[4] 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).

tax obligation to DOR on October 4, 2008, as the *Bracken* court's decision made clear.

As the Court of Appeals correctly noted, it is fundamental that the *Bracken* court's interpretation of Washington's estate tax was the law from the time the statute was first enacted. There is no "retroactive" effect of this Court's construction of a statute; rather, "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." *Osborne II*, 2019 WL 949432 at *3 (2019) (citing *Johnson v. Morris*, 87 Wn.2d 922, 927-28, 557 P.2d 1299 (1976)). Thus, as of October 4, 2008, and until 2013, the Estate had no taxes due and owing to DOR, and DOR was therefore not entitled to collect an interest penalty on taxes which were not due.[5]

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[5] DOR admitted below that due to *Bracken*, "the Estate owed no Washington estate tax on QTIP" assets. Br. of Resp't at 15. DOR then argued that *Bracken* "was controlling law in this state for only a few short months before it was repudiated and replaced by retroactive legislation enacted in 2013." Br. of Resp't at 12. Not true. The *Bracken* court's interpretation of the estate tax statute is deemed to have applied since its enactment, as will be noted *infra*. Thus, in operation, QTIP trusts *were never part of a taxable estate* until 2013 when the Legislature amended the statute. DOR was wrong in 2008 when it included them within the Estate's taxable assets. And DOR was wrong when it charged the Estate interest on unpaid funds that it had no right to collect in the first place.

The absurdity of DOR's argument is clear. DOR claimed that due to "retroactive legislation, the Estate was not entitled to deduct QTIP on its Washington return and should have paid the tax when it was due in order to avoid interest on the underpayment." Br. of Resp't at 12. But the deduction was made *in 2008*. The law did not change *until 2013*. DOR fails to explain how the Estate was wrong to deduct, in 2008, that *which was not owed*. Division II properly found that DOR's arguments are

DOR erroneously contends in its petition that Division II should not have relied on *Johnson* because it is an "outlier" or "legal fiction." Pet. at 9, 12. This is simply not true. *Numerous* courts have repeated the "familiar rule of statutory construction that when a statute has once been construed by the highest court of the state, that construction is as much a part of the statute as if it were originally written into it." *State v. Regan*, 97 Wn.2d 47, 51-52, 640 P.2d 725 (1982); *accord*, *O'Day v. King County*, 109 Wn.2d 796, 807, 749 P.2d 142 (1988); *State v. Crediford*, 130 Wn.2d 747, 760, 927 P.2d 1129 (1996); *Stedman v. Cooper*, 172 Wn. App. 9, 24, 292 P.3d 764 (2012); *Yuchasz v. Dep't of Labor & Indus. of State*, 183 Wn. App. 879, 888, 335 P.3d 998 (2014).[6] Even in federal courts, "the Supreme Court's 'construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.'" *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1225 (9th Cir. 2013) (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994)).

Here, Division II's opinion is sound where the trial court clearly ignored this long-standing and binding rule of statutory construction

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"absurd and inequitable and cannot be what the legislature intended." *Osborne II*, 2019 WL 949432 at *4.

[6] *Johnson* has been cited in 116 appellate decisions according to Westlaw.

described above, 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. 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*, this Court noted in its separation of powers discussion that

separation of powers principles are not violated only *if the Legislature does not intrude upon judicial power by retroactively reversing the courts' interpretation of a statute.* 181 Wn.2d at 819 (emphasis added). 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.

Division II correctly held that the trial court misperceived *Bracken*'s legal effect when it concluded that a tax was owed in 2008 and interest was due for failure to pay in 2008. The Estate did not owe tax on the QTIP assets in 2008 or at any time thereafter until the 2013 *Bracken* Amendment created a new definition of taxable transfer to encompass the QTIP assets. The disputed tax was not due in 2008 and the Estate could not be delinquent in the payment of a tax it did not yet owe. As the Division II correctly noted, to hold otherwise 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." *Osborne II*, 2019 WL 949432 at *4.[7]

[7] DOR never cited any provision of the *Bracken* Amendment imposing retroactive interest. Nor can it. The *Bracken* Amendment contains no reference to

Importantly, Division II's opinion does not conflict with any opinion of this Court. Rather, it falls in line with *centuries* of jurisprudence in this State. As this Court stated over 100 years ago, "the state cannot take more than the actual tax, whether under the guise of interest or otherwise, until the taxpayer has failed or omitted to perform a duty imposed by law." *State v. Superior Court for Stevens County*, 93 Wash. 433, 435, 161 P. 77, 78 (1916). In *Stevens County*, a landowner challenged his property tax assessment and prevailed in the Supreme Court. *Id.* at 433 (discussing the facts of *First Thought Gold Mines v. Stevens County*, 91 Wash. 437, 439, 157 P. 1080 (1916)). On remand, the county attempted to charge interest on the funds that the landowner disputed, funds this Court already determined could not be taxed. *Id.* The Court held that the county could not charge interest, for it would be the "height of inequity" to charge interest on a tax assessment that a taxpayer prevailed in challenging. *Id.* at 438.

In reaching its decision, the *Stevens County* court discussed the exact situation at hand, citing favorably the rule that:

> [W]here the Legislature passes a law for the taxation of property theretofore omitted as a subject of taxation, it

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interest owed on the newly imposed taxes. And to the extent there is any ambiguity in interpreting a tax statute like the 2013 amendment, the Division II correctly noted that courts must "strictly interpret[] ambiguities in statutes imposing taxes in favor of the taxpayer." *Osborne II*, 2019 WL 949432 at *2 (citing *Sacred Heart Med. Ctr. v. Dep't of Revenue,* 88 Wn. App. 632, 636-37, 946 P.2d 409 (1997)).

> cannot provide for interest from some antecedent date, but must provide some future time within which the tax must be paid after which interest may be demanded.

Id. at 435. This longstanding rule aligns with this Court's recent observation that "for an amount to constitute interest, it must be paid or received on an existing, valid, and enforceable obligation." *HomeStreet, Inc. v. State, Dep't of Revenue*, 166 Wn.2d 444, 452-53, 210 P.3d 297 (2009). As of 2010, given this Court's *Bracken* decision, there was no "valid or enforceable" obligation to which the penalty assessed by DOR could attach. 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 that no taxes were due.

Moreover, Division II's opinion *avoids* conflicting with precedent and avoids manifest constitutional problems. For example, 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).[8] The *Bracken* Amendment does not negate the fact DOR collected taxes and interest in 2010 the Estate was *not legally obligated to pay as of 2008*. Division II's 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.

In sum, Division II properly concluded that, for the period 2008-13, the Estate did not owe a tax on QTIP assets given this Court's construction of our estate tax law. DOR lacked authority to impose interest on an obligation that the Estate did not owe in light of *Bracken*. Review is not merited. RAP 13.4(b).

(3) DOR's Imposition of $310,937.15 in Interest Is an Impermissible Retroactive Penalty

This Court need go no farther than the analysis advanced by the

[8] 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).

Estate *supra.* However, there is an additional contingent argument supporting the Estate's position. The Estate argued below that the trial court's ruling improperly imposed a retroactive civil penalty, in violation of Washington law. The trial court erroneously concluded that the interest did not constitute a penalty, RP 32, and Division II declined to address this argument in its opinion. However, this is an independent basis to uphold Division II's ruling and another reason why review of that unpublished decision is unwarranted.

Retroactive civil penalties are unenforceable in Washington. *Adcox v. Children's Orthopedic Hosp. & Medical Center*, 123 Wn.2d 15, 30, 864 P.2d 921 (1993) (civil penalties imposed on hospitals not retroactive); *Johnston v. Beneficial Mgmt. Corp. of Am.,* 85 Wn.2d 637, 642, 538 P.2d 510 (1975), *modified on other grounds in Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 581 P.2d 1349 (1978) (treble damage remedy in CPA applied only prospectively). DOR did not dispute this longstanding rule below, it merely argued that the interest imposed on delinquent estate taxes is not a penalty. Br. of Resp't at 25-26. But DOR's argument has been expressly rejected by this Court.

Washington courts have long held that "[i]nterest upon delinquent taxes is a penalty, and not interest." *Stevens County*, 93 Wash. at 435. "And this is so whether the penalty be in the way of interest, the addition

of a certain per cent. [sic], or by doubling the tax." *Id.* In *In re Elvigen's Estate*, 191 Wash. 614, 71 P.2d 672 (1937), this Court expressly adopted this principle in the context of the estate tax. It explained that "[t]he 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." 191 Wash. at 621 (emphasis added). Thus, the Court wrote, "In the event one is delinquent in paying an inheritance tax, by the express terms of [the inheritance tax statute], an interest *penalty* is imposed." *Id.* (emphasis added); *see also*, *Dep't of Revenue v. Estate of Pohelmann*, 63 Wn. App. 263, 818 P.2d 616 (1991) (addressing whether DOR could collect "a *penalty* for the tardy filing of a state estate tax return") (emphasis added).

DOR never reckoned with this on-point authority, and merely cited federal cases which did not involve the Washington estate tax. Br. of Resp't at 27 (citing, *e.g.*, *United States v. Childs*, 266 U.S. 304, 309, 45 S. Ct. 110, 69 L. Ed. 299 (1924); *In re Beardsley & Wolcott Mfg. Co.*, 82 F.2d 239, 240 (2d Cir. 1936)). But these cases only discuss interest versus penalties in general terms and have no bearing on Washington tax law as outlined by the *Elvigen's Estate*. Again, in Washington, the purpose of charging interest on late estate tax payments is to "*punish* taxpayers for

frauds, evasions, and neglect of duty." *Elvigen's Estate*, 191 Wash. at 621 (emphasis added). Such a penalty cannot apply retroactively, as DOR would have this Court hold. This additional argument supports Division II's opinion. This Court should deny review and allow that opinion to stand.

E. CONCLUSION

This Court should deny review of a well-reasoned unpublished decision which by DOR's own admission, affects only *one* estate in the entire state. Far from a Supreme Court case, this is yet another refusal by DOR to admit that it wrongfully imposed an interest penalty from 2008 to 2010, when the underlying tax was not legally due until 2013. This Court should deny review.

DATED this 23d day of April, 2019.

Respectfully submitted,

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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.

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.

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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 P.3d 189 Wash.App. 1029 2015 WL 4760567 (Approx. 7 pages)

Court of Appeals of Washington,
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

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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) [1] requires us to remand to the Department for determination of the interest issues. We reverse the superior court's order in the Estate's favor. We remand this

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

FACTS

Barbara Meadag died on July 4, 2007. On October 6, 2008, her Estate filed its Washington Estate and Transfer Tax Return, which included a deduction for qualified terminable interest property (QTIP)[2] included in the Estate's federal taxable estate. The Department disallowed the Estate's QTIP deduction and issued a deficiency notice for additional taxes owed on the value of the QTIP property. On February 26, 2010, the Estate paid the additional tax plus interest under 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. 176 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

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

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

II. APPLICABILITY OF 2013 AMENDMENT

A. Final Judgment

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

Hambleton rejected a similar argument. 181 Wn.2d at 835–36. The Hambleton Estate argued that the superior court's ruling was final at the time the legislature enacted the legislation, and therefore, the amendment should not apply to it. *Hambleton*, 181 Wn.2d at 835. The Hambleton Estate arrived at this conclusion by arguing that the Department had no basis in law to appeal the order granting summary judgment because the Department appealed the order before the amendment was enacted. *Hambleton*, 181 Wn.2d at 835–36. The Supreme Court found the Hambleton Estate's reasoning unpersuasive:

> Generally, "[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." [*Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995)]. Therefore, despite the existence of a "final" trial court ruling, retroactive amendments may apply to cases pending on appeal.
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> *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).
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> 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[3] and we decline its invitation. " 'Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.' " *State v. Logan*, 102 Wn.App. 907, 911 n. 1, 10 P.3d 504 (2000) (quoting *DeHeer v. Seattle Post–Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)). We cannot ignore the fact that because of the appeal, the judgment was not final. Accordingly, we reject the Estate's final judgment argument.

B. Due Process/Vested Right

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

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

> "This notion finds root in the due process clauses of the Fifth and Fourteenth Amendments. While due process generally does not prevent new laws from going into effect, it does prohibit changes to the law that retroactively affect rights which vested under the prior law....
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> [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.[4] But justice would be served by resolving the interest issues, which arose from a retroactive change in law after the Department denied the Estate's refund request. Therefore, once the superior court enters judgment in favor of the Department on the principal tax issue, we instruct the superior court to remand this case to the Department for determination of the interest issues raised in the Estate's supplemental brief.

IV. ATTORNEY FEES

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

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

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.

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DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Answer to Petition for Review*** in Supreme Court Cause No. 96997-3 to the following:

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Original E-filed with:
Supreme Court 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: April 23, 2019, at Seattle, Washington.

Patrick Aguilar, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK/TRIBE

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