INTERMEDIARY COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-313

FORETHOUGHT LIFE INSURANCE COMPANY,

Petitioner Below, Petitioner

vs.

ALAN MCVEY, in his official capacity as

INSURANCE COMMISSIONER OF

THE STATE OF WEST VIRGINIA,

Respondent Below, Respondent.

PETITIONER'S BRIEF

Alexander Macia (WV Bar No. 6077)
Chelsea E. Thompson (WV Bar No. 12565)
Spilman Thomas & Battle PLLC
300 Kanawha Boulevard, East
Charleston, WV 25301
304-340-3800
amacia@spilmanlaw.com
cthompson@spilmanlaw.com
Counsel for Petitioner

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No. 2: Respondent erred in denying and dismissing the petition.

No. 3: Respondent erred in concluding that Petitioner has not met its burden of proving that the assessment issued by Respondent is incorrect or contrary to law.

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No. 5: Respondent erred in finding that Petitioner's "Single Premium Deferred Annuity Contracts" and/or "Flexible Premium Individual Deferred Annuity Contracts" should have resulted in insurance premium annuity tax payments when purchased.

No. 6: Respondent erred in holding that West Virginia Code §33-3-15 requires tax to be paid when there is an application to purchase an annuity, not when it annuitizes and held that, in this case, the annuity tax is levied on the day the contract is signed.

No. 7: Respondent erred in concluding that Petitioner had no secondary contract or agreement with the policyholder to purchase annuities at future dates.

No. 8: Respondent erred in concluding without legislative history or support that it does not seem reasonable that the state Legislature would impose a tax wherein 95% of the individual customers of the Petitioner could simply avoid the tax imposed by the Legislature by withdrawing the deposited money prior to the Annuity beginning distributions, particularly when he also concedes that the entire 1% annuity tax was repealed in its entirety effective 2021.

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No. 20: Respondent erred in making a conclusion of law that it did not act contrary to the clear language of West Virginia Code §33-3-15.

II. STATEMENT OF THE CASE

This case arises from Notices of Underpayment issued by the West Virginia Office of Insurance Commissioner ("Respondent" or "WVOIC") for annuity taxes allegedly owed by Petitioner in the Tax Years 2019 and 2020. *See* D.R.0003-6. Pursuant to West Virginia Code §33-3-15, every life insurer like Petitioner that is transacting business in the state shall pay the Respondent taxes equal to 1% of the gross amount of the annuity considerations, less annuity considerations returned, for those premiums collected and received during the previous calendar year. D.R.0030. In the case of funds accepted under an agreement that provides for an accumulation of money to purchase annuities at future dates, like the deferred annuity contracts at issue in this case, annuity considerations may be considered to be collected and received upon receipt ("front-end tax") or upon actual application to the purchase of annuities ("back-end tax"). D.R.0030; D.R.0161-162. Petitioner elected the back-end tax option in 2008. D.R.0162-163.

D.R.0353. This election was acknowledged in writing by the Respondent in a letter dated December 3, 2008 that further stated "Pursuant to W.Va. Code §33-3-15 Forethought life Insurance Company may consider funds accepted for the future purchase of annuities to be received for annuity tax purposes upon actual application to the purchase of annuities (bank-end) from tax year 2008 forward." D.R.0353.

Further, Respondent provided Petitioner with direction in a November 17, 2015 email from Drema Goolsby, the then Tax Audit Clerk Senior for Respondent, in which Ms. Goolsby claims that the Respondent has "been performing full review of any company that writes annuities in the State of West Virginia" for tax years 2012 – 2014. D.R.0210-217; D.R.0374-375 (the "Goolsby Email"). Ms. Goolsby informs Petitioner in that email that "Back-end companies must report and pay taxes on any previously reported deferred annuity that annuitizes, including any earnings (interest/dividends)." *Id.* Finally, Ms. Goolsby confirmed that Petitioner started reporting in 2008 as a back-end company. *Id.* Since the Goolsby Email, the Respondent has not provided Petitioner with any other rules, directives, interpretive rulings, information letters, or other guidance to contradict that specific command that back-end taxation companies report deferred annuity that annuitizes for taxation. D.R.0217-218.

Petitioner has filed its annuity tax returns with Respondent consistent with that back-end election ever since 2008. D.R.0030; D.R.0161-164; D.R.0216-217. This means that no annuity tax is due to the State every time a policyholder or customer pays the original premium to Petitioner; the tax is due, instead, when the contracts annuitize and enter the annuity phase. D.R.0163-165; D.R.0208-217. Ultimately, Petitioner completed its annuity tax forms for tax years 2019 and 2020 in this manner consistent with its 2008 back-end election, the 2015 Goolsby Email, years of prior practice, and the instructions printed on the face of the applicable 2019 and 2020 tax forms

promulgated by the Respondent. D.R.0163-164; D.R.0208-217; D.R.0375-388 (2019), D.R.0389-403 (2020). In 2019, the State legislature repealed the annuity tax effective January 1, 2021, making the 2019 and 2020 annuity tax returns at issue in this case the very last ones that Petitioner could or would owe to the Respondent. *See* W.Va. Code §33-3-15(a).

However, years later on May 12, 2022, the Respondent issued an original "Notice of Underpayment to Petitioner" for Petitioner's alleged underpayment of annuity tax for Tax Years 2019 and 2020, which sought a total of $478,441.11 and $523,432.15, respectively, in underpaid annuity taxes, penalties, and interest. D.R.0164-169; D.R.0035; D.R.0356-357 (2019); D.R.0361-362 (2020). These notices were quickly withdrawn as Respondent conceded that it had bizarrely calculated the tax on the withdrawals made by customers while the contracts were in the accumulation phase, instead of when the accumulated annuity considerations were applied to the purchase of annuities, in violation of West Virginia Code §33-3-15(b). *See* D.R.0035; D.R.148-149 ("Compliance with the laws is a critical part of our job and our responsibility as a team."); D.R.0167-169 (testimony regarding original notices); D.R.0230-231 (testimony regarding conflict between 2019 and 2020 tax filing and amended notices calculation); D.R.0295-296 (admission original notices were wrong); D.R.0356-357 (2019 notice); D.R.0361-362 (2020 notice).

Subsequently, on January 9, 2023, Respondent issued the operative Notice of Underpayment for those same tax years (the "Amended Notices"). D.R.0003-6; D.R.0167-172; D.R.0365-366. Specifically, Respondent asserted that Petitioner owed for Tax Year 2019: (a) underpayment of $929,294.57; (b) penalty under West Virginia Code §33-43-7(a) of $26,100.00; and (c) penalty under West Virginia Code §33-43-7(b) of $929,294.57 for a total of $1,884.689.14. *Id.* And, for Tax Year 2020, Respondent alleged Petitioner owed: (a) underpayment of $447,424.89; (b) penalty under West Virginia Code §33-43-7(a) of $16,975.00; and (c) penalty

under West Virginia Code §33-43-7(b) of $447,424.89 for a total of $911,824.78. *Id.* Thus, the Amended Notice greatly increased the amount of allegedly underpaid taxes, interest, and penalties.

The Amended Assessments seemingly tax all annuity considerations upon receipt and contract formation (front-end tax), and not upon annuitization (back-end tax). D.R.0167-172. The Respondent's apparent rationale for this tax calculation was that Petitioner had previously reported deferred annuities as deposit contracts, but as Petitioner's representative testified, this was never incorrectly reported because there are specific line items on the applicable tax return for deferred annuities and deposit contracts, and Petitioner had always properly distinguished between the two. D.R.0170-172. Additionally, Petitioner had not been credited with approximately $215,000.00 it had previously paid in annuity taxes. D.R.0231-234. Upon information and belief, other taxpayers paying the annuity tax received similar underpayment and penalty notices that have been opposed on similar grounds of improper calculation. *See, e.g.,* D.R.0012-15 ("there are a line of these cases and they all seem to turn on the same issue").

In the case at bar, Petitioner believed that the Amended Notices were improperly calculated and challenged the Amended Notices by filing a Request for Hearing raising a host of issues, ranging from re-iterating its back-end election, disputing the Respondent's incorrect assertion that Petitioner had been incorrectly reporting deferred annuities as deposit contracts, and Respondent's failure to apply a credit for previously paid annuity taxes. D.R.0001-6; D.R.0031; D.R.036-368.

A hearing was held before Hearing Examiner Mark Carbone on February 16, 2023, with both parties supplying witnesses and post-hearing briefs. D.R.0138-330. On June 13, 2023, Hearing Examiner Carbone issued his "Recommended Decision of the Hearing Examiner" that contained various findings of fact and conclusions of law. D.R.3640-3659. The Recommendation was adopted by Respondent in his "Final Order" entered June 21, 2023. D.R.3660-3664 (together

with Recommendation, the "Final Order"). Petitioner believes the Final Order and incorporated Recommendation are incorrect, and timely appealed the Final Order to this Court on July 19, 2023.

III. SUMMARY OF ARGUMENT

Petitioner is a life insurance company properly authorized to operate in this state, offering a broad range of retirement, life, and reinsurance products to West Virginia's citizens. Because of its annuities business, Petitioner was subject to W.Va. Code §33-3-15, which imposed upon every life insurer transacting insurance in West Virginia an annuity tax equal to 1% of the gross amount of the annuity considerations, less annuity considerations returned, for premiums collected and received during the previous year. This tax is calculated by and payable to the Respondent.

Petitioner believes that this case resolves in its favor upon a straightforward application of the clear and unambiguous language of its deferred annuity contracts to the annuity tax provisions of W.Va. Code §33-3-15. Petitioner asserts that Respondent improperly calculated this tax in the Amended Notice, and that the Final Decision was plagued with factual and legal inaccuracies regarding its annuity contracts and the legislative history of that code provision. Specifically, the Amended Notices tax annuity considerations when the contract is formed and the premium is paid, *i.e.,* on the front-end. However, Petitioner has elected back-end taxation, so the tax should be assessed later, when the contracts annuitize and payouts actually begin. To avoid Petitioner's undisputed back-end election, the Final Order and Respondent have painted Petitioner's contracts to be immediate annuities—which would give Petitioner no option under the statute to elect the timing of taxation—rather than the two-phase deferred annuities the Contracts expressly are. In doing so, the Final Order has mischaracterized or misunderstood the express terms of the deferred annuity contracts at issue; improperly disregarded Respondent's instructions to Petitioner in the Goolsby Email and its own tax forms; provided Respondent with deference to which it is not

legally entitled; denied Petitioner the benefit of doubt to which it is legally entitled in construing the tax statute; and, forced Petitioner to commit a violation of the annuity tax statute by "switching" its election. For these reasons, and others, the Final Order is in error of law, clearly wrong in light of the reliable, probative and substantial evidence on the whole record, are arbitrary or capricious, and/or are an abuse of discretion. Thus, this appeal should resolve in Petitioner's favor and its back-end election honored in the calculation of its 2019 and 2020 annuity tax returns.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 8(a)(4) of the West Virginia Rules of Appellate Procedure, Petitioner respectfully requests that this Court grant oral argument, as it believes the decision-making process in this case would be significantly aided by oral argument. Rule 19(A)(1) of the West Virginia Rules of Appellate Procedure states that a case is suitable for Rule 19 oral argument if it involves "assignments of error in the application of settled law . . . ." Here, all of the assignments of error have to do with the application of well-settled tax law in West Virginia.

Furthermore, Petitioner respectfully requests entry of a decision through a signed opinion. Because Petitioner is seeking a reversal of the Respondent's Final Order, which adopted in full the hearing examiner's Recommendation decision, this case is not appropriate for a memorandum decision, which is only permitted in limited circumstances as set forth in Rule 21(d) of the West Virginia Rules of Appellate Procedure.

V. ARGUMENT

Petitioner provides the following legal argument in support of its appeal, all of which supports a single conclusion: Under W.Va. Code §33-3-15, Petitioner may select back-end taxation and, as such, shall be taxed only upon the annuitization of its contracts, which occurs well after initial contract signature. Because the Final Order adopted the Recommendation and upheld the

Amended Notices, which taxed Petitioner on the original contract price at the time of the contract's signature, they are in error.

A. JURISDICTION

This Court has jurisdiction over this matter pursuant to W.Va. Code §51-11-4(b)(4) and 33-2-14 as Petitioner is appealing a final order issued by Respondent after June 30, 2022.

B. STANDARD OF REVIEW

The standard for reviewing an administrative appeal from the Respondent's office is the same as that applied to the circuit court, which is controlled by W.Va. Code §29A-5-4(g). As held in syllabus point one of *Muscatell v. Cline,* 196 W.Va. 588, 474 S.E.2d 518 (1996):

> On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va.Code §29A–5–4[(g)] and reviews questions of law presented *de novo;* findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.
>
> 196 W.Va. at 590, 474 S.E.2d at 520.

Applicable here, our state has recognized that "interpreting a statute or a regulation presents a purely legal question subject to *de novo* review." *Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W. Va. 573, 581–82, 466 S.E.2d 424, 432–33 (1995). Further, W.Va. Code §29A-5-4(g) provides, in relation to the circuit court's review:

> The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions decision or order are:
>
> (1) In violation of constitutional or statutory provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedures; or

(4) Affected by other error of law; or

(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

C. STRAIGHTFORWARD APPLICATION OF THE ANNUITY TAX CODE FAVORS PETITIONER

The central question of this case is how the Petitioners should be taxed on their deferred annuity contracts. The answer comes from a straightforward application of the clear annuity tax statute to the equally clear language of the deferred annuity contracts – Petitioners shall be taxed, consistent with their back-end election, when deferred annuities annuitize.

1. Operation and Language of the Annuity Tax Code

This case involves the West Virginia state annuity tax that was in effect prior to January 1, 2021. By way of background, an annuity contract, in general, is one by which an annuitant or policyholder makes an investment which will assure that the policyholder (or designated beneficiary) will receive a specified annual or quarterly sum during their life (or over a specified time period) and if they should die prematurely, their estate or those whom they designate will receive the payments they have not yet received. *See* D.R.0151-155*; see also Garos v. State Tax Commission,* 99 N.H. 319, 321, 109 A.2d 844, 847 (1954). A fundamental characteristic of an "annuity" is a periodic payment made unconditionally without any contingency. *In re Luckel's Estate,* 151 C.A.2d 481, 487, 312 P.2d 24, 29–31 (1957).

Annuities can be categorized two ways: (1) immediate annuities, in which the payment of benefits begins a short period of time after the premium has been paid to the company and the contract has been formed, and (2) deferred annuities, in which annuitization and the payment of

benefits begins on some future stated date. D.R. 0155-156. *In re Moffat*, 119 B.R. 201, 204 (B.A.P. 9th Cir. 1990), *aff'd*, 959 F.2d 740 (9th Cir. 1992) (citing *California Insurance Law and Practice* §§ 20.20–20.21 (Matthew Bender 1990)). Deferred annuities have, generally, a two-phase process. D.R.0151-157. First is the accumulation phase, in which a policyholder creates the contract and pays their money or premium to the company, and that money accumulates interest and investment earnings; and the second phase occurs when the deferred annuity annuitizes and begins to pay out to the policyholder in a pre-determined manner. D.R.0150-152. Annuitization, in other words, is essentially the exchange of the accumulated cash value of an annuity contract at a time determined by the policyholder in exchange for a series of payments over a period of time, also determined by the policyholder. D.R.0167-172; D.R.191-192 ("So we generally view the situation as such that you do purchase at annuity at the time of annuitization.").

It is under this framework that the West Virginia State annuity tax was assessed prior to January 1, 2021. The operative statute was W.Va. Code §33-3-15, which now states in full:

> (a) For the taxable years beginning on or after January 1, 2021, the tax imposed by this section is discontinued.
>
> (b) Every life insurer transacting insurance in West Virginia shall make a return to the commissioner annually on a form prescribed by the commissioner, on or before March 1, under the oath of its president or secretary, of the gross amount of annuity considerations collected and received by it during the previous calendar year on its annuity business transacted in this state and stating the amount of tax due under this section, together with payment in full for the tax due. The tax is the sum equal to one per centum of the gross amount of the annuity considerations, less annuity considerations returned and less termination allowances on group annuity contracts. All the taxes received by the commissioner shall be paid into the insurance tax fund created in § 33-3-14(b) of this code. In the case of funds accepted by a life insurer under an agreement which provides for an accumulation of money to purchase annuities at future dates, annuity considerations may be either considered by the life insurer to be collected and received upon receipt or upon actual application to the purchase of annuities. Any earnings credited to money accumulated

> while under the latter alternative will also be considered annuity considerations. For purposes of this election, the alternative which the life insurer elected to file its tax return for the 2001 tax year or which it elects when it enters the state, whichever is later, shall be considered the life insurer's election between these alternatives. A life insurer filing a year 2001 tax return shall provide written notice to the commissioner of its election within 90 days of the effective date of this enactment. Otherwise, a life insurer shall provide written notice to the commissioner of its election within 90 days after it enters the state. Thereafter, a life insurer may not change its election without the consent of the Insurance Commissioner. The Insurance Commissioner may develop forms to assure compliance with this subsection.
>
> W. Va. Code § 33-3-15.

Under this clear and unambiguous language, the calculation of annuity tax is straightforward. Every life insurer like Petitioner that is transacting business in the state shall pay WVOIC taxes equal to 1% of the gross amount of the annuity considerations, less annuity considerations returned, for those premiums collected and received during the previous calendar year. In the case of funds accepted under an agreement that provides for an accumulation of money to purchase annuities at future dates, annuity considerations may be considered to be collected and received upon receipt when the contract is formed ("front-end tax") or upon "actual application to the purchase of annuities" also known as annuitization ("back-end tax"). D.R.0160-162. An insurer notifies WVOIC of its election to use either a front-end tax or back-end tax with its original annuity tax filing, or a written notice of its election. *Id*. After that initial election, an insurer shall be taxed consistent with its election, and cannot change their election absent WVOIC's consent.

2. The Final Order Erred in Finding Back End Taxation Was Not Available

This case can be properly resolved on a straightforward application of the clear and unambiguous contractual language to the equally clear and unambiguous statutory provision imposing an annuity tax. The Final Order is based largely on the idea that the deferred annuity

contracts at issue constitute a purchased annuity immediately upon signature—in which case, Respondent argues, there is no option for Petitioner to select back-end taxation, and taxation must occur on the total money deposited with Petitioner as of the contract's execution date (*i.e.*, front-end). Yet, the Final Order erred in its application and interpretation of both contract and statute.

3. The Final Order Misunderstood or Misapplied the Deferred Annuity Contract's Clear and Unambiguous Terms

The Final Order erred when it concluded that the contracts at issue constitute an annuity immediately upon signature. This is principally because the contracts are expressly deferred annuities, which do not annuitize until a specified later date.

Petitioner has a contract titled "Single Premium Deferred Annuity Contract" (the "Contract"). D.R.0331-347. As the title suggests, these contracts are deferred annuities. D.R.0151-158. When the Contract is signed, the policyholder deposits with Petitioner a particular sum of money, known as the Annuity Deposit. *Id.*; D.R.0337; D.R.0340. The Contract also contains a specific future date, known as the Annuity Date, which is the date upon which the annuities are first annuitized. D.R.0151-158; D.R.0337; D.R.0345. The policyholder selects their own Annuity Date, and may change their Annuity Date at any time prior to the Annuity Date. D.R.0345. Prior to the Annuity Date, the Annuity Deposit does not remain static in value—perhaps increasing due to interest, or decreasing due to taxes or policyholder withdraws. Petitioner may also use these funds for investment purposes. D.R.151-155. Given these changes over time, the Contract relies upon a calculation of a daily Contract Value, which is the original Annuity Deposit plus any accrued interest, and minus any assessed taxes, withdraws, or other expressly defined deductions. D.R.0341. The Contract specifically states that a policyholder has "the right to withdraw part or all of [their] Contract Value prior to the Annuity Date." D.R.0344. As clearly articulated, this means that, prior to the Annuity Date, the policyholder may withdraw all or some of their money.

Id. Withdrawal decisions rest exclusively with the policyholder. *Id.* However, once the policyholder's chosen Annuity Date arrives, the policyholder can no longer make withdrawals, and annuitization occurs, leading to the first payouts from Petitioner to the policyholder. D.R.0345; D.R.0337 (definition of "Annuity Payments").

Thus, the Contract expressly presents the two phases typical of deferred annuities: an accumulation phase, when customers pay money in and it accumulates interest and investment earnings, and the second phase when it annuitizes and is paid out in the manner determined by policyholders. D.R.0151-158. Annuitization occurs when the deposits, together with interest and growth, are "applied" to the "purchase" of the series of payments back to the beneficiary.

In circumstances like this, where the language of a contract is clear, the language cannot be construed and must be given effect and no interpretation thereof is permissible. *Berkeley Cnty. Pub. Serv. Dist. v. Vitro Corp. of Am.*, 152 W. Va. 252, 267, 162 S.E.2d 189, 200 (1968). Similarly, the statute's language is clear—front-end and back-end tax election is available "[i]n the case of funds accepted by a life insurer under an agreement which provides for an accumulation of money to purchase annuities at future dates . . . ." W.Va. Code §33-3-15. It is the well-established precedent of this state that "[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951); Syl. Pt. 2, *Mace v. Mylan Pharms., Inc.*, 227 W. Va. 666, 714 S.E.2d 223 (2011).

Thus, applying the clear language of the Contract to the clear language of W.Va. Code §33-3-15 leads to one conclusion: The Contract satisfies the statutory requirement for Petitioner to elect back-end taxation. Specifically, Petitioner "accepts funds" known as the Annuity Deposit, which are subject to express accumulation during the Accumulation Period. Those funds are accepted

pursuant to the Contract, which expressly "applies" those funds plus any accumulation (calculated and defined to be the daily Contract Value) to the "purchase" of a series of payments back to the beneficiary upon annuitization. It is only after the Annuity Date that an option for an annuity is set, and annuitization occurs. This is entirely consistent with the statutory provision recognizing the "actual application to the purchase of annuities" in W. Va. Code §33-3-15. In fact, when directly asked what annuitization is and how it affects taxation, Respondent's representative confirmed that annuitization for a deferred annuity occurs when a contract exits the accumulation phase and "becomes an annuity," and "you pay tax at that time from that deferred phase." D.R.0288-289. Accordingly, the Contract satisfies the statute and Petitioner may chose front-end or back-end taxation pursuant to W.Va. Code §33-3-15.

The Final Order fixates on the lack of a "second" contract under which policyholders buy annuities, claiming "Petitioner's argument would be more persuasive if it could argue that there were two contracts, one allowing the deposit of funds and another purchasing the annuity." D.R.3650. However, what the Final Order just described with "two contracts" is simply the undisputed ***two-phase process of deferred annuities***. This is precisely what a deferred annuity does—within a single contract, it has terms controlling both the accumulation phase (dictating deposit and accumulation of funds) and the annuitization phase (dictating the application of those funds and accumulation to payment of annuity). D.R.150-158. There is no need for a second contract. A single contract can accomplish two different things at two different times, as the Contract and its fellow deferred annuity contracts demonstrate.

Accordingly, under the clear terms of the Contract, Petitioner satisfies the requirements of W.Va. Code §33-3-15 and may elect either front-end or back-end taxation. The Final Order erred

by demanding a "second contract" instead of the two-phase deferred annuity present in the Contract, and for holding that back-end taxation was not available.

4. The Final Order Erred When It Failed to Construe The Annuity Tax Provision In Favor of Plaintiff And Against The Respondent.

The Petitioner's argument that it satisfies the plain language of the annuity tax statute is aided by the well-founded law of this state that gives the taxpayer the "benefit of the doubt" when construing tax laws. As previously held, "there is the historic rule that tax statutes are generally to be construed in favor of the taxpayer and against the taxing authority." *Consolidation Coal Co. v. Krupica*, 163 W. Va. 74, 80, 254 S.E.2d 813, 816 (1979). This has been consistently applied and held. When the "statute to be interpreted concerns taxation, we usually construe the tax law in a manner that is favorable to the subject taxpayer. *Coordinating Council for Indep. Living, Inc. v. Palmer*, 209 W. Va. 274, 281, 546 S.E.2d 454, 461 (2001). "Laws imposing a license or tax are strictly construed and when there is doubt as to the meaning of such laws they are construed in favor of the taxpayer and against the State." Syl. pt. 1, *State ex rel. Lambert v. Carman*, 145 W.Va. 635, 116 S.E.2d 265 (1960). *Accord* Syl. pt. 2, *Baton Coal Co. v. Battle,* 151 W.Va. 519, 153 S.E.2d 522 (1967) ("As a general rule, statutes imposing taxes are construed strictly against the taxing authority and liberally in favor of the taxpayer."). *Cf.* Syl. pt. 1, *Calhoun County Assessor v. Consolidated Gas Supply Corp.*, 178 W.Va. 230, 358 S.E.2d 791 (1987) ("Statutes governing the imposition of taxes are generally construed against the government and in favor of the taxpayer. However, statutes establishing administrative procedures for collection and assessment of taxes will be construed in favor of the government.").

Given this case turns on the construction and interpretation of an annuity tax statute, that statute should generally be construed in Petitioner's favor and against the Respondent. As explained above, Petitioner's position that it is eligible for back-end taxation election is more than

reasonable and fair given the actual wording of W.Va. Code §33-3-15. To the extent there is any ambiguity, doubt, or possible alternative interpretations of that statute (which there are not), those should be resolved in Petitioner's favor under this well-documented precedent. The Final Order, however, failed to provide this consideration or "benefit of the doubt" in Petitioner's favor and, as such, committed reversible error and was contrary to the law.

5. The Final Order Erred To The Extent It Considered The Contracts To Be An Immediate Annuity, And Not An Annuity At Future Dates.

However, the Final Order found the Petitioner does not qualify under W.Va. Code §33-3-15 to elect either front-end or back-end taxation because the Contract is an annuity immediately upon signature and not at "future dates." Put another way, it found that the Contract is an immediate annuity and not a deferred annuity.[1] This conclusion is based, in part, on the idea that the policyholder's ability to withdraw their deposit makes it an immediate annuity and not a deferred annuity. *See, e.g.,* D.R.0040. This is a mischaracterization of the express terms of the Contract, yet the Final Order found that the Contract constitutes an annuity immediately upon signature. This is an error.

The term "immediate annuity" is not found in the West Virginia annuity tax statute, but is nonetheless imposed by the Final Order. Given the lack of West Virginia law regarding immediate annuities and their taxation under W.Va. Code §33-3-15, we turn to another state's analysis of

[1] Petitioner notes the internal inconsistency of some of the findings in the Final Order. On one hand, they find that the Contract is an immediate annuity immediately upon signature. Elsewhere, they hold that Petitioner had allegedly previously reported the exact same Contracts as deposit contracts instead of properly reporting them as deferred annuities. Clearly, the Contracts are not simultaneously immediate annuities sufficient to defeat taxation election, and a deferred annuity that cannot be listed as a deposit contract. This arises, apparently, from Respondent trying to mischaracterize the accumulation phase of a deferred annuity as a deposit contract. D.R.0289. Additionally, as Petitioner's representative testified, Petitioner never incorrectly reported its deferred annuities as deposit contracts because there are specific line items on the applicable tax return for deferred annuities and deposit contracts, and Petitioner had always properly distinguished between the two. D.R.171-172. In fact, testimony was provided as to Petitioner's calculation of annuity taxes om 2019 and 2020, step-by-step. D.R.0218-229. To date, Respondent has provided no viable evidence that any incorrect reporting occurred. Thus, the Final Order erred in finding that Petitioner incorrectly characterized deferred annuities as deposit contracts and used this "mischaracterization" to evade taxes.

immediate annuities. As California state courts (who interpret a nearly identical annuity tax as West Virginia's, described in detail below) have noted, an immediate annuity is one in which "payment of benefits begins a short period of time after the premium has been paid to the company, usually at the beginning or end of the first income period." *In re Moffat*, 119 B.R. 201, 204 (B.A.P. 9th Cir. 1990), *aff'd*, 959 F.2d 740 (9th Cir. 1992). This definition is consistent with Petitioner's testimony regarding what a deferred annuity is. D.R.0151-157. The Contract does not fit this definition. The Contract clearly states that payments to the policyholder do not begin until a set, future Annuity Date. D.R.0337; D.R.0345-346. This date is years away, in comparison to the monthly annuity payment options available to the policyholder. *Id.* Thus, Petitioner is not contractually obligated to begin immediately making payments to a policyholder. Additionally, a policyholder cannot withdraw their deposited funds immediately—the Contract clearly states that withdraws cannot occur until after the one-year anniversary of the contract date. D.R.0344. Accordingly, a policyholder is also not immediately able to withdraw their funds. Taken together, the Contract on its face does not constitute an immediate annuity—hence its title as a deferred annuity. D.R.0331. The Contract has been submitted to Respondent and approved, containing its title and all of these terms. D.R.0157-158.

The Final Order found otherwise, concluding that the Contract is an immediate annuity because the Contract provides death benefits. Death benefits are, for lack of a better term, a red herring. Death benefits are not the same thing as the annuity payout terms, which are ultimately selected by the policyholder. Those are two different contractual rights, obligations, payments, and calculations. The Final Order also fails to appreciate that if death benefits are paid, whatever annuity election has been selected by the policyholder never actually comes to fruition.

As explained above, the difference between an immediate and deferred annuity is the date of annuitization (*i.e.*, when annuity is purchased and begins payment to the policyholder). Death benefits are ancillary to that process, and not determinative—only the date of annuitization is determinative—and death benefits can be part of both an immediate and deferred annuity. Thus, the inclusion of death benefits is not dispositive as the Final Order found.

This conclusion is confirmed by the fact that the Final Order focuses on death benefits but disregard the other terms of the Contract. Specifically, the Contract holds that, up until annuitization on the Annuity Date, the policyholder can change their Annuity Date, completely withdraw all funds, and change their annuity election payout terms. Thus, even with death benefits as a contractual term, all the hallmarks of a deferred annuity—including the distinctive two phases of accumulation and annuitization—are present. Under the Contract's terms, actual annuity payments are not set in stone until annuitization and the Annuity Date occur.

Thus, the Contract's inclusion of death benefits is not determinative that it is an immediate annuity purchased upon signature. On this point, the Final Order is in error.

6. Conclusion

The Final Order is riddled with errors, led by its holding that Petitioner could not choose back-end taxation as the Contract was an immediate annuity, or already purchased annuity. For the reasons detailed above, the Final Order was in error and contrary to the law and evidence.

D. THE FINAL ORDER CONTORTED AND MISAPPLIED THE STATUTE AND CREATED SELF SERVING LEGISLATIVE INTENT

In order to justify its holding that back end taxation was not available to Petitioner, the Final Order severely contorted and/or misapplied the clear language of the statute and created, without any basis, new legislative history. Neither is permissible under classic statutory interpretive laws of the state.

1. The Final Order Erred by Imposing Restrictions and Definitions Not in the Statute

The Respondent argued in briefing that statutory election for front-end and back-end taxation is limited to deposit-type contracts. D.R.0038-39. The Respondent argued that deposit-type contracts maintain no mortality or morbidity risks, and since the Contract has "death benefits," it cannot be a deposit-type contract, and the statute does not permit Petitioner to elect back-end taxation. D.R.0038-39. The Final Order clearly predicated its findings upon the inclusion of "death benefits" in the Contract. Assuming the inclusion of "death benefits" in the Final Order may also harken to Respondent's argument regarding deposit-style contracts and taxation election, the argument is flawed for several reasons—the most egregious of these reasons is that it goes well beyond the statutory language and imposes new requirements and definitions upon annuity taxes which are not in the statute.

2. The Final Order Erred In Applying the Clear Text of W.Va. Code §33-3-15.

On its face, W.Va. Code §33-3-15 states that front-end and back-end elections are available "[i]n the case of funds accepted by a life insurer under an agreement which provides for an accumulation of money to purchase annuities at future dates, annuity considerations may be either considered by the life insurer to be collected and received upon receipt or upon actual application to the purchase of annuities." W.Va. Code §33-3-15. This language is clear and unambiguous. The annuity tax statute does not mention or refer to a "deposit-type contract," and certainly does not limit taxation elections to "deposit-type contracts" or contracts without mortality or morbidity risks. It is the long-standing policy for courts in our state to "look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax Dep't,* 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995). Furthermore, under our state's common law, "[i]n the absence of any

specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meaning." Syl. Pt. 1, *Tug Valley v. Mingo Cty. Comm.*, 164 W.Va. 94, 261 S.E.2d 165 (1979). Applying these statutory construction principles to W.Va. Code §33-3-15, the plain and ordinary meaning of the express language in the statute controls, and that language does not contain any requirements regarding deposit-style contracts or certain types of contractual risk provisions. This should end the inquiry in Petitioner's favor.

3. The Final Order Erred In Imposing New Conditions To Taxation Election That Are Not In the Statute, And Are Undefined

The Final Order, however, seek to impose new conditions that are not expressly included in the statute—namely, qualification as a "deposit-type contract," and the lack of "mortality risk," "morbidity risk" or "death benefits" before a taxpayer may elect front-end or back-end taxation. To be clear, none of those terms or conditions are found in W.Va. Code §33-3-15 as written. The addition of new conditions or terms beyond the statute's text is impermissible, and constitutes an attempt to contort the plain language of the statue into something it is not. It is well-settled law that such attempts by the agency to contort the plain language of the statute must be rejected. *See, e.g.*, Syl. Pt. 5, *CNG Transmission Corp. v. Craig*, 211 W. Va. 170, 564 S.E.2d 167 (2002); Syl. Pt. 2, *Domestic Violence Survivors' Support Grp., Inc. v. W. Va. Dep't of Health & Hum. Res.*, 238 W. Va. 566, 569, 797 S.E.2d 543, 546 (2017). Given the plain language of West Virginia Code §33-3-15, the conclusions of the Final Order adding new conditions or considerations based on these terms of "deposit-type contract," and the lack of "mortality risk," "morbidity risk" or "death benefits" is in error, as is their holding that the Respondent's proffered interpretation does not constitute a contortion of the express statutory text.

Additionally, as the West Virginia Supreme Court of Appeals has previously recognized, "courts must presume that a legislature says in a statute what it means and means in a statute what

it says there." *Mangus v. Ashley*, 199 W.Va. 651, 658, 487 S.E.2d 309, 316 (1997) (citation omitted). Thus, the only statutory requirements of West Virginia Code §33-3-15 at issue here is: (a) the acceptance of funds, (b) an agreement that provides for accumulation of money, and (c) purchase of annuities at future dates. The Petitioner's Contract has met all of these requirements, as outlined above. Had the state legislature intended or desired to limit taxation election to deposit-style contracts, or account for a contract's inclusion mortality risk, morbidity risk, or death benefits, it would have expressly required such. Presuming that the legislature means what it says in W.Va. Code §33-3-15, there are no statutory requirements like those suggested and relied upon by the Final Order. Thus, the Final Order was in error and contrary to law.

Finally, but critically, the Final Order's reliance upon any "deposit-type contract" argument is severely undermined by the lack of critical definitions for the newly imposed criteria for electing front-end or back-end taxation under W.Va. Code §33-3-15. The terms introduced by Respondent and echoed in the Final Order (including, but not limited to, "deposit-type contract," "mortality risk" and "morbidity risk,") are not defined in applicable statutes, regulations, administrative decisions, or case law in West Virginia. See D.R.0156 (Petitioner testifying "So the term "deposit contract," has many connotations. I'm not aware there's any prescribed definition under any law that I'm aware of"). The Final Order simply adopted the definitions presented by Respondent in its briefing, without any legal or legislative basis. Even the documents attached to the Respondent's briefing failed to contain a definition or citation to a definition for these key terms. D.R.0049-54. This is not permissible, and further demonstrates that the legal theory applied by the Final Order was an error, and not supported by the laws of this state.

4. The Final Order Erred In Creating Legislative Intent Unmoored From Legislative Text

The Final Order rejected Petitioner's argument that annuity tax is assessed on deferred annuities for back-end taxpayers upon annuitization because it would permit policy holders to remove all of their funds prior to the date of annuitization (the Annuity Date in the Contract) and avoid payment of that tax. The Final Order cites that an estimated 95% of Petitioner's policy holders so do, and concluded that it was not "reasonable" that the state legislature would impose a tax whereby that could occur. D.R.3648-3649.[2] However, the Final Order creates legislative intent without any clear basis. This is impermissible for three reasons.

First, West Virginia has clearly established statutory construction rules that prevent this. In gleaning "legislative intent," a court must "look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995). Here, the plain language of West Virginia Code §33-3-15 permits back-end elections for deferred annuities, with taxation assessed upon annuitization. This was thoroughly explained above. Thus, speculation or interpretation as to legislative intent is not required. The inquiry should end with the statute's language, but the Final Order did not do so.

Second, even if legislative intent were necessary to resolve ambiguous statutory language (which there is none), the Final Order does not cite the basis for its conclusion that it would be not

[2] This best demonstrates the incentive for Respondent to insist on taxing Petitioner at the time of contract formation rather than annuitization—many policyholders completely withdraw funds prior to annuitization. *See* D.R.0153-154 (lapsation discussion); D.R.0181-182. Moving the temporal point of taxing from annuitization (back-end) to contract formation (front-end) would capture more funds and, consequently, result in many more taxes being paid. Given the original, withdrawn notices and Amended Notices were issued only after the annuity tax was repealed, it begs the question whether the Respondent's issuance of the original or Amended Notices was motivated, in any part, by the repeal. This is particularly true as (a) the Amended Notices reach back to 2019 and 2020 which were the only tax years still within the statute of limitations, (b) the penalties and interest in the Amended Notices are much higher than the alleged underpayment of taxes themselves and would provide Respondent with a windfall, and (c) other taxpayers paying the annuity tax received similar notices that are opposed on similar grounds. *See, e.g.,* D.R.0012-15

"reasonable" for the state legislature to impose an annuity tax on "only 5% of Petitioner's policy holders. That citation is lacking because there is nothing in W.Va. Code §33-3-15 or its legislative history that supports the Final Order's purported legislative intent. The Supreme Court of the United States has admonished this creation of legislative intent, stating that "the text of a law controls over purported legislative intentions unmoored from any statutory text." *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2496, 213 L. Ed. 2d 847 (2022). It has further held that a court may not "replace the actual text with speculation as to Congress' intent." *Magwood v. Patterson*, 561 U.S. 320, 334, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010). In light of this precedent, the Final Order's purported legislative intent is unmoored from, and unsupported by, any recognized source of legislative pronouncement. Accordingly, the Final Order's purported legislative intent cannot be permitted to overrule the clear text of the statute in question.

Thirdly, it does not escape notice that, at the time of the Final Order, the annuity tax had actually been repealed in its entirety by the state legislature. To the extent legislative intent is necessary to resolve this case (which it is not), this repeal is conclusive evidence that the state legislature would be absolutely fine with 5% of policy holders being subject to the annuity tax—because the state legislature are absolutely fine with the lower figure of 0% being subject to it via the repeal. Thus, the only applicable legislative history regarding W.Va. Code §33-3-15 is its repeal, which diametrically opposes the purported legislative intent found in the Final Order.

5. Conclusion

Taken together, the Final Order's conclusion that Petitioner cannot choose back-end taxation because its Contract contains death benefits is not supported by the statute imposing the annuity tax, or its supporting regulations and case law. Thus, the Final Order was in error.

E. RESPONDENTS INTERPRETATION IS INCONSISTENT WITH PAST PRACTICE IN WEST VIRGINIA AND SISTER STATES WITH SUBSTANTIALLY SIMILAR ANNUITY TAX CODES

The Respondent's position in the Amended Notice is not only contrary to W.Va. Code §33-3-15, it is also contrary to years' worth of directives and practice by Respondent, and constitutes a major divergence from sister states with substantially similar annuity tax provisions. This demonstrates that both law and evidence substantially favor Petitioner.

1. The Final Order Erred When It Deferred To Respondent's Interpretation

The Final Order also provided Respondent with considerable deference, contrary to established law. When an agency interpretation conflicts with the earlier interpretations, those new interpretations are "entitled to considerably less deference" than one "consistently held" by the agency. *Appalachian Power Co. v. State Tax Dep't of W. Virginia,* 195 W. Va. 573, 592, 466 S.E.2d 424, 443 (1995) (quoting *Good Samaritan Hosp. v. Shalala,* 508 U.S. 402, 417, 113 S.Ct. 2151, 2161, 124 L.Ed.2d 368, 383 (1993)). Such is the case here, and deference provided in the Final Order is improper for three different reasons.

First, the evidence, taken together, demonstrates that the Amended Notices constitute a divergence from Respondent's prior interpretation of W.Va. Code § 33-3-15—before those Amended Notices, the evidence was consistent that Petitioner was a back-end taxpayer who properly taxed annuity considerations upon annuitization. Such evidence includes a decades' worth of Petitioner's consistent tax returns, the Goolsby Email, the 2019 and 2020 tax forms, and decades of harmony between West Virginia's, California's and Nevada's nearly identical tax election statutes. However, in the Amended Notices, the Respondent took the position for the first time that the Contract were now unable to select back-end taxation and must be taxed upon signature. This change in interpretation cannot result in deference.

Second, the Amended Notices are actually the result of a second pivot in Respondent's interpretation. In the initial May 12, 2022 Notices, Respondent also deviated from the plain language of W.Va. Code §33-3-15 and assessed the tax on withdrawals (money going back to the consumer or policyholder) as opposed to annuity considerations/premium (money going to Petitioner). This was inconsistent with its earlier direction and position. This inexplicable deviation was brought to Respondent's attention by taxpayers, and those notices were ultimately withdrawn and admittedly wrong, without any real explanation for how they came to be. D.R.0295-296 (admission original notices were wrong). Then, the Respondent pivoted to advance an entirely new interpretation of the statute via the Amended Notices, whereby taxation is correctly placed upon the annuity considerations/premium, but at the wrong point in time—at contract formation (*i.e.*, front-end) instead of annuitization *(i.e.*, back-end).[3] D.R.0171; D.R.0233-234 (testimony confirming Respondent had never assessed annuity taxes against Petitioner in the manner contained in Amended Notices in any prior tax year). Thus, Respondent has now twice deviated from prior practice and interpretations. Because the position put forth in the Amended Notice is not one consistently held, it cannot be afforded deference.

Third, given the prior original notices were deviations that Petitioner properly objected to and sought a hearing on prior to withdrawal, it appears that the new position taken in the Amended Notice is one Respondent was forced to take in litigation. However, West Virginia law holds that there is no deference extended for the "*ad hoc* representations on behalf of an agency, such as litigation arguments." *Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W. Va. 573

[3] The Final Order also held that the 2023 Amended Notices fully resolved/corrected the issues with the 2022 notices because the Amended Notices taxed premiums paid and not withdrawals. However, as this appeal demonstrates, error continued into the Amended Notices because of the timing of the taxation—at contract formation (front-end) instead of annuitization (back-end). Thus, not all of the issues were resolved in the 2023 amendment. To the extent the Final Order found otherwise, they are in error.

at fn 17, 588, 466 S.E.2d 424, 439 (1995); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213, 109 S.Ct. 468, 474, 102 L.Ed.2d 493, 503 (1988) (little weight should be given to expedient litigation position of an agency). This may be especially true where the agency's advocated interpretation is one that it has just adopted for the purpose of litigation and that is "wholly unsupported by regulations, rulings, or administrative practice." *Ohio Valley Env't Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 213 (4th Cir. 2009). Given the timeline of Petitioner's immediate challenge of the original 2022 notices of underpayment, their withdrawal, and the creation of Amended Notices, the Amended Notices may present the Respondent's litigation argument as to how this tax ought to be calculated. This precludes deference.

Overall, the Final Order failed to properly account for much of this precedent when it comes to agency deference for many reasons:

- Because the Final Order also incorrectly interpreted the statute, it does not find that the Amended Notices constitute a deviation or contortion of that statute, which preclude deference under Syllabus Point 5 of *CNG Transmission Corp. v. Craig*, 211 W. Va. 170, 564 S.E.2d 167 (2002) and others.

- The Final Order also concludes that the Amended Notices are consistent with the Goolsby Email simply because the Respondent testified that the Goolsby Email uses the word "annuitization" to mean "purchase of annuity," even though (a) the Goolsby Email does not so state, (b) the proffered definition is different than any industry, contract, or common definition of "annuitization," and (c) this testimony regarding past word meaning was offered in litigation and constitutes the precise "*ad hoc* representations on behalf of an agency, such as litigation arguments" that cannot be afforded deference. *See*, Footnote 3, *supra*.

- The Final Order found the 2022 original notices to be an "aberration" without understanding that that is precisely Petitioner's point—that the original and Amended Notices are aberrations in light of the decades of consistent past practice and evidence and, accordingly, cannot be afforded deference under *Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W. Va. 573, 592, 466 S.E.2d 424, 443 (1995) and similar precedent.

- The Final Order failed to address the 2019 or 2020 tax forms in any manner, and therefore could not conclude whether the Amended Notices deviated from them.

Thus, the Final Order's analysis of agency deference is, at best, incomplete and, at worst, contrary to the legal precedent cited above. Accordingly, any deference accorded to the Respondent in the Final Order is contrary to law and in error.

5. The Final Order Erred In Holding That Back End Election Is Not Available to Petitioner, In Direct Contradiction of Multiple Directives From Respondent

The Final Order concluded that back-end election is not available for Petitioner, or for other deferred annuities. This is direct contradiction of several different directives from Respondent to Petitioner, which were either ignored or inadequately considered in the Final Order.

a. <u>The Goolsby Email Confirms Directly To Petitioner That Back End Election Is Available for Deferred Annuities, and Tax Is Imposed Upon Annuitization</u>

The Petitioner undisputedly elected back-end taxation in 2008 and has been filing its annuity taxes pursuant to that election ever since. One would imagine that if it had been improperly filing its annuity taxes, it would have been caught in any year prior to 2019 and 2020, which were the last two years in which the annuity tax was effective law. Not only was no issue ever raised in the decade of Petitioner's past annuity tax filings, but Respondent actually provided directives to Petitioner in 2015 about how to file annuity tax on its deferred annuities as a back-end company.

The directive arose at the conclusion of a review of the records of Petitioner and other insurance companies by the Audit Division in 2015 for tax years 2012 - 2014. D.R.0374-375. As part of this audit process, Respondent, by and through Drema Goolsby, the then Tax Audit Clerk Senior, provided specific direction via email to those companies on the manner in which deferred annuities would be taxed for backend tax payers. *Id;* D.R.0210-211. In Item No. 7 of that Goolsby Email, Respondent directed that "[b]ackend companies must report and pay taxes on any previously reported ***<u>deferred annuities that annuitizes</u>***, including any earnings and dividends."

D.R.0374-375 (emphasis added); D.R.0211-215.[4] This direction is entirely consistent with the provisions of W.Va. Code § 33-3-15, Petitioner's prior practice, and—as explained below—Respondent's own tax forms.

In any event, Petitioner properly relied on the direction provided in Item No. 7 of the Goolsby Email. D.R.0211-215; D.R.171-172 (testimony Petitioner believed all tax forms filed correctly): D.R.0255-256 ("Based upon the direction given to us by the State of West Virginia from the 2015 email, we followed exactly the instructions they provided to us"); D.R.229 (different dollar amounts but consistently reporting the same products and contracts"). After undergoing a review of records by the Audit Division, it would seem odd, if not reckless, for any insurance company to then ignore the directives provided by the agency in a written communication, be it an email or an Interpretive Letter or Bulletin. As such, this reliance is reasonable and not in any way misplaced. The audit resulted in no other directives or instructions to Petitioner to change or alter the manner in which it was calculating its annuity taxes for deferred annuities.

The Final Order, however, simply swept the directive in the Goolsby Email aside, finding it unpersuasive and unnecessary, principally because it was "confusing" and Petitioner allegedly failed to uphold an alleged duty to contact the Respondent with questions. D.R.3651-3653. To be clear, there is no legal duty for Petitioner to contact Respondent in this manner, and certainly no precedent that the failure to adhere to this alleged "duty" is to ignore a written agency directive.

[4] The Respondent attempted to back away from the directive in the Goolsby Email by saying that the term "annuitization" used in that email meant simply an annuity had been purchased. D.R.0265; D.R.3652. However, annuitization is a term of art, and refers to more than "an annuity had been purchased." As Respondent testified "so we referenced that being annuitization, that it was – the annuity contract was when it was annuitized, that it was purchased." D.R.0265. To the extent this testimony claims Respondent equated annuitization with contract formation in the Goolsby Email, it is wholly incorrect and contrary to all industry and common meanings. Annuitization is a specific step in the two-step phase process of deferred annuities, like the Contract of Petitioner. D.R.0151-157. Any perceived confusion would only arise due to Respondent allegedly using a term of art in a way other than its common and industry specific meaning, without so stating. Additionally, this testimony about the meaning of the word "annuitization" was provided by someone other than the emails' author, during litigation.

Additionally, there was simply no need for Petitioner to contact Respondent with questions, because it believed it understood what the Goolsby Email instructed it to do as relevant to this case: tax deferred annuities upon annuitization consistent with its back-end election. D.R.0210-2017. Testimony from the Petitioner's representative at hearing demonstrated that Petitioner understood Line 7 of the Goolsby Email instructed it to tax deferred annuities at annuitization, which it had already been doing for years. *Id*. The testimony regarding Petitioner's "confusion" was limited to another issue—specifically, that Respondent instructed Petitioner to report death benefits, death benefit payouts and guaranteed withdrawal benefit payouts as annuitized annuities—which prompted Petitioner to file amended returns for tax years 2012 to- 2014. D.R.0213-218. When it came to the central issue in this case, namely, the taxation of deferred annuities, there was no confusion and Petitioner's representative clearly testified that the Goolsby Email's directive was clearly instructing Petitioner to tax deterred annuities "when they annuitized based upon this email" and that Respondent "did not consider those to be annuitized until they met the criteria" of item number seven in the Goolsby Email. *Id*. Thus, on the operative issue before this Court, there was no questions that needed resolved.

Finally, if some sort of subsequent communication were required under the law (which it is not), there is no reason why Petitioner's annuity tax returns for 2015, 2016, 2017, and 2018—all of which complied with the directive in the 2015 Goolsby Email—are insufficient to fulfill that requirement. Certainly, those years-worth of tax filings and supporting documentation would put Respondent on notice about how Petitioner was calculating its deferred annuity considerations at annuitization. To the extent the Final Order found Petitioner did not attempt to contact Respondent for clarification, it is in error.

Ultimately, the Final Order's decision to disregard the Goolsby Email, or deem it unpersuasive or unnecessary, is based largely upon a duty with no legal basis. This is in error and contrary to law. The Goolsby Email directive complied with the express wording of the statute and, as explained below, directives from Respondent contained in its tax forms. It must be given proper consideration and persuasive authority.

b. <u>Respondent's Own Tax Forms Confirm that Back End Election Is Available for Deferred Annuities, and Tax Is Imposed Upon Annuitization</u>

The Goolsby Email is not the only directive Respondent provided to Petitioner regarding its back-end taxation and annuity tax calculations. The Respondent's own tax forms for 2019 and 2020 support Petitioner's position: that it can be taxed on the back-end when annuitization occurs. In 2019, the applicable tax form promulgated by the Respondent contains Line No. C5 which seeks a taxpayer to enter a number for "Annuitization (back-end prior Deferred annuities) (Not included on A/S Page) (Must include interest and dividends)." D.R.0375-388. The instructions accompanying this form state:

> **Line No. C5:** Section II Back-end only- Enter the total prior deferred annuities that have annuitized, deferred contracts that payout increment stream of payments (periodic payments), minimal distributions or immediate annuities that are not included on the Annual State Page, including all earnings that are not included in Line C1 - C3. This information is on Sch. C Supplemental 2 - Lines 10 and 11.

The Respondent's tax forms for 2020 were similar, with annuity tax being assessed based on line items in Line C5 for "Annuitizations (Back-end prior Deferred annuities) (Not included on A/S Page) (Must include interest & dividends)." *See* D.R.3596-D.R.3601. The instructions accompanying that form state:

> **Line No. C5:** Section II Back-end only- Enter the total prior deferred annuities that have annuitized, deferred contracts that payout increment stream of payments (periodic payments), minimal distributions or immediate annuities that are not included on the Annual State Page, including all earnings that are not included in Line C1 - C3. This information is on Sch. C Supplemental 2 - Lines 10 and 11.

Thus, the 2019 and 2020 tax forms and instructions created and promulgated by the Respondent clearly communicate to Petitioner and its fellow taxpayers that (a) back-end election

is available to deferred annuities like the Petitioner's Contract, and that (b) taxation for back-end taxpayers occurs only when deferred annuities "have annuitized." Thus, the Respondent's tax forms are consistent with both the language of W.Va. Code §33-3-15 and Petitioner's argument before this Court.[5] Petitioner's calculation and payment of annuity taxes in tax years 2019 and 2020 complied with the instructions on the applicable tax forms, as the Petitioner's process for doing so was exhaustively testified to, step-by-step, at the evidentiary hearing. D.R.0218-229; D.R.0236 ("I also read the instructions that are provided with the returns, every year, before finalizing the returns to make sure there's nothing new that's been communicated or notified to us"). This was also Petitioner's past practice before the 2019 and 2020 tax years at issue here. D.R.161-164; D.R.177-179; D.R.255-256. With this appeal, Petitioner simply seeks to be taxed in the manner consistent with the statute, tax forms, and past practice.

Stunningly, the Final Order failed to mention, address, or explain the apparent conflict between the Amended Notice's calculation of annuity and the instructions Respondent provided in its 2019 and 2020 tax forms. The Final Order's conclusion directly contradicts the Respondent's own tax forms, provided to taxpayers like Petitioner so they may calculate and remit payment of annuity taxes. Thus, it is in error and contrary to law.

[5] The Final Order state, somewhat tongue in cheek, that Petitioner's position cannot be supported by the language of West Virginia Code §33-3-15 because "the word annuitization does not appear in W.Va. § 33-3-15." D.R.3648. At a minimum, the 2019 and 2020 tax forms provided by Respondent demonstrate that it had interpreted "purchase at future dates" for back-end election to equal the point of annuitization. Respondent also testified that backend taxation was done when the annuity contract is purchased and that was considered annuitization even though the word annuitization does not appear in the code. D.R.0281. This is in addition to the common, contractual, or industry specific definitions of annuitization that support Petitioner's position. *See, e.g., Jackson National Life Order Insurance Company,* Cause No. 10.0124, 2010 WL 2977677, at *4 ("NRS 680B.025(2) permits the Company to elect when such premium tax is payable. The Company has elected to pay such premium tax ***at time of annuitization of the annuity contract***.") (emphasis added). Furthermore, Petitioner argues that the statute also does not contain the words "deposit-style contract" or "death benefits," yet the Final Order applied those considerations to the Contract, despite their absence. Thus, the lack of the word "annuitization" in West Virginia Code §33-3-15 cannot be as fatal as the Final Order claim.

2. Interpretation of Substantially Similar Annuity Tax Provisions In Other States Support Petitioner's Arguments

The Final Order's argument that W.Va. Code §33-3-15 permits back-end tax election only for "deposit-style contracts" lacking morbidity risk, morality risk, or death benefits is also contrary to the administration of annuity tax statutes in California and Nevada, the two states with annuity tax statutes nearly identical to our own. California's annuity tax reads, in relevant part:

> Funds accepted by a life insurer under an agreement which provides for an accumulation of funds to purchase annuities at future dates may be considered as "gross premiums received" either upon receipt or upon the actual application of such funds to the purchase of annuities. However, any interest credited to funds accumulated while under the latter alternative shall also be included in "gross premiums received," and any funds taxed upon receipt, including any interest later credited thereto, shall not be subject to taxation upon the purchase of annuities. Each life insurer shall signify on its premium tax return covering premiums for the calendar year 1957 its election between such two alternatives. Thereafter an insurer shall not change such election without the consent of the commissioner.
>
> Cal. Rev. & Tax. Code §12222 (West)

Nevada's annuity tax reads in relevant part:

> Money accepted by a life insurer pursuant to an agreement which provides for an accumulation of money to purchase annuities at future dates may be considered as "total income derived from direct premiums written" either upon receipt or upon the actual application of the money to the purchase of annuities, but any interest credited to money accumulated while under the latter alternative must also be included in "total income derived from direct premiums written," and any money taxed upon receipt, including any interest later credited thereto, is not subject to taxation upon the purchase of annuities. Each life insurer shall signify on its return covering premiums for the calendar year 1971 or for the first calendar year it transacts business in this State, whichever is later, its election between those two alternatives. Thereafter an insurer shall not change his or her election without the consent of the Commissioner.

Nev. Rev. Stat. Ann. §680B.025 (West)

Accordingly, the California, Nevada, and West Virginia annuity taxes are substantially similar, and the operative language regarding taxation election is virtually identical. All three permit a life insurance company to elect either front-end or back-end annuity taxation for "funds [or money] accepted by a life insurer under [or pursuant to] an agreement which provides for an accumulation of funds [or money] to purchase annuities at future dates." *Id.*; *compare* Cal. Rev. & Tax. Code § 12222 (West) & W.Va. Code §33-3-15. Given the similarity of these three annuity tax schemes, a review of California's and Nevada's administration of their annuity tax can be instructive. This is particularly true as Respondent's representative testified that their office looked to these two states for interpretative guidance, stating "you know we looked at other states, some of the other seven states, particularly California and Nevada because they both offered backed and frontend annuity contracts for annuities types." D.R.0271.

To be blunt, California's administration of its annuity tax is fundamentally opposite to the Final Order's conclusion that only deposit-style contracts benefit from annuity taxation election. In California, a life insurance company may issue a "funding agreement," which is defined statutorily as "an agreement that authorizes an admitted life insurer to accept funds and that provides for an accumulation of those funds for the purpose of making one or more payments at future dates in amounts that are not based on mortality or morbidity contingencies." Cal. Ins. Code §10541(b) (West). Thus, California's "funding agreement" appears to be the same as the "deposit-style contract" offered by Respondent and relied upon in the Final Order—both are agreements that accept funds for accumulation and future payments that exclude morbidity or mortality risks.

Tellingly, in California, receipts from a funding agreement are expressly excluded from being a "gross premium" upon which the annuity tax is assessed. *See* Cal. Ins. Code §10541(a)

(West). Thus, funding agreements are exempt from the annuity tax entirely, and absolutely no annuity tax is assessed or paid for receipts under these types of agreements. *Id.* Accordingly, it is impossible for a funding agreement (or the similarly defined deposit-style contract) to take advantage of the front-end or back-end election present in its annuity tax provision. *See* Cal. Rev. & Tax. Code §12222 (West). Given this exemption of funding agreements from annuity taxation, it logical that only other types of agreements could still be subject to the tax and capable of making a front-end or back-end taxation election. Administrative decisions interpreting this California annuity tax provision have confirmed that other types of agreements (including ones very similar Petitioner's own deferred annuity Contract) are empowered and permitted to elect either front-end or back-end annuity taxation. *See, e.g., In the Matter of the Petition For Redetermination Under the Insurance Tax Law of: Reliastar Insurance Company*, 2000 WL 798075, at *3. However, on this specific issue, the Final Order urges the exact opposite: that not only are deposit-style contracts subject to the annuity tax, but they are the only type of annuity that can make a front-end or back-end taxation election. This is in opposition to California's scheme, despite the two states having identical annuity tax and election statutory language. This opposition further confirms that it was an error for the Final Order to conclude that Petitioner cannot elect back-end taxation for annuity tax. Under the California and West Virginia annuity tax statues, Petitioner is qualified to do so.

Nevada's administration of the nearly identical annuity tax election further confirms this conclusion. When interpreting its statutory election language, Nevada's administrative decisions have confirmed that the election was generally available, and not limited in any way that the Final Order suggests. *See, e.g., Jackson National Life Order Insurance Company*, Cause No. 10.0124, 2010 WL 2977677, at *4 ("NRS 680B.027 requires the Company to pay a premium tax on annuity considerations at the rate of 3.5% of the annuity consideration. NRS 680B.025(2) permits the

Company to elect when such premium tax is payable. The Company has elected to pay such premium tax ***at time of annuitization of the annuity contract***. ") (emphasis added). In fact, Nevada has openly held that a company selling deferred annuities may select back-end taxation for annuity and premium tax. *See, e.g., Genworth Life and Annuity Insurance Company,* Cause No. 10.0091, 2010 WL 2977648, at *3. Taken together, Nevada's statute and decisions confirm that it permits companies to elect front-end or back-end taxation of deferred annuities, and that the latter occurs upon annuitization. This is consistent with Petitioner's position.

It is finally noteworthy that Petitioner sells deferred annuities in both California and Nevada where it, as in West Virginia, elected to be a back-end taxpayer. D.R.0237. It has never had any issues with the way it reported and assessed its annuity tax liability in either state. *Id.* Coincidentally, Petitioner even underwent an audit in California at or about the same time as this present dispute arose for tax years 2017 - 2020. *Id.* The California audit resulted in no adverse findings against Petitioner as it related to the back-end tax treatment of deferred annuities upon their annuitization. *Id*. This result further confirms that the Final Order's current interpretation of West Virginia Code §33-3-15 deviates radically from nearly identical annuity tax provisions in other states which have, up until this point, been in lockstep with each other.

In conclusion, the administration of nearly identical annuity tax election language in California and Nevada demonstrate that the Final Order's consideration of death benefits in the Contract was in error. The West Virginia annuity statute should be applied as written, without any regard for deposit-style contracts, morbidity risks, mortality risks, or death benefits, and Petitioner should be taxed upon annuitization consistent with its back-end election and the administration of sister statutes in California and Nevada.

F. THE FINAL ORDER ALSO ERRED REGARDING CREDITS AND PENALTIES

Even if the Final Order were correct and no back-end tax is available (which is strongly disputed) it still erred in denying a credit and imposing windfall penalties.

1. The Final Order Erred In Denying Petitioner Credit

Petitioner objected to the Amended Notices not only because they assessed the tax at the wrong time (at contract formation or front-end, instead of annuitization or back-end) but also because they failed to credit Petitioner with payments made for the 2019 and 2020 tax liability. Pursuant to W.Va. Code §33-43-13(b), "[p]ayments by a taxpayer in excess of the amounts requires to satisfy the taxpayer's liabilities for taxes and related charges shall give rise to a credit against the taxpayer's future liabilities . . . ." Respondent claimed that Petitioner was attempting to claim double credit for taxes previously paid. This is simply not true and Respondent provides no evidence in support of this assertion. Petitioner, on the other hand, provided relevant testimony that is had submitted annual returns that indicated a liability, submitted installment payments to satisfy that liability, and identified approximately $215,000 in prepayments and annual return payments for tax years 2019 and 2020 that were not credited to Petitioner in the Amended Notices. D.R.0231-233. These tax payments had never been previously claimed as a credit on any other tax returns (2018 or before). *Id.* Given the annuity tax was repealed, the 2019 and 2020 tax years are the last filings in which the credit could be applied. Thus, the credit must be paid on these tax years, and withholding it is improper.

Respondent denies the credit because, as cited in the Final Order, its representative could only testify that the payments at issue were paid by Petitioner for annuities occurring in prior years. This is incorrect for several reasons. First, this testimony is not dispositive because W.Va. Code §33-43-13(b) clearly holds that when such payments ***exceed*** liabilities, a credit towards ***future***

liability must be created. Second, it is also contrary to law, as Respondent has no authority to reallocate Petitioner's installment payments to prior tax years. *See* W.Va. Code §33-43-12. Finally, there was no basis for Respondent to apply the extra payments to any prior tax year, because Petitioner had already paid them in full. Respondent did not timely issue an amended assessment for any prior tax year that had a higher, unpaid liability figure, and did not issue Petitioner a notice of underpayment for a prior tax year—thus, all liabilities have been paid in full to Petitioner's knowledge, testimony, and documentation. *See, e.g.*, W.Va. Code §33-43-8 (Respondent's ability and limitations on amended assessments); W. Va. Code §10-43-10 (overpayments and underpayments notices). Taken together, there is no creditable basis to deny the credit, and it has been improperly withheld. The Final Order erred in denying it.

3. <u>The Final Order Erred In Its Refusal To Waive or Reduce Interest and Penalties</u>

Under W.Va. Code §33-43-7, tax penalties may be waived or reduced if the "failure upon which the penalty is based was not, in whole or in part, willful or due to the neglect of the taxpayer." The Final Order acknowledges that "there was no proof that the actions of the Petitioner were willful." D.R.3656.[6] However, the Final Order refused to waive penalties and interest, claiming Petitioner was "negligent" for not contacting Respondent after the Goolsby Email, and it "knew or should have known" that allowing policyholders to withdraw their full amounts prior to annuitization would result in no annuity tax. D.R. 3656. Neither is a sufficient justification.

As explained above, Petitioner understood the directive in the Goolsby Email relevant to this case—to tax annuities upon annuitization consistent with its back-end taxation election—and

[6] This finding that there was no willfulness should put to rest contrary holdings in the Final Order, Recommendation, and Respondent's briefing (a "calculated scheme", an "evasion", or even a "misrepresentation") that Petitioner incorrectly characterized deferred annuities as deposit contracts and used this "mischaracterization" to evade the payment of taxes. Given the acknowledged lack of willfulness, there cannot also be a finding that Petitioner was purposefully evading taxes. To the extent the Final Order found so, it is in error, contrary to the evidence, and in conflict with its other internal holdings.

there is no legally cognizable duty imposed upon Petitioner to contact Respondent. Any perceived duty would have also been fulfilled through subsequent tax filings consistent with the Goolsby Email's directive. Thus, the alleged failure to contact the Respondent after the Goolsby Email is neither a failure to adhere to duty, nor an act of negligence.

Additionally, the Final Order's states that Petitioner "knew or should have known" that allowing policyholders to withdraw their amounts, in full, prior to annuitization would avoid any annuity tax under a back-end election, but does not explain how this constitutes negligence. In fact, given its back-end election, years of consistent tax returns, the 2015 Goolsby Email direction, and 2019 and 2020 tax form directions, this knowledge would simply be the proper operation of the annuity tax statute, and nothing alarming. It was not until the original notices were sent in 2022 that Petitioner was notified, in any way, that Respondent held them error. At that point, the annuity tax had been repealed and no further filings were required. Thus, Petitioner never submitted a tax filing "knowing" it did not comply with Respondent's reading of W.Va. Code §33-3-15.

In short, the record confirms that there is neither willfulness nor negligence. Petitioner testified that "compliance with the laws is a critical part of our job and our responsibility as a team" and that it believed it was filing correct tax returns. D.R.0148-149; D.R.171-172. Any alleged failure to remit annuity taxes is the result of Petitioner's reasonable alternate reading of the statute and no penalties are warranted. This is particularly true given the exorbitant assessments in the Amended Notices, where interest and penalties, in both tax years, exceed the alleged amount of underpayment of taxes. D.R.0003-6; D.R.0365-366. This doubles the award and constitutes a windfall to Respondent in the final years of this particular tax's imposition. This is unjustified, given Petitioner's reasonable conduct. Thus, the Final Order erred when it refused to waive or reduce penalties and interest under these facts.

CONCLUSION

Petitioner respectfully requests that its 2019 and 2020 annuity taxes to be properly calculated according to its back-end election consistent with West Virginia Code §33-3-15.

Based on the foregoing, Petitioner respectfully requests that this Honorable Court:

1. Reverse the "Final Order" entered June 21, 2023 and found at D.R.3660-3664;

2. Enter an order awarding Petitioner a credit in the amount of $215,000.00 to be applied to the 2019 and/or 2020 tax assessments for annuity taxes;

3. Remand this case to the Respondent for reassessment of Petitioner's annuity tax liability for tax years 2019 and 2020 consistent with this Court's opinion; and

4. Grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

By counsel,

/s/ Alexander Macia
Alexander Macia, Esq. (WV Bar No. 6077)
Chelsea E. Thompson, Esq. (WV Bar No. 12565)
Spilman Thomas & Battle PLLC
300 Kanawha Boulevard, East
Charleston, WV 25301
304-340-3800
amacia@spilmanlaw.com
cthompson@spilmanlaw.com

INTERMEDIARY COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-313

FORETHOUGHT LIFE INSURANCE COMPANY,

Petitioner Below, Petitioner

vs.

ALAN MCVEY, in his official capacity as
INSURANCE COMMISSIONER OF
THE STATE OF WEST VIRGINIA,

Respondent Below, Respondent.

CERTIFICATE OF SERVICE

I, Alexander Macia, counsel for the Petitioner, do hereby certify that service of the foregoing **PETITIONER'S BRIEF** has been made upon counsel for the Respondent on October 23, 2023, by causing a true copy of the same to be transmitted through the File and Serve X-Press system which will send notification of the same to all counsel of record.

/s/ Alexander Macia
Alexander Macia, Esq. (WV Bar No. 6077)