IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NO. 23-ICA-313

FORETHOUGHT LIFE INSURANCE COMPANY,

Petitioner,

v.

ALLAN MCVEY,
in his official capacity as Insurance Commissioner of the State of West Virginia,

Respondent,

On Appeal from the
West Virginia Offices of the Insurance Commissioner
Administrative Proceeding No. 22-IC-02274

RESPONDENT'S BRIEF

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INTRODUCTION

This case is about the taxation of annuity contracts. In West Virginia Code § 33-3-15, the West Virginia Legislature required insurance companies to pay a one-percent tax on sales of annuity contracts. Forethought Life Insurance Company ("Forethought") sold deferred annuity contracts to its customers in 2019 and 2020. Yet, it believes it should be permitted to avoid paying the tax entirely because its contracts permit its customers to either (1) "lock in" the purchase price at a later date (which Forethought believes is the purchase date) or (2) have the purchase price later returned to them. The Court should reject Forethought's appeal, as the Legislature granted no relevant exemption to the general rule that insurance companies owe the tax whenever annuity contracts are actually sold—even if the customer can later get a refund. In other words, the tax was due upon sale of the annuity contract.

Forethought tries to avoid its obligation by invoking a tax exemption that is limited to *future* annuity purchases of annuity contracts with funds deposited by customers. In particular, before the Legislature repealed the tax in 2021, Section 33-3-15(b) contained a deferral / exemption to the tax only "[i]n the case of funds accepted by a life insurer under *an agreement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(b) (emphasis added). In that specific circumstance, "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." *Id.*

Here, it is undisputed that Forethought never entered into agreements with its customers to **purchase** annuity contracts at future dates. Rather, Forethought only sold annuity contracts to its customers. Because Forethought sold annuity contracts and failed to pay the corresponding tax,

the Offices of the Insurance Commissioner's ("OIC") assessments were proper. That's especially so considering how exemptions from tax are strictly construed against the taxpayer.

Forethought's arguments against the assessment conflict with the statute's text, misunderstand the strict construction requirements at play in tax-exemption cases, and present no valid reason to grant it a credit or relief from the penalties and interest it owes. This Court should affirm the OIC's June 21, 2023, *Final Order*.

COUNTER-STATEMENT OF THE CASE

I. West Virginia Law Regarding Taxation of Annuities

Annuities are "contracts in which the purchaser" pays premiums "to the issuer in exchange for a series of payments, which continue either for a fixed period or for the life of the purchaser." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254 (1995). Annuities come in various types. For example, an annuity can be "fixed,"—where it "comes with a guaranteed set interest rate,"—or it can be "variable"—where the interest rate and return "is tied to [the success of] an investment portfolio." W. VA. OFFICES OF THE INSURANCE COMMISSIONER, ANNUITIES: RIGHT FOR YOUR RETIREMENT, https://tinyurl.com/y2mdjwaw (last visited Dec. 21, 2023). Some annuities are "deferred"—meaning "the investor receives payment in the future" such as upon "retirement," *id.*—while others are "immediate" and begin "to pay benefits" shortly after the annuity is purchased. BLACK'S LAW DICTIONARY, "annuity," "immediate annuity" (11th ed. 2019). Still others "guarantee[] an income stream for the investor's lifetime" or for a "fixed period" of time. INSURANCE COMMISSIONER, ANNUITIES, *supra*. An annuity can be purchased for an individual beneficiary or for a group, "such as group pension plan." BLACK'S LAW DICTIONARY, "annuity," "group annuity," (11th ed. 2019).

West Virginia law lists annuities under the definition of "life insurance," W. VA. CODE § 33-1-10(a), and subjects their various types to certain standard contract terms, *e.g.*, *id.* § 33-13-17

(for individual life annuities), *id.* § 33-14-22 (for group life annuities), and other standard insurance regulations, *e.g., id.* § 33-13-30a(b) (listing variable annuities, immediate annuities, and deferred annuities among those subject to standard nonforfeiture laws).

For years, the Legislature directed the Insurance Commission to tax life-insurance companies on their "annuity business transacted." W. VA. CODE § 33-3-15(b) (2019). The Legislature enacted the tax in 1998 to fund juvenile and adult detention and correction facilities. *See* W. VA. ACTS 1998, c. 95 (Mar. 21, 1998). It originally required companies to report and pay taxes on the "amount of annuity consideration" they received "during the previous calendar year." W. VA. CODE § 33-3-15(a) (1998). But four years later, the Legislature modified the statute to give companies the option to pay the tax "upon receipt" of the annuity consideration (*i.e.*, on the front-end when the premium is collected) or "upon actual application to the purchase of annuities" (*i.e.*, on the back-end). W. VA. ACTS 2002, c. 172 (Mar. 9, 2002). In pertinent part, the statute provided that:

> 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. . . . 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.

W. VA. CODE § 33-3-15(a) (2002), *recodified in* W. VA. CODE § 33-3-15(b) (2019). The 2002 changes also required companies to "provide written notice to" the Insurance Commissioner "elect[ing]" front-end or back-end tax treatment. *Id.* It prohibited them from "chang[ing] [their]

election without the consent of the Insurance Commissioner." *Id.* And it empowered the Insurance Commissioner to "develop forms to ensure compliance with this" tax. *Id.*

Almost twenty years later, the Legislature repealed the tax for the years "beginning on or after January 1, 2021," W. VA. ACTS 2019, c. 142 (June 7, 2019), *codified in* W. VA. CODE § 33-3-15(a) (2019).

II. Underlying Facts and Procedural History

Forethought is an Indiana-based company that is licensed to sell life insurance products in West Virginia. D.R. 29. In 2008, it elected to be taxed as a back-end annuity taxpayer. D.R. 30. The OIC acknowledged this application by letter soon afterward and instructed Forethought to "consider funds accepted for the future purchase of annuities to be received" for tax purposes "upon actual application to the purchase of annuities." D.R. 353.

For 2019 and 2020, Forethought marketed and sold a product it called a "Single Premium Deferred Annuity Contract." D.R. 331-47. This contract allowed customers to pay a single sum of money (*i.e.*, a "premium") "on the Issue Date of the Contract," D.R. 337, 340, in exchange for periodic payments starting at a future date (*i.e.*, an "annuity date") the customer selected when the annuity payments would begin. D.R. 345. But the customers could change the annuity date after giving Forethought thirty days' notice, *id.*, or withdraw the money they paid Forethought before the annuity date, D.R. 344.

Forethought filed annual tax returns with the Insurance Commissioner for 2019, D.R. 375, and 2020, D.R. 389, reporting its total annuity considerations, deposit type contracts, and annuitizations for each year. D.R. 378 (2019 reporting), D.R. 392 (2020 reporting). Afterward, the OIC audited Forethought's 2019 and 2020 returns, and issued Forethought notices of underpayment (*i.e.*, "assessments") for those tax years. D.R. 3-6, 3641. The OIC amended those notices of underpayment on January 9, 2023, to reflect that Forethought owed $1,884,689.14 in

unpaid annuity taxes (plus penalties and interest) for 2019 as well as $911,824.78 in unpaid annuity taxes for 2020. D.R. 365-66, 3602, 3641. Forethought disputed those assessments and requested a hearing. D.R. 367-68.

In February 2023, a contested hearing was held before Hearing Examiner Mark Carbone, Esq, pursuant to West Virginia Code § 33-43-9. Forethought's primary witness at the hearing was Justin MacNeil, managing director and head of tax. D.R. 146. Mr. MacNeil testified that for its annuity products, there is an "accumulation phase and annuitization phase" of the contracts, but "[t]here is only one contract that is ever signed between the insurance company and the customer." D.R. 190-91. Within Forethought's deferred annuity products, the customer's:

> [deposited] money grows in interest over time and essentially will continue to grow until they make that determination that they want to annuitize. . . . It will have a surrender charge, meaning that there is a -- if they pull their money out of the contract within the first five years or seven years, there will be a fee assessed against them. It typically acts as a backstop. It prevents people from pulling money out. But once that surrender period disappears, people typically shop around and will take their money maybe to a company that's paying a higher interest rate.

D.R. 153. Mr. MacNeil estimates, however, that "probably less than five percent of what we sell will ultimately be with us at the point of annuitization." D.R. 181-82. In other words, Forethought has historically paid annuity taxes on approximately five percent of the annuity contracts it sells. D.R. 182-84. By not paying the annuity tax at the time the annuity contract was purchased by the policyholder, which would have been an extra cost, Forethought was able to pay higher interest rates, which made its annuity products more competitive. D.R. 196-97.

The OIC offered the testimony of Rhonda Hartwell, its manager of financial reporting in the financial accounting unit. D.R. 259. Ms. Hartwell testified that the OIC believed before its recent audits of Forethought that "the funds that were received were in deposit-type contracts and the actual annuity contract had not been purchased." D.R. 265. That is, the OIC was "under the assumption that [Forethought was] reporting deposit-type contracts because that's what—

they were saying they were deferred annuities, what we considered deferred annuities, they are in that deposit-type contract. They're still in what you call a savings account. The [annuity] contract had not been purchased." D.R. 0271. This "misunderstanding" was the fault of Forethought, however, because Forethought specifically reported "purchased annuity contracts as deposit contracts". D.R. 281-82. The OIC now considers that reporting as a "misstatement on the statement on [Forethought's] tax forms[.]" D.R. 282.

Ms. Hartwell also explained how Forethought may have come to "mistranslat[e]" or "misinterpret[]" a 2015 email sent by an OIC employee (Drema Goolsby). That email informed Forethought that taxes must be paid on a "deferred annuity that annuitizes". D.R. 373. But Ms. Hartwell testified that the OIC used the word "annuitizes" believing that Forethought's used both "deposit contracts and purchased annuities," rather than only selling an annuity contract. D.R. 314. That was because Forethought's tax returns specifically stated that the company had "deposit contracts," D.R. 378 (reporting $725,369 thousand in deposit contracts), and "purchased" annuities, D.R. 381 (reporting $977,369 as "[f]unds used to purchase annuities"). The OIC did "not hav[e] a full understanding of annuities at th[at] time and [was] relying on what the companies told [it]." D.R. 314. But "after doing additional research and sending the backend surrender [worksheets]," the OIC came to realize that the deposit contracts Forethought reported "were actually annuity contracts." D.R. 314.

Following the hearing, the Hearing Examiner issued his *Recommended Decision* on June 13, 2023. D.R. 3640. In his *Final Order* dated June 21, 2023, the Insurance Commissioner adopted the *Recommended Decision*, and made supplemental findings of fact and conclusions of law, including the finding that:

- Forethought incorrectly characterized its deferred annuity contracts as deposit agreements in its tax returns, D.R. 3660-61;
- Forethought actually collected premiums from its policyholders for purchased deferred

annuity contracts, D.R. 3661; and

- Because the premiums paid were for deferred annuities, the taxes were due at the time the funds were accepted for the purchased annuity contracts, D.R. 3661.

Forethought then appealed to this Court, asserting that the OIC committed twenty different errors in its decision. Specifically, Forethought asserts that the OIC erred by (1) adopting and approving the Hearing Examiner's recommendation; (2) denying and dismissing the petition; (3) concluding that Forethought failed to meet its burden of proof that the assessments were incorrect; (4) finding that Forethought incorrectly characterized its deferred annuity contracts as deposit contracts and that this mischaracterization was used to evade the payment of taxes; (5) finding that Forethought should have paid tax upon the purchase of its deferred annuity contracts; (6) holding that under Section 33-3-15, the tax is due upon the entry into the contract, and not upon annuitization; (7) concluding that Forethought had no secondary contract or agreement to purchase annuities at future dates; (8) concluding that it is not reasonable for the Legislature to impose a tax where 95% of the individual customers of Forethought could avoid the tax by withdrawing deposited money prior to the annuity beginning distributions; (9) finding that the front-end/back-end election is not available for already purchased annuities; (10) finding that Forethought failed to prove that the 2015 Goolsby email was a directive to only pay the tax upon annuitization; (11) finding that the 2015 Goolsby email and 2023 Notice of Underpayment are consistent; (12) creating a duty to question an instruction in the 2015 Goolsby email; (13) finding that there was no evidence that Forethought attempted to contact OIC for clarification of the 2015 Goolsby email; (14) finding that the 2015 Goolsby email was contrary to the statute and a nullity; (15) holding that Forethought's reliance on the 2015 Goolsby email was a misunderstanding or misinterpretation; (16) finding that the 2023 Notice of Underpayment fully corrected issues with the 2022 Notice of Underpayment; (17) holding that Forethought is not entitled to the benefit of the doubt under either *Consolidated Coal Co. v. Krupica*, 163 W. Va. 74, 254 S.E.2d 813 (1979)

or *Coordinating Council for Independent Living v. Palmer*, 209 W. Va. 274, 546 S.E.2d 454 (2001); (18) holding that Forethought is not entitled to credit; (19) concluding that Forethought failed to prove by a preponderance of the evidence that there was any question of construction of West Virginia Code § 33-3-15; and (20) making a conclusion of law that OIC did not act contrary to the clear language of Section 33-3-15.

In the Argument Section of its *Brief*, Forethought consolidates these twenty assignments of error into four main issues (*i.e.*, headings C, D, E, and F), arguing *first* that a straightforward application of Section 33-3-15 favors its argument that it does not owe additional annuity taxes, *id.* at 10-19; *second*, that the OIC contorted and misapplied Section 33-3-15 and created self-serving legislative intent, *id.* at 19-24, *third*, that the OIC deviated from past practice in West Virginia and other states with similar statutes, *id.* at 25-36, and *fourth* that the OIC erred by denying its request for tax credits and by imposing penalties, *id.* at 37-39. The American Council of Life Insurers (the "Amicus") also filed an *Amicus Curiae* brief raising some of these same points.[1]

SUMMARY OF ARGUMENT

I. Forethought is not entitled to an exemption from tax for its annuity contracts sales. For an insurance company to be eligible for the tax deferral / exemption, the relevant tax statute requires two separate transactions with the customer (*i.e.*, an agreement for the accumulation of

[1] Because Forethought's argument "headings" do not exactly "correspond with the assignments of error," W. Va. R. App. P. 10(c)(7), in its *Respondent's Brief*, the OIC intends to "respond to each assignment or error, to the fullest extent possible," W. Va. R. App. P. 10(d), by addressing the four main issues in Forethought's argument section, as well as the supporting sub-arguments. The OIC understands Assignments of Error 1, 2, 3, 4, 5, 6, 7, 8, 9, 17, 19, and 20 to all relate to Forethought argument that the OIC violated the "straightforward application" of the statute and contorted its language in a self-serving manner. Petr's Br., 1-3, 10-24. Similarly, the OIC understands Assignments of Error 10, 11, 12, 13, 14, 15, and 16 to relate to whether the OIC's decision was inconsistent with past practice or sister states' taxes. *Id.* at 2, 25-36. And the OIC understands Assignment of Error 18 to relate to whether Forethought should have been given a credit. *Id.* at 3, 37-38. But none of the assignments of error to relate to whether the OIC should have waived penalties and interest. *Id.* at 38-39. OIC intends to respond to each issue in turn.

money and the later purchase of an annuity contract with that accumulated money). Forethought admits to only having one transaction—the sale of an annuity contract to the policyholder.

Before the Legislature repealed the tax in 2021, the law required insurance companies to pay a one-percent tax for their "annuity business transacted" based on the "annuity considerations collected." W. VA. CODE § 33-3-15 (2019). An insurance company could, however, defer paying the annuity tax if it (1) entered into an agreement with the customer to accumulate money (2) and purchased a separate annuity contract for the customer at a future date (at which point the tax would be due when the annuity was purchased). Although the Legislature did not describe the nature of such an accumulation agreement, the OIC characterized it as a "deposit agreement" within the worksheets Forethought was required to submit with its tax returns. During the hearing, Forethought admitted that it entered into only a single "annuity contract" with its customers. Forethought argues that the agreement complied with the statute because the single contract has two phases (an accumulation period and an annuitization period). But the statute is clear: to defer the annuity tax during an accumulation phase, there must be an agreement for future purchase of an annuity contract. The contractual election in Forethought's annuity contracts is not a purchase—because that annuity contract was already purchased at the time the product was sold to the policyholder.

II. Although it agrees that Section 33-3-15(b) is clear and unambiguous, Forethought still says that the statute must be construed to avoid or ignore this future purchase requirement. But each of its arguments in support is wrong. It first argues that there was no sale of an annuity contract for which taxes were owed because the terms of annuity contracts permit the customer to either (1) elect a date following the sale of the contract for annuity payments to begin (*i.e.*, the annuity date) or (2) withdraw the annuity deposit prior the annuity date. This argument ignores

the word "purchase" within the statute. A purchase is a payment of money to obtain a product or service. The only purchase (*i.e.*, the exchange of money for a good or service) between Forethought and its customers was the annuity payment in exchange for the annuity contract, which occurred long before any contractual election.

Forethought then asks this Court to strictly construe Section 33-3-15(b) in a manner that will permit it to avoid the annuity tax—relying on *Coordinating Council for Independent Living, Inc. v. Palmer*, for the proposition that "[l]aws imposing . . . a tax are strictly construed . . . in favor of the taxpayer and against the State." Syl. Pt. 3, *id.*, 209 W. Va. 274, 546 S.E.2d 454 (2001). But in *Coordinating Council*, the question was whether the entity was subject to the tax at all. Forethought has already effectively stipulated that it is "subject to and pays annuity taxes." D.R. 29. *Coordinating Council* did not consider the separate question presented here—whether a life insurer can qualify for an exemption letting it *defer or avoid* the established tax. *Coordinating Council*'s rules of construction do not apply here. Instead, as in all tax exemption cases, the statutes and rules are construed against the taxpayer.

Lastly, Forethought claims that a 2015 email from an OIC employee, which says that taxes must be paid when a "deferred annuity [] annuitizes," controls and precludes the OIC from changing its position in the 2019 and 2020 assessments. Petr' Br. 31. But Section 33-3-15(b) never uses the word annuitize; nor does it direct back-end taxpayers to pay taxes upon annuitization. It uses the word purchase. What's more, the tax return worksheets Forethought was required to complete back-up the statutory language. The worksheets require life insurers to report "[f]unds used to purchase annuities." D.R. 381. By using the word purchase on the worksheets, OIC was express in its direction that Forethought pay tax on funds used to purchase annuities, not on contractual elections. Forethought ignored that direction.

III. Forethought is also not entitled to a credit or to relief from penalties and interest. It claims that the hearing examiner improperly applied penalties and interest. But by statute, interest cannot be waived. And penalties can only be waived in the Insurance Commissioner's discretion for excusable neglect. Here, Forethought's neglect was not excusable. It structured its annuity contracts contrary to the statute's plain terms, it disregarded return forms requiring it to report funds in deposit contracts and funds used to purchase annuities, and it has presented no legitimate excuse for doing so. Nor has it justified a credit in this case. Forethought claims that a tax payment based on contracts that had annuitized under the terms of those agreements (rather than on formation) should be credited toward the assessed taxes. As explained during the hearing, the taxes paid were for contracts separate from those assessed. Forethought cannot claim credit for those separate agreements, which are also taxable.

The 2019 and 2020 amended assessments—and the OIC's decision affirming them—were right. Forethought cannot qualify as a back-end taxpayer because it did not have a separate contract to purchase future annuities—as the statute requires. And Section 33-3-15(b) cannot be rewritten or misconstrued to remove that requirement. Each of Forethought's assignments of error and its arguments for overturning the decision below should be rejected.

STATEMENT REGARDING ORAL ARGUMENT

The OIC requests Rule 20 oral argument because this appeal presents issues of first impression and fundamental importance regarding the methodology for calculating annuity tax liability. *See* W. Va. R. App. P. 20(a)(l), (2).

STANDARD OF REVIEW

Forethought asks this Court to review assessments and penalties issued by OIC. Under West Virginia Code § 33-43-9(d), "[a]ssessments issued by the commissioner shall be presumed

correct, and the taxpayer shall bear the burden of proving, by a preponderance of the evidence, that the assessment is incorrect or contrary to law." For this Court to reverse, vacate, or modify the OIC's decision, Forethought must show that the OIC prejudiced its substantial rights due to one of the six enumerated grounds in West Virginia Code § 29A-5-4(g). *Tasker v. Agency Ins. Co.*, No. 23-ICA-83, 2023 WL 6290569, *3 (Ct. App. June 15, 2023) (mem. decision). Under this standard, the Court reviews questions of law *de novo*. However, the Court must give due consideration to "administrative expertise and discretion." *Griffith v. ConAgra Brands, Inc*., 229 W. Va. 190, 195, 728 S.E.2d 74, 79 (2012). *Id.* at 195, 728 S.E.2d at 79. The OIC's factual findings are presumptively valid, and the Court may not set them aside unless they are "clearly wrong." *Griffith*, 229 W. Va. at 195, 728 S.E.2d at 79.

This case also involves a tax exemption, and exemptions from tax are strictly construed against the taxpayer. *See, e.g*., Syl. Pt. 1, *RGIS Inventory Specialists v. Palmer*, 209 W. Va. 152, 544 S.E. 2d 79 (2001) (Consumers Sales Tax); Syl. Pt. 4, *Shawnee Bank v. Paige*, 200 W.Va. 20 488 S.E.2d 20 (1997) (Business and Occupation Tax); Syl. Pt. 5, *CB & T Operations v. Tax Commissioner of the State of West Virginia*, 211 W. Va. 198, 564 S.E. 2d 408 (2001) (Use Tax).

ARGUMENT

I. Forethought Must Pay the Annuity Sales Tax Because It Did Not Qualify For the "Back-End" Tax Exemption in Section 33-3-15(b).

Forethought's annuity contract sales do not qualify for back-end treatment because the company did not have separate agreements with its customers to purchase annuities at future dates. So, it must pay the tax in the year it received the premiums for the purchase of annuity contracts from its customers.

Before repealing the statute, the Legislature required "[e]very life insurer transacting insurance in West Virginia" to pay a one-percent tax on the "amount of annuity consideration [it]

collected and received" "during the previous calendar year." W. VA. CODE § 33-3-15(b) (2019). Insurers had "to file an annual return with the OIC "on or before March 1." W. VA. CODE § 33-3-15(b) (2019). On the return, each insurer had to state "the gross amount of annuity considerations collected and received." *Id.* (emphasis added). It also had to report "the amount of tax due" and include "payment in full" with the return." *Id.* The amount of tax due was calculated as a "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." *Id.*

While the phrase "annuity considerations" is not defined in statute, "Taxable Premiums" means "the amount of the gross direct premiums, *annuity considerations* or dividends on participating policies applied in reduction of premiums less premiums returned to policyholders due to cancellation of policies." W. VA. CODE § 33-43-3(i) (emphasis added). And "Premium" is defined as "the consideration for insurance, *by whatever name called*." *See* W. VA. CODE § 33-1-17 (emphasis added). Therefore, annuity considerations are premium payments made toward annuity contracts. Simply put, insurance companies were required to pay a one-percent tax on all annuity considerations (*i.e.*, premiums) received for their "annuity business transacted".

When Forethought received payments from its customers for the annuity contracts, those payments were annuity considerations. It is undisputed that the deferred annuity contracts were issued by Forethought to its customers upon receipt of a payment or payments (*i.e.*, annuity considerations). That is why Forethought stipulated that it "marketed, sold, and issued annuity products" and "is subject to . . . annuity taxes" under this section. D.R. 29. "Annuity business" was therefore "transacted" by Forethought upon the issuance of the deferred annuity contracts. W. VA. CODE § 33-3-15(b). Accordingly, the one-percent tax was owed.

Forethought, however, insists that it can take advantage of a separate provision to defer payment of those taxes until well into the future (or, potentially, avoid paying them at all). In 2002, the Legislature passed Senate Bill 647, which was an act "relating to taxes on the sale of annuities in the state; and clarifying the alternatives that life insurers may choose for reporting and paying taxes on annuities." S.B. 647, 75th Leg., Reg. Sess. (W. Va. 2002), *enacted* W. VA. ACTS 2002, c.172 (eff. June 7, 2002). In revising Section 33-3-15, the Legislature provided the following alternatives for reporting any paying taxes:

> 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.

W. VA. CODE § 33-3-15(a) (2002) (emphasis added), *recodified* W. VA. CODE § 33-3-15(b) (2019). This statutory tax deferral / exemption is only applicable when the customer enters into an agreement with an insurance company to purchase an annuity at a future date. Section 33-3-15(b) thus permitted insurance companies to defer paying the annuity tax when its customer entered into an agreement to accumulate money to purchase an annuity at a future date. While the Legislature did not describe the nature of such an accumulation agreement, the OIC characterized it as "deposit agreement" within the forms Forethought was required to submit with its tax return.

Here, Forethought's customers undisputedly purchased an annuity contract on the date the "Single Premium Deferred Annuity Contract" was sold and paid for. That purchase occurred on the day they paid Forethought a sum in exchange for a contract titled "Single Premium Deferred Annuity Contract." D.R. 331. During the hearing, Forethought's witness (Mr. MacNeil) testified that "[t]here is only one contract that is ever signed between the insurance company and the customer." D.R. 190-91. He also testified that "[c]onsideration" for this type of contract "is given to [Forethought] when the contract is agreed upon by the customer and the company."

D.R. 240. The terms of the annuity contract include an "accumulation phase" and an "annuitization phase", but both are covered under "the initial contract the insured purchased." D.R. 190-91. Forethought's customers did not, however, have an agreement with Forethought for the accumulation of money for the purchase an annuity at a future date.

While the word "purchase" is not defined in the West Virginia Code or Code of State Rules, courts give "[u]ndefined words and terms . . . their common, ordinary and accepted meaning," Syl. Pt. 6, *State ex rel. Cohen v. Manchin*, 175 W. Va. 525, 527, 336 S.E.2d 171, 173 (1984), and they often turn to the dictionary to supply such common meanings, *e.g.*, *Kings Daughters Housing, Inc. v. Paige*, 203 W. Va. 74, 76, 506 S.E.2d 329, 331 (1998) (relying on BLACK'S LAW DICTIONARY (5th ed. 1979); *W. Va. Consol. Pub. Ret. Bd. v. Weaver*, 222 W. Va. 668, 675 nn.8-10, 671 S.E.2d 673, 680 nn.8-10 (2008) (finding the common definition of "related" in RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY (2d ed.1998) and the XIII THE OXFORD ENGLISH DICTIONARY (2d ed.1991 reprint)). This Court should do the same here. Merriam-Webster defines "purchase" to mean: "to obtain by paying money or its equivalent." *Marketing*, MERRIAM-WEBSTER, DICTIONARY, https://www.merriam-webster.com/dictionary/marketing (last accessed Nov. 30, 2023). According to Black's Law Dictionary, "purchase" is similarly defined as "[t]he act or an instance of buying." BLACK'S LAW DICTIONARY, "Purchase" (11th ed. 2019).

Again, with regard to the issue of purchases by its customers, Forethought's witness Mr. MacNeil testified that for its annuity products, "[t]here is only one contract that is ever signed between the insurance company and the customer." D.R. 190-91. The language of the annuity contract itself confirms Mr. MacNeil's testimony. The customer initially makes an "annuity deposit," which is "[t]he premium credit to this contract on the Issue Date of the Contract." D.R. 337. The contract also provides that "[o]n the Issue Date, the Contract Value equals the Annuity

Deposit." D.R. 341. The contract further provides that it is governed by West Virginia law. D.R. 338. Thus, when Forethought's customers paid money for that one contract (*e.g.*, a Single Premium Deferred Annuity Contract), that event was the only purchase.

The Hearing Examiner also found that Forethought's customers purchased the annuity contracts on the date they were issued:

> The facts presented by the Petitioner and the WVOIC clearly show that there was only one event that occurred in the Petitioner's dealing with its insured, which was the initial contract entered into between the parties. This event is the application to purchase an annuity as contemplated in W. VA. CODE § 33-3-15. **Thus, it is clear that the date of the purchase is the date of the only contract signed** and that event triggers the imposition of the taxes. Any contributions received after the contract is signed are also taxed when received.

D.R. 3650 (emphasis added). In other words, Forethought did not structure its transactions with its customers for the customers to "purchase annuities at future dates." W. VA. CODE § 33-3-15(b). The only purchase was on the date the annuity contracts were sold to the customers—that is, the date that money was exchanged for the annuity product—which was the date the contracts were first issued.

In analyzing Section 33-3-15(b), the 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 of W. Va.*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995). This Court must also follow the Supreme Court of Appeals' rule that "[w]here a person claims an exemption from a law imposing a license or tax, such law is strictly construed against the person claiming the exemption." *See, e.g.*, Syl. Pt. 1, *RGIS Inventory Specialists v. Palmer*, 209 W. Va. 152, 544 S.E. 2d 79 (2001) (Consumers Sales Tax).

Forethought's customers only made one purchase—which occurred on the day the annuity contracts were entered into. Because the statute requires that any deferral or exemption

to the annuity sales requires an agreement for the customer to purchase an annuity at a future date, the inquiry ends. The Legislature is presumed to "say in a statute what it means and mean[] in a statute what it says there." *Appalachian Power*, 195 W. Va. at 586, 466 S.E.2d at 437. If the Legislature intended to grant an annuity tax exemption in situations such as the present, it could have done so. The text could have made the back-end tax election available to the purchase of deferred annuities that provide for an accumulation phase and a payout phase. It could also have made the tax collectable when the product "annuitizes" and the payouts begin. But it didn't. Instead, Section 33-3-15(b) only allows the back-end tax election when the funds are accepted by a life insurer under an agreement which provides for an accumulation of money to ***purchase annuities at future dates***. This back-end election does not apply where an annuity was previously sold to a policyholder, but the payouts are deferred.

Because Forethought has failed to meet its burden to prove, by a preponderance of the evidence, that the Insurance Commissioner's notices of underpayment are contrary to law, the OIC's *Final Order* must be affirmed. *See* W. VA. CODE § 33-43-9(d)). Strictly construing this exemption against Forethought confirms this result.

II. Section 33-3-15(b)'s Tax Exemption / Deferral Is Not Applicable To Forethought's Single-Instrument Sale of Annuity Contracts [Assignments of Error 1, 2, 3, 4, 5, 6, 7, 8, 9, 17, 19 & 20].

a. The second "phase" of Forethought's two-phase deferred annuity agreements does not qualify it for the tax deferral / exemption.

Despite the statute's plain terms, Forethought argues there was no sale of annuity contracts for which taxes are owed because the terms of annuity contracts permit the customers to either (1) elect a date following the sale of the contract for annuity payments to begin (*i.e.*, the annuity date) or (2) withdraw the annuity deposit prior the annuity date. According to Forethought, it initially "accepts funds" from the customers, and those funds are later applied "to the 'purchase' of a series

of payments back to the beneficiary upon annuitization." Petr's Br. 14-15. It is that contractual clause that Forethought believes triggers tax liability.

However, the commencement of payments under a previously purchased annuity contract, is not the purchase of an annuity within the plain meaning of Section 33-3-15(b). A purchase, as defined in Section I, *supra*, is an act "to obtain by paying money or its equivalent." Forethought's customers purchased annuity contracts on the date they paid their premiums to Forethought for their Single Premium Deferred Annuity Contract. Thereafter, the policyholders could elect under the terms of the contract to begin receiving annuity payouts. Exercise of a contractual election within the agreement does not change the fact that the annuity contract was already purchased. Similarly, if the customer elects to withdrawal all of the deposited funds, that election does not mean the sale of the "Single Premium Deferred Annuity Contract" never occurred. A sale of an annuity contract did, in fact, occur when the customer gave Forethought premium money in exchange for the annuity contract. If the customer elects to withdraw the funds at a later date, then the annuity contract is simply cancelled or terminated. But it was still purchased by the customer.

In order to qualify for the tax deferral / exemption under Section 33-3-15(b), Forethought was required to have two separate transactions with its customers. The first transaction would be for the customer to deposit money with Forethought for the future purchase of an annuity contract. The second transaction would be for the customer (or the company at the customer's direction) to use the deposited money to purchase an annuity at that future date (*i.e.*, deferring the purchase of the annuity). Forethought argues that the "Final Order fixates on the lack of a 'second' contract under which policyholders buy annuities" and that its "two-phase process of deferred annuities" accomplishes the same goal. Petr's Br. 15. Forethought is incorrect. The OIC is simply applying the statute as written. Section 33-3-15(b) requires (1) an agreement for the accumulation of money

and (2) a purchase of an annuity (with that money) at a future date. Forethought got it wrong because the annuity contracts were purchased at the outset (making the tax due immediately)—and were not purchased at a future date.

Despite Forethought's arguments to the contrary, the statute's insistence on two transactions does not transform Forethought's deferred annuities into immediate annuities; nor does it require Forethought "to begin immediately making payments to the policyholder". Petr's Br. 17-18. The annuity tax statute does not dictate when a life insurance company shall begin making payments to its policyholders. Likewise, the terms of the annuity contracts, as set by the life insurer, cannot dictate when the premium tax is due. The title to the contract is "Single Premium Deferred Annuity Contract" and it is undisputed that these contracts were sold to the customers on the first day. Again, Forethought is not entitled to the tax deferral / exemption because it did not contract with its customers for (1) the accumulation of money to (2) purchase an annuity (with that money) at a future date. Any contractual obligations between Forethought and its customers regarding payout obligations are not relevant to the tax analysis. In other words, Forethought can continue to defer annuity payments to its customers, but it must pay taxes on the consideration it received when its customers purchased the annuity contracts.

b. The OIC correctly declined to construe Section 33-3-15(b) in favor of Forethought.

In their briefs, Forethought and the Amicus state that Section 33-3-15(b) is "clear and unambiguous" and that this case can be resolved upon the statute's "straightforward application". Petr's Br. 7, 12 & 20; Amicus Br. 7. The OIC agrees that the statute is clear and unambiguous. "Where the Legislature has spoken directly to a question, the court, as well as the agency, must give effect to . . . that unambiguously expressed intent." *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W.Va. 573, 589, 466 S.E.2d 424, 440 (1995) (cleaned up). Similarly,

when a statute is "clear and unambiguous," it should be "applied and not construed," Syl. Pt. 1, *State v. Elder*, 152 W. Va. 571, 571, 165 S.E.2d 108, 109 (1968), and "its plain meaning is to be accepted and applied without resort to interpretation." Syl. Pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 715, 172 S.E.2d 384, 385 (1970). "If the text of a statute, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co.*, 195 W.Va. at 587, 466 S.E.2d at 438.

Forethought and the Amicus further argue, however, that Section 33-3-15(b) should be construed in their favor. Petr's Br. 16-17; Amicus Br. 9. For example, the Amicus argues that "the statute must be construed to allow life insurers the option of electing back-end taxation on deferred annuities[]" and the OIC's "decision goes against the clear intent of the Legislature and renders the statute's option to elect a method of taxation useless." Amicus Br. 9. But again, the Amicus states in its *Brief* that Section 33-3-15 has a "plain meaning." Amicus Br. 7. Forethought and the Amicus cannot have it both ways: either the statute is unambiguous, or the statute is ambiguous and must be construed. While the OIC believes that the statute is unambiguous, if this Court accepts Forethought's alternative argument that the statute is ambiguous, general rules of statutory interpretation favor the OIC—because OIC is the agency charged with administering the statute.

Following the framework for review provided by *Appalachian Power Company v. State Tax Department of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995), appellate courts must defer to administrative agencies' reasonable interpretations of the statutes those agencies are charged with administering. The Supreme Court of Appeals of West Virginia utilizes a two-part test established by the Supreme Court of the United States in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984), for

judicial review of an agency's construction of a statute that it administers, the second of which involves deference to the agency. *See* Syl. Pts. 3–4, *Appalachian Power,* 195 W. Va. at 578, 466 S.E.2d at 429; Syl. Pts. 2–3, *Amedisys W. Va., LLC v. Pers. Touch Home Care of W. Va., Inc.*, 245 W. Va. 398, 859 S.E.2d 341 (2021). This Court uses this test, too. *E.g.*, *Stonewall Jackson Mem. Hosp. Co. v. St. Joseph's Hosp. of Buckhannon, Inc*., No. 22-ICA-147, 2023 WL 4197305, at *6 (Ct. App. June 27, 2023) (mem. decision). First, "a court must look primarily to the plain meaning of the statute, drawing its essence from the particular statutory language at issue, as well as the language and the design of the statute as a whole." *Appalachian Power*, 195 W. Va. at 586, 466 S.E.2d at 437 (internal citations omitted). In doing so, the question as to whether the Legislature has spoken on a particular question involves two smaller steps—

> We 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. . . . If no such readily apparent meaning springs from the statute's text, we next examine, albeit skeptically, other extrinsic sources, such as the legislative history, in search of an unmistakable expression of legislative intent.

Id. at 587, 466 S.E.2d at 438. Assuming the statute requires interpretation, in applying the *Chevron* analysis, "deference looms large"—and "a court must examine the agency's interpretation to see how it relates to the statute. This examination involves a high degree of respect for the agency's role." *Appalachian Power*, 195 W. Va. at 587-88, 466 S.E.2d at 438-39.

> We believe that if the Legislature explicitly leaves a gap in legislation, then an agency has authority to fill the gap and the agency is entitled to deference on the question. Thus, an agency's interpretation will stand unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844, 104 S.Ct. at 2782, 81 L.Ed.2d at 703.

Id. at 588–89, 466 S.E.2d at 439–40. "The policy favoring deference is particularly important where, as here, a technically complex statutory scheme" is involved; "[u]nder such circumstances, the argument for deference is at its strongest." *Id.* at 589–90, 466 S.E.2d at 440–41.

Here, the OIC specifically found in its *Final Order* that Section 33-3-15(b) "is clear and unambiguous, on its face" and that Forethought's "contract with its insured indicates that the contract is a purchase of an annuity, therefore, under Section 33-3-15, the annuity tax is levied on the day the contract is signed." D.R. 3657. This Court should do the same. It should find the statute clear and unambiguous, apply it as written, and hold that Forethought does not qualify for back-end treatment.

But the result should be the same even if this Court finds some ambiguity in the text because the Insurance Commissioner's application of the statute is reasonable. He applied Section 33-3-15(b) to the facts of this case. He found that "Forethought had no secondary contract or agreement with the policyholder to purchase annuities at future dates." D.R. 3662. He also found that Forethought did not pay its taxes at the time the annuities were sold. *Id.* And that application of the law to the facts should receive deference.

Agency deference aside, OIC's decision is further supported by the requirement that tax exemptions be strictly construed against the taxpayer. *See, e.g.*, Syl. Pt. 1, *RGIS Inventory Specialists v. Palmer*, 209 W. Va. 152, 544 S.E. 2d 79 (2001). In other words, because Forethought never entered into agreements with its customers to purchase annuity contracts at future dates, the OIC reasonably applied Section 33-3-15(b) to deny Forethought the deferral / exemption from the annuity tax.

Forethought gets these strict construction principles backwards, too. In its *Brief*, Forethought cites case law proposing that ambiguous statutes imposing taxes should be construed in favor of taxpayers. Syl. pt. 3, *Coordinating Council for Independent Living, Inc. v. Palmer*, 209 W. Va. 274, 546 S.E.2d 454 ("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."). Here, as Forethought has conceded, there is no doubt as to the meaning of Section 33-3-15(b). The Amicus concedes this as well arguing that Section 33-3-15 has a "plain meaning." Amicus Br. 7. Thus, the Court has no reason to construe that statute in favor of Forethought.

But even if the statute was ambiguous, it would not be construed in Forethought's favor anyway. The issue in *Coordinating Council* was whether a health care services provider tax applied to community care services. The Supreme Court of Appeals held that when there is "doubt" as to whether a tax applies, the law imposing the tax is construed in the taxpayers' favor, and that homemaker services were not within the scope of the tax. Here, there is no doubt that all annuity contracts are subject to the tax. The issue in this case is whether a deferral / exemption to that tax applies. Again, taxpayers receive no construction in their favor for tax exemptions because tax exemptions are strictly construed against taxpayers.

Forethought's and the Amicus's arguments also implicate the canon against surplusage—which favors interpretations of statutory text where "no clause, sentence, or word shall be superfluous, void, or insignificant." *South Carolina v. U.S. Army Corp. of Engineers*, 55 F.4th 189, 195 (4th Cir. 2023). For example, Forethought claims that "[t]he Final Order is based largely on the idea that the deferred annuity contracts at issue constitute a purchased annuity immediately upon signature . . . [and] there is no option for the Petitioner to select back-end taxation." Petr's Br. 12-13. For its part, the Amicus argues that OIC's construction of the statute "renders the statute's option to elect a method of taxation useless." Amicus Br. 9. But this canon "is not absolute" and does not trump the statute's unambiguous meaning. *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004).

Plus, these arguments are red herrings anyway because the insurance companies were able to claim the deferral / exemption so long as they followed the text of the statute**.** Prior to the repeal

of the tax, if an insurance company contracted with its customers for (1) the accumulation of money to (2) purchase of an annuity (with that money) at a future date, the deferral / exemption statute applied. The OIC's application does not render the deferred tax payments provision of the statute void or superfluous. Forethought just failed to qualify for this deferral option under the statute's clear language because it only had a single transaction with its customers.

Forethought's statutory construction arguments are unnecessary and do not require reversal of the OIC's *Final Order*. Assignments of Error 1, 2, 3, 4, 5, 6, 7, 8, 9, 17, 19, and 20 should be rejected.

III. The OIC Did Not Previously "Interpret" Section 33-3-15(b) Or Deviate From Any Prior Interpretations [Assignments of Error 10, 11, 12, 13, 14, 15 & 16].

Forethought also tries to avoid Section 33-3-15(b)'s text by pointing to a 2015 email from Ms. Goolsby, an employee of the OIC, and worksheets used to claim the tax deferral that both use the word "annuitize." Petr's Br. 26-36. To be clear, Forethought does not argue that these documents estop the OIC from enforcing the statute's text. After all, the "general rule" is "that estoppel may not be invoked against a government unit when functioning in its governmental capacity." *Samsell v. State Line Dev. Co*., 154 W. Va. 48, 59, 174 S.E.2d 318, 325 (1970). As the Fourth Circuit put it, "[i]f equitable estoppel ever applies to prevent the government from enforcing its duly enacted laws, it would only [be] in extremely rare circumstances." *Volvo Trucks of N. Am., Inc., v. United States*, 367 F.3d 204, 211-12 (4th Cir. 2004). Instead, Forethought says that the Goolsby email and the OIC's worksheets are prior interpretations of Section 33-3-15(b) that undermine any deference owed to the decision below. This argument fails for two reasons.

First, the word annuitize does not appear in Section 33-3-15(b), and any use of that word by OIC cannot change the statutory mandate that the deferral / exemption requires the holding of funds by the insurer until a later purchase of an annuity contract. OIC's 2015 email did not excuse

Forethought from these requirements. But OIC could not have contradicted the statute in any event. "[T]hose who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 420 (1985). *Second*, Forethought's assessment is consistent with the OIC's worksheets. True, these worksheets use the word "annuitize." But they also stated that Forethought was required to report (1) funds held in "deposit contracts," D.R. 378 (line C2), and (2) that when reporting contracts that had undergone "annuitization," D.R. 378 (line C5), the company had to account for "[f]unds used to purchase annuities." D.R. 381 (Schedule C, Supp. 2, line 9). Thus, the OIC's worksheet instructions confirmed the statute's future purchase requirement and contradict Forethought's claim that, in the past, the OIC only required it to pay tax upon contractual annuitization.

By way of background, in a 2015 email to Forethought from Dreama Goolsby, an OIC Tax Audit Clerk, she stated, in part, that:

> Back-end companies must report and pay taxes on any previously reported deferred annuity that *annuitizes*, including any earnings (interest / dividends). SPIA, benefits paid due to Death, Structured Settlements and Guaranteed lifetime withdrawal's cannot be deferred.

D.R. 0373 (emphasis added). Ms. Goolsby also noted that "[t]he company has deferred all annuity considerations reported on the Annual Statement State Page 24 from 2008—2014. No taxes have been paid on any annuities." D.R. 0373. During the hearing, Ms. Hartwell explained that email, testifying that:

> This was an email that we sent out to all . . . insurance companies that wrote annuity taxes. We revised our tax form on the premium tax statement. So we were just letting them know what items were to be presented in their -- on the tax form, and we were just telling them like that West Virginia doesn't distinguish between a qualified or nonqualified. We treat all annuities the same, no matter whether they're frontend or backend.

> That if they had premiums identified on the annual state page under line 7.2, if they were not included in the annuity considerations reported on line one, then they were to be taxed.

D.R. 264. The 2015 email from the OIC provided instructions to the insurance companies about completing their tax reporting forms. D.R. 284 ("This [email] was after we had a meeting, as I stated, with our commissioner, general counsel, the people listed, just to give them an understanding that—how they're to report on the new tax form, the revisions to the tax form.").

In its *Brief*, Forethought extrapolates the word "annuitization" to mean that the OIC approved the annuity contracts it sold for deferred / exempt tax treatment merely because the contracts contained an annuitization election clause. This extrapolation is improper for a variety of reasons. *First*, as noted in the *Final Order*:

> Even if, as Forethought argued, the Commissioner previously issued an "interpretation" of [Section] 33-3-15 which allowed only for taxation upon "annuitization" under a single contract or agreement, as opposed to taxation upon the sale of the annuity contract, the interpretation would have been directly contrary to the statute to the point that it would have been a nullity. Nevertheless, the OIC has denied issuing this "interpretation" . . . [and] relying upon prior misunderstanding or misinterpretations of the applicable tax law is unnecessary.

D.R. 3363.

This analysis is consistent with Supreme Court of Appeals' case law. Where statutory language is plain, the statute's language must be applied as written without any further interpretation. *See* Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968) ("Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation."). Again, both Forethought and the Amicus agree that Section 33-3-15(b) is clear and unambiguous. Therefore, even if the OIC "interpreted" that statute in its 2015 email, that interpretation could not contradict the plain language of the statute. *Division of Justice and Commc'n Servs. v. Fairmont State Univ.*, 242 W. Va. 489, 496, 826 S.E.2d 456, 463

(2019) ("If the intent of the statute is clear, a court need not defer to an agency's interpretation of a statute it administers.").

Additionally, the email itself was nothing more than an instruction from the OIC to Forethought on how it should complete its tax reporting forms. In stating that the Forethought "must report and pay taxes on any previously reported deferred annuity that annuitizes," the OIC did not contradict the language of Section 33-3-15(b). As Ms. Hartwell testified: "Based on what we have been told by all of the companies that we have worked with, they referred to as when they told us that they had a deferred annuity, that was what they considered the deposit-type stage of an annuity, when it goes—when they stated that once they purchased the contract, then that's when they considered it annuitized." D.R. 0292. While Forethought may have believed that a contractual annuitization clause within its annuity agreement was sufficient to avoid paying taxes on the sale of those agreements, the OIC did not analyze the terms of the agreements in the 2015 email. So, Forethought could not rely on any such analysis by OIC of its contracts.

Forethought's assumption that the OIC's use of the word annuitizes in an email meant that the plain language of the statute was not controlling was, at best, negligent. The Hearing Examiner concluded exactly that, finding that Forethought "was negligent by failing to ask for clarification from the OIC when it was confused by the 2015 Goolsby email." D.R. 3658. At the very least, rather than relying on the email, Forethought should have reviewed the language of Section 33-3-15(b) and asked for further clarification. It failed to do so.

Similarly, Forethought argues that the OIC's worksheets (referred to in the 2015 email) support its argument that the OIC instructed it to only pay the annuity tax when **contractual annuitization** occurred—as opposed to when the annuity contracts were purchased. Petr's Br. 31-32. The Amicus also argues that the OIC "specifically instructed insurance companies to enter

the total prior deferred annuities that had annuitized, with the line instruction being "Back-end only." Amicus Br. at 10.

Both Forethought and the Amicus are wrong, because the OIC specifically instructed Forethought to report **purchased** annuities in its worksheets. Page 1, Line 2 of the OIC Worksheet states that a one percent annuity tax will be paid pursuant to Section 33-3-15. D.R. 0376. That reference indicates that the tax will be paid according to statute. Additionally, Schedule C required the "Itemization of Annuity Considerations" by Forethought. D.R. 378. Line C2 required Forethought to list annuity considerations held in "Deposit Type Contracts" and Line C5 required it to list "Back-end prior year Deferred contracts." D.R. 378. Thus, the OIC worksheets identified deposit contracts and annuity contracts purchased with the deposited funds funds (*i.e.*, back-end annuity contracts) as different types of contracts—in line with Section 33-3-15(b). Because Forethought only had one contract with its customers, the worksheet should have at least given rise for further inquiry of the OIC.

Additionally, on Schedule C Supplemental Worksheet for "back-end" taxpayers, the OIC specifically stated that Line C5 of the (primary) worksheet (for back-end prior year deferred annuity contracts) should report "[f]unds used to purchase annuities." D.R. 381. The OIC worksheets thus tracked the language statute and required Forethought to report (1) monies held in "deposit contracts" (2) later used to purchase annuities. Forethought's attempt to focus on the word "annuitization" and ignore the remainder of the OIC's instructions is unreasonable.

And because the OIC's worksheets were clear that Forethought was required to report both funds held in deposit contracts and funds used to purchase annuities, Forethought's claim that the OIC is making "*ad hoc* representations . . . such as litigation arguments" which are entitled to no deference is incorrect. Petr' Br. 26. The parties agree that Section 33-3-15(b) is

clear and unambiguous, but to the extent the OIC is entitled to deference for the application of that statute to the facts of this case, the OIC has not taken a litigating position in this case. Rather, its worksheets have always closely tracked the language of the statute and made clear that insurance companies were required to separately list funds held in deposit contracts and funds used to purchase annuities. Therefore, if the statute is ambiguous, the OIC's assessments based on Forethought's failure to hold funds in deposit accounts and immediately issue purchased annuity contracts are entitled to deference.

That deference does not vanish because the OIC made a mistake on the original assessment notices issued in May 2022. Petr's Br. 2, 26. Originally, both the 2019 and 2020 assessments were calculated on the money Forethought *paid* to customers—instead of on money it *received* from customers. D.R. 295-96. But this mistake was corrected by the amended notices issue in January 2023, and this case revolves around the validity of those amended notices. D.R. 3654-55. Everyone agrees the original notices were wrong, D.R. 295-96, that the statute taxes "considerations collected and received by" life insurers, W. VA. CODE § 33-3-15(b), and does not tax the money insurers pay to their customers, D.R. 3641; Petr's Br. 26 n.3. So, there are no live issues and nothing for this Court to decide regarding the correctness of these original notices. *State ex rel. W. Va. Secondary Sch. Activities Comm'n v. Cuomo*, 247 W. Va. 324, 331, 880 S.E.2d 46, 53 (2022) ("Generally, moot questions are not proper for consideration by [appellate courts]").

True, the "consistency of" an agency's "position is one of the relevant factors" courts consider when deciding questions of agency deference. *Appalachian Power*, 195 W. Va. at 592, 466 S.E.2d at 443. And conflicting agency positions are "entitled to considerably less deference than" "consistently held" ones. *Id.* (cleaned up). But the original assessment of annuity payments

was not the type of intentional and considered policy judgment to which this principle generally applies. *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019) (applying deference only where "regulatory interpretation" is "the agency's authoritative or official position" that "reflect[] the agency's views" (cleaned up)). It was simply a mistake—as the Hearing Examiner put it, an "aberration," D.R. 3654—and one that the OIC quickly corrected when it was pointed out. D.R. 365. That mistake should not lessen any deference otherwise afforded to the amended assessments of the annuity considerations Forethought collected and received from its customers.

Aside from that, agencies are not "irrevocably bound" by their mistakes. *Appalachian Power*, 195 W. Va. at 592, 466 S.E.2d at 443. They are allowed to correct prior actions, especially where" an earlier action "is based on . . . some mistake of law." *Id.* And reviewing courts still afford considerable respect to "administrative understanding of the statutes"—especially where the agency "return[s] to [an] earlier [held] position." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993). Courts uphold even corrected assessments when they reflect "a reasonable exercise of" agency discretion. *E.g.*, *Antero Res. Corp. v. Irby*, No. 20-530, 20-531, 20-579, 2022 WL 1055446, at *4 (Apr. 8, 2022) (mem. decision) (upholding property tax revaluation of oil and gas wells on agency discretion grounds). The OIC's correction of the original assessment notices does not require a different result here.

Finally, because West Virginia administered Section 33-3-15(b) as written, how California or Nevada may have administered their (similar) statutes taxing deferred annuity contracts is of no moment. Forethought points to no case law or regulatory guidance from California or Nevada indicating that a single annuity contract can be considered tax exempt under those statutes. Nevada may not have audited Forethought yet—just has West Virginia had not yet audited Forethought until the current assessments—and California may not have

penalized it yet. D.R. 3655 (Hearing Examiner: indicating California may not have "penalized [Forethought] after a recent audit"). But West Virginia is not bound by the inactions of other states. And Forethought cannot rely on these other states' inactions to bless its failure to comply with West Virginia's statute.

Plus, the inaction of these other states may be justified by differences in the language of their statutes anyway. For example, the triggering event for back-end annuity taxpayers in California is "the actual application *of such funds* to the purchase of annuities." CAL. REV. & TAX § 12222 (1974) (emphasis added). In Nevada, its "the actual application *of the money* to the purchase of annuities." NEV. REV. STAT. § 680B.025.2 (2013) (emphasis added). And in Nevada, money withdrawn "before its actual application to the purchase of annuities" is not taxable. *Id.* West Virginia, in contrast, taxes back-end companies on the "application to the purchase of annuities," W. VA. CODE § 33-3-15(b), which makes clearer that the taxable event is not when the money is applied to the annuity but instead, when the annuity is actually purchased. W. VA. CODE § 33-3-15(b). California and Nevada's statutes are not exactly the same as West Virginia's, and the fact that these states have not enforced their statutes in the same way West Virginia does not prove that Forethought's assessment was wrong.

What's more, annuities are treated in varying ways throughout the country anyway. Only seven states have a similar tax, and the majority of these do not allow back-end payments at all. *See e.g.*, FL. STAT. 624.509 (2023) (taxing premiums when received); ME. STAT. 36, § 2513 (2017) (same); S.D. CODIFIED LAWS § 10-44-2 (2011) (same); WYO. STAT. ANN. § 26-4-103 (2021) (same). The OIC's decision to tax insurers when their customers paid for and purchased annuities certainly does not put West Virginia at odds with any national consensus on this issue.

The OIC's decision applies the text of Section 33-3-15(b) as written and does not deviate from any prior interpretation of the statute. This Court should reject Forethought's Assignments of Error 10 through 16 and affirm.

IV. The OIC Correctly Denied Forethought's Claimed Tax Credit [Assignment of Error 18].

Forethought next argues that, assuming the OIC's assessments are upheld, that it be entitled to credit for approximately $215,000 in taxes paid in 2019 and 2020 for contracts which had "annuitized"—under the terms of those contracts. As the Hearing Examiner properly concluded, however, Forethought is not entitled to credit for those taxes paid because those "taxes were for annuity contracts entered into during years prior to 2019 and 2020." D.R. 3658.

During the hearing, Ms. Hartwell explained OIC's reasoning for denying the tax credit:

> The reason it was denied is because it was for a prior period. It wasn't for the current year. So I'm not going to reduce the tax that is due for the current year when those -- *the premiums that they paid were actually for prior year contracts that were completed in tax year 2019 and 2020*. They're totally separate from what was reported on line C1 as annuity considerations, so the tax was due.
>
> Those were contracts that were in the -- they were funds that were in the deposit-type contract and they actually purchased an annuity contract in that calendar year. So the tax was due on those premiums in addition to what was reported as annuity-type considerations.

D.R. 273-74 (emphasis added).

In simpler terms, in its 2019 and 2020 tax returns, Forethought reported that it "sold" certain annuity contracts during those years when customers elected to contractually annuitize under those agreements. Thus, Forethought paid taxes on those particular self-reported sales. Separately, the OIC's audit uncovered that Forethought also entered into contracts with customers that had not contractually annuitized, but that were nonetheless "purchased" by Forethought's customers pursuant to Section 33-3-15(b)—because Forethought issued annuity contracts to its customers in exchange for money.

In its *Brief*, Forethought incorrectly argues that "there was no basis for [the OIC] to apply the extra payments to any prior tax year, because Petitioner had paid them in full." Petr' Br. 38. Forethought also argues that the OIC should have issued an amended assessment for the prior tax years. These arguments are red herrings—because Forethought is responsible for its own tax returns. That is, Forethought self-reported that it owed taxes on contracts that contractually annuitized during 2019 and 2020, and that it owed annuity taxes based on those annuitizations. But the original contracts were obviously sold in prior tax years. The OIC is under no obligation to correct Forethought's tax returns. If Forethought wishes to amend prior years' tax returns and allocate the $215,000 in taxes to those tax years, it is free to do so. However, this does not change the fact that Forethought also owes taxes for 2019 and 2020 for the annuity contracts purchased by its customers upon issuance—and that it is entitled to no credit for taxes owed from prior tax years. At the end of the day, all of these taxes will still be owed, and Forethought cannot offset the assessed taxes with taxes owed for other contracts that it sold.

V. The OIC Correctly Refused To Waive Interest and Penalties [Pet'r Br. 38: No Related Assignment of Error].

Forethought's final argument is that the OIC should have waived penalties and interest in its assessment pursuant to West Virginia Code Section 33-43-7(a) & (b). That section provides that insurance companies are subject to penalties for failure to pay taxes by the payment date. But the OIC "may waive or reduce [a] penalty if the Commissioner determines that the failure to timely file was caused by excusable neglect[]" and a "penalty may be waived or reduced if the taxpayer establishes, to the satisfaction of the Commissioner, that the failure upon which the penalty is based was not, in whole or in part, willful or due to the neglect of the taxpayer." W. Va. Code § 33-43-7(a), (b).

In his *Recommended Decision*, the Hearing Examiner found that while "[t]here was no proof that the actions of [Forethought] were willful . . . [its] failure to clarify the Goolsby letter of 2015 can be construed as negligent." D.R. 3656. The Hearing Examiner also concluded that "allowing insured [*sic.*] to withdraw their premiums up to sixty or ninety days before the annuity became active, was an action that allowed its insured to avoid paying taxes to the State of West Virginia." D.R. 3656.

Section 33-43-7 does not permit the OIC to waive interest; it only addresses the waiver of penalties. And Section 33-43-11—the part of the Code addressing interest on insurance tax assessments—is mandatory: providing that "[a] taxpayer *shall* be liable for interest on any unpaid final assessment or penalty." W. VA. CODE § 33-43-11 (emphasis added). Thus, the Insurance Commissioner has no discretion to waive interest. The only issue is whether the Commissioner improperly exercised his discretion to not waive Forethought's penalties due to excusable neglect. As established above, Section 33-3-15(b), prior to its repeal, was clear that insurance companies could only defer / exempt annuity contract sales from taxation when the customer enters into an agreement with an insurance company to purchase an annuity at a future date. The OIC's worksheets also indicated that it considered deposit contracts and back-end annuity contracts to be separate contracts, and the supplemental worksheet required Forethought to report "Funds used to purchase annuities." D.R. 378, 381. By ignoring both the plain language of the statute and the specific language of the worksheets, Forethought failed to establish excusable neglect, and the Insurance Commissioner properly exercised his discretion to not waive penalties.

The OIC's refusal to waive interest and penalties should be affirmed.

CONCLUSION

Based on the forgoing, the Insurance Commissioner respectfully requests that Forethought's twenty (20) assignments of error be rejected, and that its *Final Order* be affirmed.

Respectfully submitted,

ALLAN MCVEY, in his official capacity as Insurance Commissioner of the State of West Virginia,

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IN THE INTERMEDIATE COURT OF APPEALS

OF WEST VIRGINIA

NO. 23-ICA-313

FORETHOUGHT LIFE INSURANCE COMPANY,

Petitioner,

v.

ALLAN MCVEY,
in his official capacity as Insurance Commissioner of the State of West Virginia,

Respondent,

On Appeal from the
West Virginia Offices of the Insurance Commissioner
Administrative Proceeding No. 22-IC-02274

CERTIFICATE OF SERVICE

I, William C. Ballard, do hereby certify that on this 21st day of December 2023, the foregoing Respondent's Brief was electronically filed with the Clerk of the Court using the File & Serve Xpress system, which constitutes service on the following:

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