INTERMEDIARY COURT OF APPEALS OF WEST VIRGINIA

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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 REPLY BRIEF

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SUMMARY OF REPLY ARGUMENT

Respectfully, the Respondent's brief fails to meaningfully or cogently combat the facts, arguments, and conclusions in Petitioner's brief. Petitioner remains steadfast that the straightforward application of the annuity tax statute to the express terms of its contract supports its position that it has been incorrectly taxed on the front-end. Rather than engage in a tit-for-tat with the many inaccuracies or inconsistencies of law, citation, and fact contained in Respondent's brief, Petitioner instead refocuses the Court on the issue before it. Contrary to the Respondent's rather convoluted arguments in its brief, the question before this Court is limited and straightforward: is Petitioner's contract "an agreement which provides for an accumulation of money to purchase annuities at future dates"? *See* W. Va. Code § 33-3-15. If so, Petitioner must be taxed consistent with its back-end election, which was undisputedly not done in the operative Amended Notices of Underpayment. Petitioner maintains that the contract terms qualify for back-end election under the statute's plain language, a conclusion supported by the long history of the Respondent administering this tax, the insurance industry as demonstrated by the Amicus Brief of the American Council of Life Insurers, the language of Respondent's own tax forms, the Fiscal Note associated with the tax's ultimate repeal, and the administration of sister annuities taxes in other states. Petitioner is the one being consistent in its interpretation and administration of the statute, the one applying the clear language of the annuity tax statute, and the one backed by the insurance industry.

LEGAL ANALYSIS

For the reasons listed in its brief and herein, the appeal should resolve in favor of Petitioner.

I. Respondent's "Two Contracts" Requirement Is Contrary to the Statute And Disregards the Terms of Petitioner's Contract

The question before this Court is whether Petitioner's contract "an agreement which provides for an accumulation of money to purchase annuities at future dates" that may qualify for back-end election, and the answer is a definitive **YES**. *See* W. Va. Code § 33-3-15. Petitioner adequately explained in its brief how its contract contains express terms for two phases—an accumulation phase during which money is, essentially, held in an investment account and "provides for an accumulation of money," and the annuitization phase in which the money in that investment account is converted "at a future date" into an annuity under terms chosen by the customer. The brief also details how that annuitization phase satisfies the statutory language for back-end election. Respondent, disregarding the plain language of the statute, conjures up a "two-contracts" requirement and argues that Petitioner cannot qualify for back-end election simply because it has one contract instead of two. Respondent's position is not supported by the language of the statute. The relevant portion reads:

> 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 (emphasis added)

Clearly, the statute does not require two contracts, as only one agreement ("an" agreement") is contemplated. For this reason alone, Respondent's position must fail.

Looking deeper, Respondent's two-contract requirement can generously be described as a form over function argument. Followed to its logical conclusion, Respondent's requirement would

have a first contract whose terms accumulate money and obligate the customer to use that money at some future date to buy an annuity. The second contract would take that money and formally "purchase" an annuity. Petitioner respectfully points out that is exactly what occurs here, only within a single contract. There is no meaningful difference. Under Petitioner's contract, there are two express phases: the accumulation phase, and the annuitization phase. No annuity exists during the accumulation phase, and none exists unless and until annuitization occurs. In this regard, Petitioner's contract is standard for the insurance industry, as fully explained in the Amicus Brief of the American Council of Life Insurers.

During the accumulation phase, a customer has an investment account, and may withdraw the balance in a lump sum or in regular or varying amounts, at regular or ad hoc intervals. D.R.0331-347. The customer may add more money, or may remove or surrender the entire amount. *Id.* They may change their Annuity Date (*i.e.*, the contractual defined date of annuitization) and they may change which of the six annuity payout options they want. *Id.* There can be no "annuity" during this accumulation phase because all of the actual "terms" of that annuity (start date, amount of premium, payout terms) are not agreed upon, and are still susceptible to change by customer. It is **only** when the customer permits the money to annuitize on the Annuity Date that those terms finalize and an annuity may be considered "purchased."[1] After all, the hallmark of an annuity is payment by the insurance company, and by the express terms of its contract, Petitioner only becomes contractually obligated after the Annuity Date and annuitization occurs to start making payments to the customer consistent with the customer's chosen annuity option. *Id.* Before that Annuity Date, the customer has total control over the dispensation of that money during the

[1] Petitioner argues that to the extent a "second" contract is needed, any "second" contract to purchase an annuity is created when a customer chooses to not withdraw or surrender their money and permits annuitization to occur.

accumulation phase, and can withdraw it all without Petitioner ever having to pay under any of its six annuity options. *Id.; see also* D.R. 0034.

After annuitization on the Annuity Date, the customer no longer has an account balance, cannot make additional depositions or withdraws, and cannot exercise control over the stream of payments; but this is the point at which Petitioner begins making the agreed-upon payments. *Id.; see also* D.R. 0034. Given the specific authority and obligations imposed upon the parties by the contract during the accumulation and annuitization phases, Petitioner's contract only truly becomes an annuity upon annuitization.

The operation and terms of Petitioner's contract is actually entirely consistent with the testimony of Respondent's own representative. Rhonda Hartwell, the Financial Reporting Manager in the Respondent's Financial Accounting Unit, testified extensively as to her understanding of deferred contacts, and consistently referred to annuitization as the point that a deferred annuity contract "becomes an annuity" and the insurance company "purchases their annuity contract." D.R.0288-291. She reiterated that prior to that point, money is just going into a "savings account" and confirmed that "you do not pay tax" while it is in the "savings period." *Id*. Given the hypothetical of a person who entered into a deferred annuity contract with Petitioner and paid $1,000.00 in premiums each year for ten years, and opts to annuitize, Ms. Hartwell confirmed that no tax would be imposed in any of those ten years preceding annuitization or "becoming an actual contract." *Id.* Given this testimony, and the contract's express terms for accumulation and annuitization, Petitioner's contract "provides for an accumulation of money to purchase annuities at future dates" and is eligible for back-end election. This appeal should resolve in Petitioner's favor.

II. The Undisputed Chronology Shows There Were Decades Of Consistent Practice in Administering the Annuity Tax Until This Tax Was Repealed

Respondent would have this Court brush aside or give little consideration of the decades of tax years in which Petitioner submitted its annuity tax returns consistent with its back-end election, without any issues. To briefly summarize the undisputed chronology:

- **December 3, 2008**: Petitioner made its back-end election, which Respondent confirmed in writing. D.R.0353.
- **2008**: Petitioner reported its annuity tax consistent with its back-end election without issue. D.R.0030; D.R.0161-164; D.R.0216-217.
- **2009**: Petitioner reported its annuity tax consistent with its back-end election without issue. D.R.0030; D.R.0161-164; D.R.0216-217.
- **2010**: Petitioner reported its annuity tax consistent with its back-end election without issue. D.R.0030; D.R.0161-164; D.R.0216-217.
- **2011**: Petitioner reported its annuity tax consistent with its back-end election without issue. D.R.0030; D.R.0161-164; D.R.0216-217.
- **2012**: Petitioner reported its annuity tax consistent with its back-end election without issue. D.R.0030; D.R.0161-164; D.R.0216-217.
- **2013**: Petitioner reported its annuity tax consistent with its back-end election without issue. D.R.0030; D.R.0161-164; D.R.0216-217.
- **2014**: Petitioner reported its annuity tax consistent with its back-end election without issue. D.R.0030; D.R.0161-164; D.R.0216-217. Additionally, as Ms. Hartwell testified, in 2014, the Respondent still did not fully understand annuity tax treatment

and relied on the industry and annuity tax provisions of other states (including California and Nevada) to provide education and guidance. D.R.00270-271.[2]

- **November 17, 2015**: Petitioner receives an e-mail 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 E-mail"). Ms. Goolsby informs Petitioner in that e-mail that "Back-end companies must report and pay taxes on any previously reported deferred annuity **that annuitizes**, including any earnings (interest/dividends)" and confirms Petitioner is taxed on the back-end. *Id.* (emphasis added). Ms. Goolsby does not raise any issues with Petitioner's calculation of annuity tax consistent with the Original Notices or Amended Notices. *Id.* Petitioner subsequently reported its annuity tax for tax year 2015 consistent with its back-end election and the Goolsby E-mail without issue. D.R.0030; D.R.0161-164; D.R.0216-217.[3]
- **2016**: Petitioner reported its annuity tax consistent with its back-end election and the Goolsby Email without issue. D.R.0030; D.R.0161-164; D.R.0216-217.
- **In March 2017** the West Virginia Senate attempts to eliminate the annuity tax by passing S.B. 464; the bill does not pass the House of Delegates.

[2] Given the testimony that Respondent specifically looked to and relied upon the annuity taxation laws of California and Nevada in interpreting West Virginia's annuity tax provisions, then it is absolutely correct for this Court to do so now upon appeal. Respondent cannot openly rely on other states for guidance, and then claim the law of those same states is of "no moment" as argued in Respondent's brief. Thus, the Court should consider the statutes and administrative decisions of California and Nevada on this issue, which are fully articulated in Petitioner's Brief Section V(5) and the Amicus Brief.

[3] Respondent attempts once again to separate itself from the Goolsby E-mail, but instead further confuses the issue even more so than when first presented to the Hearing Examiner, who found it confusing even then. *See* Footnote 4 of Petitioner's Brief. To attempt to clarify this point: Petitioner maintains that it properly interpreted the Goolsby Email to say what is plainly said—to tax deferred annuities upon annuitization.

- **2017**: Petitioner reported its annuity tax consistent with its back-end election and Goolsby E-mail without issue. D.R.0030; D.R.0161-164; D.R.0216-217.
- **In March 2018** the West Virginia Senate again attempts to eliminate the annuity tax by passing S.B. 297; the bill once again fails to pass the House of Delegates.
- **2018**: Petitioner reported its annuity tax consistent with its back-end election and the Goolsby Email without issue. D.R.0030; D.R.0161-164; D.R.0216-217.
- **January 24, 2019** Respondent (by Melinda Kiss, Assistant Commissioner of Finance for the Offices of the Insurance Commissioner) provides a Fiscal Note to the state legislature to accompany S.B. 30, the third attempt to repeal the annuity tax, stating "a portion of those annuities **may be surrendered prior to annuitization and therefore not subject to the tax**. It is unknown what portion of the deferred back-end annuities **will fail to annuitize**." (emphasis added).[4]
- **March 9, 2019** the West Virginia Legislature enacted S.B. 30 and eliminates the annuity tax for tax years after January 1, 2021.
- **2019**: Petitioner reported its annuity tax consistent with its back-end election and the Goolsby E-mail without issue. D.R.0030; D.R.0161-164; D.R.0216-217. The tax form for this year 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 Respondent's instructions for

[4] The Court may take judicial of the legislative history of S.B. 30, including the public filing of the Fiscal Note associated therewith, which is available at: https://www.wvlegislature.gov/Fiscalnotes/FN(2)/fnsubmit_recordview1.cfm?RecordID=733251001 (last accessed Jan. 10, 2024). *See State ex rel. City of Charleston v. Sims*, 132 W. Va. 826, 54 S.E.2d 729 (1949) (holding courts may judicially notice legislative enactments and current events of public nature and are not required to close their eyes to things which are in plain view, especially in matters concerning government of West Virginia.)

completing Line No. 5C in the 2019 tax form state: "Section II Back-end only – Enter the total prior deferred annuities **that have annuitized**." *See* Petitioner's Brief Section (V)(5)(b) (emphasis added).

- **2020**: Petitioner reported its annuity tax consistent with its back-end election and the Goolsby E-mail without issue. D.R.0030; D.R.0161-164; D.R.0216-217. The Respondent's tax forms for that year state that annuity tax being assessed based on 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 Respondent's instructions for completing Line No. 5C in the 2020 tax form state: "Section II Back-end only – Enter the total prior deferred annuities **that have annuitized**." *See* Petitioner's Brief Section (V)(5)(b) (emphasis added).
- **January 1, 2021**: S.B. 30 (2019 Regular Session) goes into effect and the annuity tax is repealed. *See* W.Va. Code § 33-3-15(a).
- **May 12, 2022**: Respondent issued a "Notice of Underpayment to Petitioner" for Petitioner's alleged underpayment of annuity tax for Tax Years 2019 and 2020 (the "Original Notices"), 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). This is the first notice of any alleged underpayment of annuity taxes ever received by Petitioner.
- **July 11, 2022:** Petitioner seeks appeal of the Original Notices, as they impermissibly assess tax on the amount of money *withdrawn* by customers prior to annuitization under the contract, in clear violation of West Virginia Code § 33-3-15. D.R.0001-2.

- **2022**: Respondent withdraws the Original Notices acknowledging that it was incorrectly applied to money withdrawn by customers. D.R.0035 ¶8; 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).
- **January 9, 2023**: Respondent issued the operative "Notice of Underpayment" for 2019 and 2020 (the "Amended Notices"). D.R.0003-6; D.R.0167-172; D.R.0365-366. Upon information and belief, other taxpayers paying the annuity tax received similar underpayment and penalty notices at or around this time, which have been opposed on similar grounds of improper annuity tax 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"). This is the first notice Petitioner received that Respondent did not consider its contract eligible for back-end election.

Given this undisputed chronology, there were decades of understanding between the parties. Petitioner filed the same way for 14 years without Respondent questioning whether its contracts constitute "an agreement which provides for an accumulation of money to purchase annuities at future dates" or whether it was eligible for back-end election. Instead, during those 14 years, there was ample confirmation that Petitioner was correctly reporting its annuity considerations prior to annuitization, including Respondent's own tax forms and instructions, its Fiscal Note to the state legislature, and the Goolsby Email. It was only after the annuity tax was repealed in 2021 that an issue arose.

That issue first arose in May 2022 when the Respondent issued the Original Notices and deviated from their well-established administration of the annuity tax. The Original Notices assessed the annuity tax on the money **withdrawn** by customers prior to annuitization. This is absolutely and undisputedly wrong under West Virginia Code § 33-3-15, which only taxes annuity considerations, or the money **put in** by customers. The Respondent's miscalculation in the Original Notices was not a scrivener's error or a simple transposed number. It was a fundamental misapplication of the annuity tax statute to the wrong stream of revenue. Petitioner raised its appeal to the Original Notices, and Respondent was forced to admit that the Original Notices were wrong, and withdraw them. D.R.0295-296 (admission original notices were wrong). To date, Respondent has still never explained how or why such a fundamental error occurred in administering the annuity tax statute, even though it is the same statute at issue before this Court. Regardless, after it withdrew the Original Notices, Respondent issued the operative Amended Notices in January 2023.[5] However, in the Amended Notices, Respondent again misapplied the statute—only this time, it taxed the correct revenue stream (*i.e.,* annuity considerations/premium) but at the wrong point in time: at contract formation (*i.e.*, front-end) instead of annuitization *(i.e.*,, back-end). Instead of withdrawing these as were properly done with the Original Notices, Respondent attempts to justify its new two-contract requirement, despite admitting that it had never assessed annuity taxes against Petitioner in the manner contained in Amended Notices in any prior tax year.

[5] Petitioner notes that the Amended Notices actually claim that the "deferred annuities previously reported on prior tax returns as Deposit Type Contracts should have been reported for taxation since the funds were annuity contracts." D.R.0356-366. However, Respondent's brief does not appear to argue about deposit contracts, death benefits, or how they differ from annuity contracts in any meaningful way, despite it being the proffered basis of the underpayment of taxes. The brief, with its focus on "two contracts" requirement, may therefore constitute the third different theory from Respondent under which Petitioner allegedly underpaid annuity taxes in 2019 and 2020. This is precisely why deference is not warranted. *See* Petitioner's Brief Sections V(C)(4) and (V)(E)(1).

D.R.0233-234 (testimony confirming the same).[6] The Amended Notices therefore represent a new administration of West Virginia Code § 33-3-15, and a deviation from the decades of administering and paying this tax between the parties.

Respondent glosses over all of this in its brief: the undisputed chronology of Petitioner's tax filings, the potential impact of the repeal of the annuity tax, the Fiscal Note, Respondent's tax forms, and the withdrawn Original Notices. But this is all imperative to understanding the case before this Court. Respondent's prior representations to Petitioner in the Goolsby Email and Original Notices, to taxpayers generally in its tax forms and instructions, and to the state legislature in its Fiscal Notice must all be considered to show how Respondent is currently deviating from its prior administration of the annuity tax (in addition to deviating from the statute's clear wording). If nothing else, it must be considered that, with its Original Notices, Respondent has already previously miscalculated and maladministered this same annuity tax against Petitioner in these exact same tax years. **It is doing so again here**. However, instead of properly withdrawing the Amended Notices, as it did the Original Notices, Respondent has doubled down on its latest position that West Virginia Code § 33-3-15 requires two contracts. Thus, in addition to the other reasons listed here, Respondent's "two contracts" requirement is not supported by the decades of filings between Petitioner and Respondent leading up to the repeal of the annuity tax summarized above. Respondent openly admits that it is imposing taxes upon Petitioner in the Amended Notice

As explained in Petitioner's brief and herein, Respondent's "two contracts" requirement is not supported by the express language of West Virginia Code § 33-3-15 or the realty of the insurance industry. Certainly, Respondent's current administration of the annuity tax is not

[6] Respondent argues somewhat confusingly about the proper deference that it must be afforded, but Petitioner remains steadfast that Respondent's admission that the Amended Notices include a new interpretation or imposition of the annuity tax different from prior years, is, by itself, sufficient to prevent deference. *See* Petitioner's Brief (V)(E)(1).

supported by the prior representations of Respondent or the decades of annuity tax filings between Petitioner and Respondent preceding repeal of that tax. Consequently, the appeal should resolve in Petitioner's favor.

III. Respondent's "Two Contracts" Requirement Would Have Absurd Results

Respondent's "two contracts" requirement would also lead to absurd taxation results that are prevented by classic statutory interpretation precedent.

First, Respondent's requirement would render the back-end election found in West Virginia Code § 33-3-15 meaningless, with taxpayers unable to actually make use of it. Putting Respondent's imagined two contract requirement into action, there would be a first contract in which (a) money could be put in (or taken out) at various times and permitted to accumulate, and (b) there is an obligation to use that money to purchase an annuity in the future, but not purchase the annuities.[7] Thus, the first contract would **never** have any "annuity considerations" to tax under the statute, because under Respondent's theory, the first contract is not an annuity at all. A second contract would be the formal purchase of an annuity, but under the Respondent's current position, the second contract could not have an actual option to elect front-end or back-end taxation because it is a one-time transaction. Because it is a one-time transaction, the second contract would **always** have to be taxed on the front-end because the front-end is the only "year" in which the insurance company "collected and received" annuity considerations. This renders a taxpayer unable to actually elect and use a back-end election, and renders that section of West Virginia Code § 33-3-15 meaningless and non-functional. In this state, it is presumed that "the legislature had a purpose in the use of every word, phrase and clause found in a statute and intended the terms so used to be effective" and, as a result, "an interpretation of a statute which gives a word, phrase or clause

[7] Petitioner's contract simply does both (a) and (b) in the same contract in which the annuity is purchased.

thereof no function to perform . . . must be rejected as being unsound." *See Osborne v. United States*, 211 W. Va. 667, 673, 567 S.E.2d 677, 683 (2002) (quoting Syl. pt. 7, *Ex parte Watson*, 82 W.Va. 201, 95 S.E. 648 (1918)). In enacting West Virginia Code § 33-3-15, the legislature intended to provide life insurance companies selling annuities with a meaningful option to select back-end taxation for annuity tax. Respondent's position would deny such an option and render it meaningless and without a function. Accordingly, it must be rejected.

Furthermore, Respondent's two-contract requirement would impermissibly tax annuities twice. Close scrutiny of the dollar figures in the Amended Notices reveals that Respondent taxed not only those figures reported as annuity considerations by Petitioner, but also the amounts listed as deposit contracts.[8] As Ms. Hartwell testified, Respondent chooses to consider the accumulation phase of a deferred annuity contract to be a deposit contract. D.R.0288-291. The administration of annuity tax in the Amended Notices confirms that is their position. However, If Respondent is taxing deposit contract proceeds as annuity considerations, then it may be double taxing in its two-contract interpretation. The same first contract would exist to accumulate money, but it would be assessed annuity tax because it is a deposit contract, despite not actually purchasing an annuity—consistent with the Amended Notices and Ms. Hartwell's testimony. This taxation could occur on the front-end or the back-end of the first deposit contract, but it would be taxed nonetheless. That same money would then be used to purchase an annuity in the second contract and, as explained

[8] There is absolutely no basis to assess annuity tax on consideration for a deposit contract. W. Va. Code § 33-3-15(b) clearly states that the tax is imposed upon "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." Simply put, annuities and deposit contracts are different. Ms. Hartwell herself testified as to this. D.R.0288-291. Petitioner reiterates that it has properly categorized and reported annuity premiums and deposit contracts separately in the tax years at issue (and all prior tax years). Annuity premiums were properly reported on lines C1 and C2 and the taxable annuities were reported on line C9 of the applicable forms.

above, that second contract would certainly fall within the taxation of West Virginia Code § 33-3-15 because it has "annuity considerations." This means that the same stream of money is assessed with the same annuity tax twice: once when it goes through the first deposit contract, and again when it goes through the second annuity contract. Such double taxation may be a constitutional violation, and this state's courts have long held that "in construing statutes, always presume that [double taxation] was not intended, unless the legislative intent to impose it is clearly manifest. Doubts are always resolved against it." *State ex rel. Dillon v. Graybeal*, 60 W. Va. 357, 55 S.E. 398 (1906). Accordingly, Respondent's interpretation cannot stand.

IV. Respondent Continues to Assert Willfulness Against Petitioner to Support Egregious Penalty Award, Contrary to Final Order

Throughout its brief, Respondent paints Petitioner in the worst possible light, as a scheming company that purposefully thwarted tax payments and doctored its tax returns. However, none of that is true—Petitioner simply seeks to be assessed consistent with the clear wording of the statute and decades of Respondent's practice. Critical to this appeal is the undisputed fact that the Final Order expressly found that "there was no proof that the actions of the Petitioner were willful." D.R.3656. Respondent has not appealed that conclusion. Therefore, the many mischaracterizations or continued allegations of willfulness by Respondent during this appeal are unfounded, inappropriate, and contrary to settled law in the Final Order.

Accepting the Final Order's conclusion that Petitioner did not willfully violate any law, there is absolutely no basis for the imposition of exorbitant penalties in this matter. 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." With willfulness settled, there is insufficient evidence of Petitioner's negligence in its annuity tax filings to warrant penalties. Petitioner takes legal compliance seriously, and has rigorous procedures in place to

ensure that compliance including, but not limited to, the following: multiple levels of internal review for tax return completion and filing, participation in trade groups, regular education and conferences for employees responsible for tax return completion and filing, engagement of a third-party consultant to help review tax returns prior to filing, maintaining a legal compliance team, utilizing a legislative activity team, subscribing to a tool called CODE which updates Petitioner about changes to applicable laws, and communicating regularly with Respondent. D.R.0148-151.

Furthermore, in this particular case, Petitioner filed annuity tax filings consistently for 14 years without issue, and had reasonable assurances that its filings were correct under both the Respondent's own tax forms and a reasonable interpretation of the Goolsby E-mail. Furthermore, the contracts at issue were submitted and approved by the Respondent's office per state law, and Petitioner underwent a "full review" of its annuity tax filings in or around 2015 per the Goolsby E-mail, all without any indication that Respondent disagreed with its back-end election or annuity tax returns.[9] Critically, Respondent has admitted that the annuity tax imposed in the Amended Notices was never previously imposed on Petitioner in a prior tax year, and these were the last tax years in which the annuity tax was even effective; meaning Petitioner – and, it seems, the Respondent - only became aware of this "two contracts" requirement in January 2023, and Petitioner had no opportunity to correct its filings before penalties were imposed.[10] Given the facts of this case as a whole, there is no negligence and no basis for such penalties.

[9] Given the legal requirement to submit its contracts to the Respondent's office for approval prior to offering it to customers, it would be impossible for Petitioner to craft contracts to avoid annuity tax and/or give it an unfair advantage. As demonstrated by the amicus brief, Petitioner's products are in line with the industry standard practice of deferred annuities.

[10] In a similar vein, on the issue of Respondent failing to provide Petitioner with credit for overpayments of annuity tax in prior years, Respondent argues in its brief that Plaintiff should simply amend its returns for those prior years to try and take advantage of any overpayments. Not only is this contrary to the credit statute, but impossible, as those tax years have closed and are outside of the statute of limitations. These are simply additional examples of how Respondent's self-serving timing of the Amended Notice deprives Petitioner of its rights and rightful taxation. It also demonstrates how Respondent failed to provide meaningful opposition on the issue of credit; for this reason, the appeal should resolve in Petitioner's favor on this issue for the reasons outlined fully in Section (V)(F) of Petitioner's brief.

This is particularly true given the severe penalties sought in this case, which increased exponentially between the Original Notices and Amended Notices, even though the underlying alleged misconduct (*i.e.,* Petitioner filing annuity tax incorrectly) was the same. The penalties speak for themselves, and rose from roughly $109,923 in the 2019 Original Notice to more than $955,000 for that year in the Amended Notices—constituting an increase of more than 750%. *See* D.R.0365; D.R.0354-355; D.R.0361-362. Tax year 2020 saw a similar increase, as penalties went from $120,259 in the Original Notice to more than $464,000 in the Amended Notice—a nearly 300% increase. *Id.*[11] Thus, the penalties started steep, then rose considerably when Respondent amended them.

Simply put, these are not facts that warrant the imposition of any penalties, and particularly not the draconian penalties sought by Respondent. The appeal should resolve on this issue in Petitioner's favor.

V. Respondent's Brief Fails to Address Arguments

Petitioner ends by noting that large portions of its brief were not addressed in a meaningful way in the Respondent's brief, indicating they are not contested. Specifically, Respondents failed to address Petitioner's arguments regarding:

- The Final Order invented legislative intent in Section V(D)(4);
- Deposit style contracts and death benefits in Sections (V)(D)(1)-(3);
- Immediate annuities in Section V(A)(5);
- Internal inconsistencies in the Final Order at Footnote 1; and

[11] Finally, but interestingly, the Amended Notices to not expressly impose interest, whereas the Original Notices did. *Compare* D.R.0365, D.R.0354-355, and D.R.0361-362.

- Language of Respondent's own tax forms in Section V(E).

Because Respondent's brief fails to address key issues raised in Petitioner's brief and in the Final Order that was appealed, those issues are considered conceded, and the appeal should be resolved in Petitioner's favor. *See, Frankum v. Bos. Sci. Corp.*, No. 2:12-CV-00904, 2015 WL 1976952, at *14 (S.D.W. Va. May 1, 2015) (Judge states "The plaintiff fails to respond to this argument, and I presume that the plaintiff concedes that [argument]. I decline to raise counterarguments on their behalf."); Fed. R. App. P. 10(d)("If the respondent's brief fails to respond to an assignment of error, the Intermediate Court or Supreme Court will assume that the respondent agrees with the petitioner's point of view of the issue.").

CONCLUSION

Nothing in the Respondent's brief meaningfully challenges the legal arguments and authority presented by Petitioner in its brief. Petitioner's contracts qualify for back-end election under the clear wording of both contract and statute. All evidence confirms this is the proper conclusion including, but not limited to, Respondent's representations in its tax forms and instructions, its representations to the state legislature in the Fiscal Note, the Goolsby Email, the common practice of the industry and in sister statutes administering an identical annuity tax as described in the Amicus Brief, and the decades of Respondent administering this tax prior to its appeal. Accordingly, this appeal should resolve in Petitioner's favor, and the 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.

Respectfully submitted,

By counsel,

/s/ Alexander Macia

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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 REPLY BRIEF** has been made upon counsel for the Respondent on January 10, 2024, 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
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