

NO. 70446-0-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

In re Estate of

BARBARA M. PURDUE, Deceased.

SUSAN P. CHRISTOFF, NANCY P. MYHRE, HAZEL P. BEATTY, and
WILLIAM J. PURDUE, as co-personal representative of the Estate of
BARBARA M. PURDUE, deceased,

Respondents,

v.

DEPARTMENT OF REVENUE OF Washington State,

Appellant.

APPELLANT'S SUPPLEMENTAL BRIEF

ROBERT W. FERGUSON
Attorney General

David M. Hankins, WSBA # 19194
Senior Counsel
Charles Zalesky, WSBA # 37777
Assistant Attorney General
Revenue Division, OID No. 91027
P.O. Box 40123
Olympia, WA 98504-0123
(360) 753-5528

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I. INTRODUCTION

The estate of Barbara Purdue (Estate) has conceded that *In re Estate of Macbride*, consolidated with *In re Estate of Hambleton* (hereinafter “*Hambleton*”) is controlling and that “[b]ased on the intervening change in law” it is not entitled to the tax refund at issue in this appeal. *See* Supp. Br. of Resp. at 1-2. The Department agrees.¹

The Estate’s supplemental brief is equivalent to a concession of error and should be treated as such. Accordingly, the Court should reverse the Superior Court’s decision upholding the Court Commissioner’s order granting the Estate’s refund claim and remand the case with instructions to enter judgment in favor of the Department.

Although no longer necessary in light of the Estate’s concession, the Department believes that it may still be helpful to the Court to provide a brief explanation supporting the parties’ view that *Hambleton* is controlling and resolves this appeal. That explanation is provided below.

¹ The Estate asserts in its supplemental brief that it “remains entitled to the remaining portion of its requested refund.” Supp. Br. of Resp. at 2. The Estate appears to be referring to the refund it requested in its first amended return, which is still pending before the Department of Revenue and is not part of this litigation. *See* CP 141 (cover letter), 142 (1st amended return). In any event, because the Estate presented no briefing or argument pertaining to the “remaining portion” of its refund request, the Court may disregard the matter. *See* RAP 12.1(a); *State v. Johnson*, 119 Wn.2d 167, 170, 829 P.2d 1082 (1992).

II. STATEMENT OF THE CASE

In early 2013 the Estate filed a second amended Washington estate tax return with the Department of Revenue, asserting that no Washington tax was owed on the value of qualified terminable interest property (QTIP) included in its federal gross estate under Internal Revenue Code § 2044. CP170. The Estate's refund claim was based on the holding set out in *In re Estate of Bracken*, 175 Wn.2d 549, 290 P.3d 99 (2012). CP 169; CP 3.

The Legislature promptly amended the estate tax code in response to the *Bracken* decision. Laws of 2013, 2d Spec. Sess., ch. 2. That 2013 legislation (the "2013 Act") amended the definitions of "transfer" and "Washington taxable estate" to expressly include QTIP in the Washington taxable estate of a decedent. *Id.* at § 2. These amendments apply to "all estates of decedents dying on or after May 17, 2005." *Id.* at § 9. The amended law applies to the estate of Barbara Purdue, who died in 2007.

The Supreme Court, in *Hambleton*, held that the 2013 Act was a valid exercise of legislative authority. Shortly after the *Hambleton* opinion was issued, this Court asked for supplemental briefs addressing the impact of that opinion on this appeal.

III. ARGUMENT

A. ***Hambleton* Is Controlling And Resolves This Appeal In Favor Of The Department.**

Hambleton involved two estates (Estate of Helen Hambleton, Sup. Ct. case no. 89419-1, and Estate of Jessie Campbell Macbride, Sup. Ct. case no. 89500-7) that challenged the 2013 Act on constitutional and equitable grounds. The Supreme Court unanimously rejected all of the estates' arguments and concluded that the Department was entitled to judgment in both cases as a matter of law. Slip op. at 17.

Prior to filing its supplemental brief, the Purdue Estate had asserted most of the same arguments that were rejected in *Hambleton*. Specifically, the Estate challenged the retroactive application of the 2013 Act on separation of powers and due process grounds, and also claimed that the Act violated the contracts clauses of the federal and Washington constitutions and imposed an unconstitutional "direct tax" on the QTIP assets. See Br. of Resp. at 24-45. As explained in *Hambleton*, none of these arguments has any merit.

1. ***Hambleton* holds that retroactive application of the 2013 Act does not violate the separation of powers doctrine.**

The Legislature may pass a law that directly impacts a pending court case. *Hambleton*, slip op. at 8; *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 304, 174 P.3d 1142 (2007). Appellate

courts apply the new law in deciding the case “even if the new law alters the outcome.” *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 627, 90 P.3d 659 (2004) (citing *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 226-27, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995)).

The 2013 Act retroactively amended the statutory definitions of “transfer” and “Washington taxable estate” to make clear that QTIP is subject to the Washington tax. When amending the law, the Legislature was careful to preserve any final judgments entered prior to the date the Act became law. Laws of 2013, 2d Spec. Sess., ch. 2, § 10. The Legislature was also careful not to threaten the integrity of the judicial branch. Instead, as explained in *Hambleton*, the Legislature acted wholly within its proper sphere of authority to make laws and to amend existing laws.

Applying the “principles and reasoning” of *Hale v. Wellpinit School District No. 49*, 165 Wn.2d 494, 198 P.3d 1012 (2009), and *Lummi Indian Nations v. State*, 170 Wn.2d 247, 241 P.3d 1220 (2010), the Court in *Hambleton* rejected the estates’ separation of powers challenge. Slip op. at 7-8. As in *Hale* and *Lummi Indian Nation*, the Legislature did not offend the separation of powers doctrine when it retroactively amended

the law in response to a Supreme Court decision interpreting the prior law. Slip op. at 8.²

The Supreme Court's holding that the 2013 Act does not violate separation of powers principles "is binding on all lower courts in the state." *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006). Consequently, the Estate's separation of powers argument must be rejected, as the Estate now concedes.

2. *Hambleton* holds that retroactive application of the 2013 Act does not violate due process.

The Court in *Hambleton* also rejected the estates' due process challenge to the 2013 Act, holding that retroactive application of the law meets the "rational basis" standard that applies to economic legislation. *Hambleton*, slip op. at 9. Under that rational basis test, a court will uphold the retroactive application of tax legislation if it serves a legitimate legislative purpose furthered by rational means. *United States v. Carlton*, 512 U.S. 26, 30-31, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994). The 2013 Act served the legitimate legislative purpose of preventing the adverse fiscal impact of the *Bracken* decision, and "[t]he period of retroactivity [was] rationally related to preventing the fiscal shortfall." Slip op. at 11.

² In *Hale* the Court "firmly rejected the contention that just because an appellate court's statutory interpretation relates back to the time the state was originally adopted, any retroactive amendment of that statute violates separation of powers." *Hambleton*, slip op. at 7 (quoting *Lummi Indian Nation*, 170 Wn.2d at 262).

Consequently, “the retroactive period meets the due process clause’s rational basis test.” *Id.*

The Court also rejected the estates’ claims that the 2013 Act imposed a “wholly new tax” and “impairs a vested right” acquired under the prior law. Slip op. at 11-12. Although the remainder beneficiaries of a QTIP trust have a vested right to the trust property upon the death of the second spouse, the 2013 Act properly taxes the “shift in interest” that occurs when the second spouse dies. Slip op. at 12. “The estate tax does not deprive the remaindermen of their interest in the property or change the nature of their interest. It simply taxes the transfer of assets.” *Id.*

The 2013 Act does not violate due process. The Purdue Estate’s arguments to the contrary were expressly rejected in *Hambleton* and, as the Estate now concedes, must be rejected here.

3. *Hambleton* holds that taxing QTIP when the second spouse dies does not violate the contracts clause.

Both the federal constitution and the Washington constitution protect citizens from state laws that impermissibly impair contracts. This constitutional protection has limits: “The contracts clause does not prohibit the states from repealing or amending statutes generally, or from enacting legislation with retroactive effects.” *Hambleton*, slip op. at 13 (quoting *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107,

145, 744 P.2d 1032, 750 P.2d 254 (1987)). Before a state law will be undone under the contracts clause, the person challenging the law must establish a substantial impairment to a contract. If this threshold inquiry is met and the contract is between private parties, the courts must then determine whether the enactment was reasonably necessary. *Hambleton*, slip op. at 13.

The 2013 Act did not violate the contracts clause. As explained in *Hambleton*, amending the Washington estate tax code to prevent QTIP from escaping the Washington tax did not substantially impair a contract. *See* slip op. at 14 (the prior law as interpreted in *Bracken* was not a promise and “it was reasonable for the Estates to expect that the estate tax law would change.”). In addition, the 2013 Act was reasonably necessary because it “prevented the fiscal shortfall created by *Bracken*.” *Id.* Therefore, the 2013 Act would not violate the contracts clause even if it had resulted in a substantial impairment to a contract.

The Court’s holding that the 2013 Act did not violate the contracts clause is binding in this appeal and resolves this issue in favor of the Department. *See 1000 Virginia Ltd.*, 158 Wn.2d at 578.

4. *Hambleton* holds that taxing QTIP when the second spouse dies does not result in an unconstitutional direct tax.

Prior to filing its supplemental brief, the Estate argued that *Bracken* and the earlier Supreme Court decision in *In re McGrath's Estate* “demonstrate that, if ‘transfer’ is interpreted as the Department urges, the estate tax is an unconstitutional direct tax on property rather than a constitutionally permissible excise tax.” Br. of Resp. at 28 (citing *In re Estate of Bracken*, 175 Wn.2d 549, 290 P.2d 99 (2012), and *In re McGrath's Estate*, 191 Wash. 496, 71 P.2d 395 (1937)). The Supreme Court in *Hambleton* rejected this argument, explaining that the estate tax is an excise tax imposed on “a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property.” *Hambleton*, slip op. at 14 (quoting *Fernandez v. Wiener*, 326 U.S. 340, 352, 66 S. Ct. 178, 90 L. Ed. 116 (1945)). In other words, the Washington estate tax—like the federal estate tax—is not a direct tax on property. As a result, constitutional limitations that apply to “direct” taxes do not apply to the Washington or the federal estate taxes. *Hambleton*, slip op. at 14; *Knowlton v. Moore*, 178 U.S. 41, 81-82, 20 S. Ct. 747, 44 L. Ed. 969 (1900).

The Court in *Hambleton* also emphasized that a “transfer” under the federal estate tax code is “broadly construed” and is not limited to a

direct transfer of property by the decedent. Slip op. at 14. And while the Washington estate tax was construed narrowly in *Bracken*, the Legislature acted well within its authority to amend the definition of “transfer” to make the Washington tax consistent with the federal tax. As amended by the 2013 Act, a “transfer” subject to the Washington estate tax includes QTIP passing at the death of the second spouse. Slip op. at 15. The Estate’s prior claim to the contrary is incorrect and must be rejected.

5. The Estate’s equal protection argument has no merit.

The Estate has raised an equal protection challenge to the 2013 Act. *See* Br. of Resp. at 45-47. This issue was not raised in *Hambleton*. However, the Estate has effectively conceded this issue. *See* Supp. Br. of Respondent at 1-2. In any event, the Estate’s equal protection argument has no merit and should be rejected for the reasons explained in the Department’s reply brief. *See* App. Reply Br. at 22-24.

B. Because *Hambleton* Is Controlling, The Court Is Not Required To Decide The Other Issue Raised By The Department.

The Department raised two issues on appeal. *See* Br. of App. at 2. The Supreme Court’s decision in *Hambleton* resolves the second issue in favor of the Department. Under *Hambleton*, the Estate is not entitled to exclude QTIP from its Washington taxable estate and is not entitled to the estate tax refund it is claiming. Consequently, the Court does not need to address the first issue raised by the Department, whether the Trust and

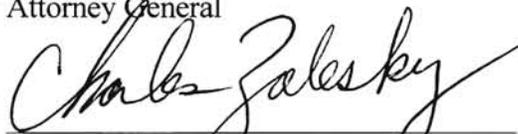
Estate Dispute Resolution Act applies to a claim for refund of estate tax. In short, because the Estate is not entitled as a matter of law to the refund it is seeking, it makes no difference to the outcome of this appeal whether TEDRA can apply to an estate tax refund claim.³

IV. CONCLUSION

Under the Washington estate tax code as amended, the Estate is not entitled to deduct QTIP in computing the Washington tax. The amended law is constitutional and controlling. For this reason, the Department requests that the Court reverse the Superior Court's decision upholding the Court Commissioner's order granting the Estate's refund claim and remand the case with instructions to enter judgment in favor of the Department.

RESPECTFULLY SUBMITTED this 21ST day of October, 2014.

ROBERT W. FERGUSON
Attorney General



DAVID M. HANKINS, WSBA # 19194
Senior Counsel
CHARLES ZALESKY, WSBA # 37777
Assistant Attorney General
OID No. 91027
Attorneys for Appellant

³ Under RAP 11.4(j), the Court may decide this case without oral argument. Because *Hambleton* is controlling and resolves this appeal, and because the Estate has conceded this point, it would be appropriate for the Court to decide the matter without oral argument.

PROOF OF SERVICE

I certify that I served a copy of this document electronically by email on the following:

George W. Akers
Jonathan Moore
Montgomery Purdue Blankinship & Austin PLLC
5500 Columbia Center
701 Fifth Avenue
Seattle, WA 98104-7096
jmoore@mpba.com
eservice@mpba.com
akers@mpba.com

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

DATED this 21st day of October, 2014, at Tumwater, WA.



Carrie A. Parker, Legal Assistant