BEFORE ALLAN L. MCVEY, INSURANCE COMMISSIONER
OF THE STATE OF WEST VIRGINIA

In the Matter of:

FORETHOUGHT LIFE INSURANCE COMPANY (NAIC # 91642)

Administrative Proceeding No. 22-1C-02274

FINAL ORDER

Findings of Fact, Conclusions of Law and
Order Adopting Recommended Decision

On a prior day, to-wit, June 13, 2023, the Hearing Examiner in this matter submitted his Recommended Decision, appended hereto, containing findings of fact, discussion, analysis and conclusions of law. After consideration thereof, the undersigned Insurance Commissioner makes the following additional and/or clarifying findings of fact and conclusions of law, and makes the order as set forth hereinbelow:

Findings of Fact

1. Forethought Life Insurance Company ("Forethought") has filed tax forms as a back-end taxpayer for premium taxes on deferred annuities. Forethought's premiums were for individual purchased deferred annuities. Forethought incorrectly characterized these deferred annuities as deposit contracts.

2. An agreement which provides for an accumulation of money to purchase annuities at a future date, or a deposit account held for the future purchase of an annuity is eligible to elect front-end or back-end premium taxation. However, this front-end/back-end election is not available for already purchased annuities. Forethought has evaded the payment of premium taxes by characterizing their purchased deferred annuity contracts as deposit agreements instead of deferred annuity contracts. However, evidence adduced in this matter clearly shows Forethought sold

"Single Premium Deferred Annuity Contract[s] or Flexible Premium Individual Deferred Annuity Contract[s]" to their policyholders and the insurance premium annuity tax should have been paid when the annuities were purchased.

3. Forethought filed its insurance premium tax forms with the Offices of the Insurance Commissioner ("OIC") as a back-end taxpayer essentially alleging that it did not owe premium taxes on deferred annuities until the previously sold annuity contracts "annuitized." However, evidence adduced showed that Forethought's collected premiums from policyholders were for individual purchased deferred annuities and that Forethought incorrectly characterized these deferred annuities as deposit contracts. (Trans., p. 138, lines 1 -23). In fact, the policies that Forethought sold were titled "Single Premium Deferred Annuity Contract[s] or Flexible Premium Individual Deferred Annuity Contract[s]".

4. Because these premiums were for deferred annuities, insurance annuity premium taxes were due at the time funds were accepted by Forethought from its policyholders for purchased annuity contracts or policies.

Conclusions of Law

1. Article 3, Chapter 33 of the West Virginia Code sets forth various insurance premium taxes, including the insurance premium tax, additional insurance premium tax, additional fire and casualty insurance premium tax, annuity premium tax, and retaliatory tax. Specifically, W.Va. Code §33-3-15 provides that every life insurer transacting insurance in West Virginia shall make an annual tax return to the Commissioner of the gross amount of annuity considerations, or premiums, collected and received on its annuity business transacted in West Virginia. The premium tax due on annuities is one percent of the "gross amount of the annuity considerations, less annuity considerations returned and less termination allowances on group annuity contracts." See W.Va. Code 33-3-15.

2. W.Va. Code §33-3-15 further provides that, 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 to be collected and received upon receipt or upon actual application to the purchase of annuities. This is the front-end/back-end election. However, in this instance, Forethought had no secondary contract or agreement with the policyholder to purchase annuities at future dates. Instead, Forethought sold only one "Single Premium Deferred Annuity Contract or Flexible Premium Individual Deferred Annuity Contract[s]" to its policyholders but failed to remit taxes at the time the annuity was sold or when additional premiums were collected. A front-end/back-end election is not applicable once premium to purchase an annuity has been received and accepted by the life insurance company.

3. Pursuant to W.Va. Code §33-43-8, the Commissioner may issue assessments for tax liabilities and related charges, or any portions thereof, which are due and payable but unpaid. If the taxpayer has filed a return for the tax and taxable year at issue, the Commissioner may issue the assessment for tax liabilities within three years of the filing date for the return or the date upon which the return actually was filed, whichever comes later.

4. W.Va. Code § 33-43-9(d) further specifically provides that "assessments 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." In the instant matter, Forethought Life Insurance Company has not met its burden of proving that the assessment issued by the Insurance Commissioner's Financial Accounting Tax Unit is incorrect or contrary to law.

Order

It is, therefore, ORDERED as follows:

1. The undersigned, Insurance Commissioner of the State of West Virginia, does adopt and approve the Recommended Decision of the Hearing Examiner, appended hereto, as well as the findings of fact and conclusions of law contained therein.

2. Even if, as Forethought argued, the Commissioner previously issued an "interpretation" of W.Va. Code §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, that 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 since the language of W.Va. Code §33-3-15 is clear that every life insurer transacting insurance in West Virginia shall make an annual tax return to the Commissioner of the gross amount of annuity considerations, or premiums, collected and received on its annuity business transacted in West Virginia, and further since it is also clear that Forethought sold multiple "Single Premium Deferred Annuity Contract[s]" without paying insurance annuity premium taxes thereon, relying upon prior misunderstanding or misinterpretations of the applicable tax law is unnecessary.

3. The Petitioner, Forethought, failed to prove that the OIC violated West Virginia Code § 33-43-9(d).

4. Inasmuch as orders entered by the Insurance Commissioner are subject to judicial review in the Intermediate Court of Appeals as set forth in W.Va. Code § 51-11-4(b)(4), any person aggrieved by this order may, within 30 days after the of entry of the judgment being appealed, file an appeal as set forth in W.Va. Code § 33-2-14 and W. Va. R.A.P., Rule 5(b). Pursuant to W.Va. Code §33-43-9(e), if Forethought does not timely appeal this order, it becomes final as of the

expiration of the period during which the taxpayer may have brought an appeal. Upon becoming final, this order shall be conclusive of the liability of Forethought Life Insurance Company and shall not be subject to either administrative or judicial review.

5. Accordingly, the petition of Forethought, and the same is hereby, DENIED and DISMISSED.

ENTERED this 21ST day of June 2023.

Allan L. McVey, CPCU, ARM, AAI, AAM, AIS
Insurance Commissioner

BEFORE ALLAN L. MCVEY, INSURANCE COMMISSIONER
OF THE STATE OF WEST VIRGINIA

In the Matter of:

FORETHOUGHT LIFE INSURANCE COMPANY (NAIC # 91642)

Administrative Proceeding No. 22-IC-02274

RECOMMENDED DECISION
OF THE HEARING EXAMINER

On February 16, 2023, a hearing was held before Hearing Examiner Mark W. Carbone, Esquire, at the Offices of the Insurance Commissioner. Forethought Life Insurance Company ("Forethought" or "Petitioner"), appeared by counsel Alexander Macia, Esquire. Gregory A. Elam, Esquire, and William Ballard, Esquire, appeared on behalf of West Virginia Offices of the Insurance Commissioner ("WVOIC").

Based upon a thorough review of the entire record in this case, the undersigned now makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Forethought is an insurance company licensed to do business in West Virginia and forty-nine other states. It has been licensed in West Virginia since 1986. (Tr. P. 14) Forethought first began its operations as a funeral benefits company and currently sells annuities and funeral benefits insurance. (Tr. P.17)

2. The West Virginia Offices of the Insurance Commissioner is an agency created by the West Virginia Legislature that promulgates and adopt rules relating to the Insurance industry.

3. As a West Virginia licensed insurer that sells annuities, Forethought is subject to paying annuity taxes under W.Va. Code §33-3-15(b).

4. On or about May 12, 2022, the WVOIC sent Forethought a Notice of Underpayment for the years 2019 and 2020. (Tr. P. 32; Petitioner's Exhibits 3 and 4)

5. According to the testimony of Justin MacNeil, Tax Director for Forethought, the purpose of these notices was to inform Forethought that its method of calculating the annuity tax was incorrect. He went on to say that the WVOIC notice indicated that the annuity tax should be applied to any withdrawals from the contracts while the contract was in the accumulation phase.[1] (Tr. P. 32; Petitioner's Ex. 3 and 4)

6. Upon receipt of the May 12, 2022, Notices of Underpayment, Forethought challenged the Notice of Under Payment and requested a hearing. (Tr. P. 34; Petitioner's Ex. 5)

7. After the Petitioner filed a request for a hearing, the WVOIC reviewed the Notice of Underpayment dated May 12, 2022, and determined it was incorrect. The WVOIC found out that they had calculated the tax on the withdrawals made by customers. This was in conflict with W.Va. Code §33-3-15(b). (Tr. P. 98,139, 162 – 163; Petitioner's Ex. 3, 4)

8. On January 9, 2023, the WVOIC issued another Notice of Underpayment for the years 2019 and 2020. The Petitioner challenged the second Notice of Underpayment and requested a hearing. The hearing was held on February 16, 2023. (Tr. P. 37; Petitioner's Ex. 6, 7)

9. Forethought asserted that the second Notice of Underpayment ignored the Petitioner's back-end selection when determining the amount of taxes owed. The Petitioner argued that the second Notice of Underpayment calculated the tax rate as a front-end calculation. However, the second Notice did tax premiums paid and not withdrawals, thus correcting the alleged error in the May 12, 2022. (Tr. P. 38)

[1] Each of the parties agree that there are two phases in an annuity contract, the accumulation phase and the annuity phase.

10. The Petitioner elected to be on a back-end basis in 2008. Under West Virginia law, once a selection is made to be on a front-end or a back-end basis it cannot be changed without the permission of the West Virginia Insurance Commissioner. (Tr. P. 82; Petitioner's Ex. 8)

11. Mr. MacNeil testified that approximately 5% of the contracts that Forethought sells end up being converted into an annuity. Mr. MacNeil also stated that they are selling their annuity product as an accumulation vehicle. (Tr. P. 48 – 49)

12. Forethought characterizes the annuities it sells as deferred annuities. As a deferred annuity, the client will put in consideration and will receive a guaranteed rate of return. (Tr. P. 19)

13. Under most of the Petitioner's contracts, there is a surrender fee for the first five to seven years. After that time, the policyholder can withdraw any, or all of, its consideration without penalty. This can occur anytime up until sixty or ninety days before the money is placed into an annuity, depending on the contract. Typically, when it is time to convert the consideration into a distribution, the clients will withdraw their consideration and purchase a different vehicle of investment, if it has a better rate of return. (Tr. P. 20, 54)

14. In the contracts entered into with the Petitioner, Forethought claims that these contracts are not annuities until the deposits are used to purchase an annuity. Prior to the conversion into an annuity, the Petitioner asserts that this is the accumulation phase and is exempt from taxation until it is converted. (P. Tr. 21-22)

15. The Petitioner presented a sample of the annuity policies. The title of the sample policies stated at the top of the contract states it is a "Single Premium Deferred Annuity Contract". The WVOIC took the position that the statement on top of the contract was sufficient to classify this as an annuity contract. There are no other contracts entered into between the insured and the Petitioner when the insured allegedly purchases an annuity. (Tr. P. 57-58, 148; Petitioner's Ex. 1)

16. On November 17, 2015, an email was sent by Drema Goolsby of the WVOIC to Lisa Ridenour, Assistant Vice-President of Tax, of Global Atlantic Financial.[2] This email was generated because the WVOIC was reviewing the Insurance Industry's application of annuity taxes and treatment of annuities. (Tr. P. 78; Petitioner's Ex. 8)

17. In relevant parts, the email states, in numbered paragraph 7, the following: "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 (sic) cannot be deferred." (Petitioner's Ex. 8)

18. It was the testimony of Lisa Ridenour that upon receiving that email, she was instructed to report as annuitized annuities: death benefits, death benefit that were paid out, as well as guaranteed withdrawal benefit payouts.[3] Due to these instructions, the Petitioner amended its 2012, 2013 and 2014 tax returns. (Tr. P. 80 -81)

19. Ms. Ridenour went on to testify that she was a little confused because it appeared that the WVOIC considered that distributions can be taxed even though the distribution happened before the annuitizing occurred. She stated that the WVOIC characterized these types of contracts to be annuity contracts. (Tr. P. 82; Petitioner's Ex. 8)

20. After receiving the email from Ms. Goolsby, the Petitioner reported and paid taxes on those policies that had annuitized. It also reported consideration received for the policies which they believed had not annuitized but would then back out those considerations on the tax return sent to the WVOIC. The Petitioner believed that this was proper since there was a place on the

[2] The Petitioner, Forethought, is a subsidiary of Global Atlantic Financial

[3] The terms payout and disbursements in this decision refer to the term annuitization as used by the Petitioner in its arguments.

form for those deferred annuities that have not annuitized. (Tr. P. 83)

21. Ms. Hartwell, Financial Reporting Manager in the Financial Accounting Unit of the WVOIC, who participated in several meetings prior to the 2015 Goolsby email, testified that it was her understanding that when the insurance companies referred to annuitization they were referring to the point in time when the annuity was purchased.[4] Ms. Hartwell went on to explain that when the email stated annuitization it meant that the annuity had been purchased. (Tr. P. 132; Petitioner's Ex. 8)

22. Other than the 2015 email, Ms. Ridenour stated that the Petitioner has not received any other communication or directive from the WVOIC about the method to tax annuities until it received the findings from an audit conducted by the WVOIC. (Tr. P. 84)

23. There was no evidence presented that the Petitioner ever attempted to contact the WVOIC for clarification following the receipt of the 2015 Goolsby email.

24. Exhibit 9 is the annual West Virginia premium tax return for 2019, which was filed by the Petitioner. This return is filed for all of the annuity considerations that Petitioner considers to be taxable based on the email from Ms. Goolsby. The return also is used for reporting additional premium taxes, such as property and casualty premiums and taxable life and accident premiums. Petitioner reported the tax payments they have made in the past year and if there is any tax due, that is paid by March 1 of the following year. (Tr. P. 86 - 87; Petitioner's Ex. 9)

25. Schedule C and the supplemental Schedule on the tax return form are the sections that break down the annuity tax calculation. In 2019, the Petitioner reported on schedule C all of the contract premiums for annuities (referred to by the witness as deposit type of contracts), SPIAs, death benefits and guaranteed withdrawal benefits. The total in 2019 was $103 million. The

[4] Ms. Hartwell was also copied on the Goolsby email.

Respondent then backs out annuity considerations which have not annuitized leaving $10,201,398. The Petitioner then applies the 1% tax to that amount. In 2019, the Petitioner did not have any back-end accounts that annuitized. The same calculation was made for the year 2020. (Tr. P. 89 -96; Petitioner's Ex. 9 and 10)

26. In the January 9, 2023, Notice of Underpayment, the WVOIC alleged that the Petitioner underpaid $929,294.57 for the year 2019. It also stated that the penalty for that year was $26,100.00 under W.Va. Code §33-43-7a. The Notice of Underpayment per W.Va. Code § 33-43-7b stated that the penalty under that Code section was $929,294.57. The total owed for 2019 was $1,884,689.14. (Petitioner's Ex. 6)

27. In the January 9, 2023, Notice of Underpayment, the WVOIC alleged that the Petitioner underpaid $447,424.89 for the year 2020. It also stated that the penalty for that year was $16,975.00 under W.Va. Code §33-43-7a. The Notice of Underpayment per W.Va. Code § 33-43-7b stated that the penalty under that Code section was $447,424.89. The total owed for 2020 was $911,824.78. (Petitioner's Ex. 6)

28. The total for both 2019 and 2020 that the WVOIC alleged was owed by the Petitioner was $2,796,513.92 (Petitioner's Ex.6)

29. It was the testimony of Rhonda Hartwell that the Petitioner should not have backed out those annuity premiums from the Petitioner's tax returns since the contract entered into between the Petitioner and the insured at the beginning of the process was the actual purchase of the annuity. (Tr. P. 136)

30. The Petitioner argued that both California and Nevada have similar statues as West Virginia and the Petitioner had been audited recently in California and was not penalized for not recognizing the initial contract as the purchase of an annuity. (Tr. P. 104)

31. Ms. Hartwell testified that only two states, California and Nevada, had front-end and back-end options, which would make those state laws comparable to West Virginia law. She was unaware of any actions taken against the Petitioner in those states. (Tr. P. 173)

32. The Petitioner also stated that any taxes levied concerning 2019 and 2020 would typically be taken from the contributions provided by the insured. However, in this instance many of those insureds have withdrawn all of their contributions. Therefore, any penalty would have to be paid by the Petitioner, which seems to imply that the penalty would be an unfair burden on the Petitioner. (Tr. P. 42)

33. Mr. MacNeil testified that if the Petitioner was forced to go back to the customers for the annuity tax, the customers would be unhappy and the agents selling its product would push back on collecting the tax at a later date. (Tr. P. 42-43)

34. Ms. Ridenour went over the West Virginia State Tax form and admitted that those contracts that had not annuitized were backed out on the form. For instance, in 2019 the Petitioner backed out $92,929,457.

35. The Petitioner claimed that it did not get any credit for taxes paid on prior annuity payments in the January 2023 Notice of Underpayment. Ms. Hartwell testified that it was not entitled to a credit because the taxes paid were for a prior year and not for the years in question. (Tr. P. 108, 140)

Issue Presented

Whether the West Virginia Offices of the Insurance Commission has properly interpreted W.Va. Code § 33-3-15 when it issued the Notice of Underpayment for the years 2019 and 2020 in 2023.

Burden of Proof

The Petitioner has the burden of proof to prove, by a preponderance of the evidence, that the decision by the West Virginia Offices of the Insurance Commissioner concerning the 2023 Notice of Underpayment is incorrect and not valid under W.Va. Code § 33-3-15.

Jurisdiction

The West Virginia Offices of the Insurance Commissioner has jurisdiction of this matter pursuant to West Virginia Code § 33-3-14a.

Analysis

The Petitioner filed an appeal with the WVOIC challenging the Agency's interpretation of W.Va. Code § 33-3-15. The Statute in question states as follows:

> (a) For the taxable years beginning on or after January 1, 2021, the tax imposed by this section is discontinued.
>
> (b) Every life insurer transacting insurance in West Virginia shall make a return to the commissioner annually on a form prescribed by the commissioner, on or before March 1, under the oath of its president or secretary, of the gross amount of annuity considerations collected and received by it during the previous calendar year on its annuity business transacted in this state and stating the amount of tax due under this section, together with payment in full for the tax due. The tax is the sum equal to one per centum of the gross amount of the annuity considerations, less annuity considerations returned and less termination allowances on group annuity contracts. All the taxes received by the commissioner shall be paid into the insurance tax fund created in §33-3-14(b) of this code. In the case of funds accepted by a life insurer under an agreement which provides for an accumulation of money to purchase annuities at future dates, annuity considerations may be either considered by the life insurer to be collected and received upon receipt or upon actual application to the purchase of annuities. Any earnings credited to money accumulated while under the latter alternative will also be considered annuity considerations. For purposes of this election, the alternative which the life insurer elected to file its tax return for the 2001 tax year or which it elects when it enters the state, whichever is later, shall be considered the life insurer's election between these alternatives. A life insurer filing a year 2001 tax return shall provide written notice to the commissioner of its election within 90 days of the effective date of this enactment. Otherwise, a life insurer shall provide written notice to the commissioner of its election within 90 days after it enters the state. Thereafter,

> a life insurer may not change its election without the consent of the Insurance Commissioner. The Insurance Commissioner may develop forms to assure compliance with this subsection.[5]

Both the Petitioner and the Respondent rely upon this Code section in arguing their cases. Both Parties agree that the Petitioner selected the back-end option is 2008.

The Petitioner claims that the Statute is clear and unambiguous therefore it cannot be interpreted by the courts and should be given its full force and effect. Citing Syl. Pt. 2, *State v. Expertly*, 135 W.Va 877, 65 S.E.2d 488 (1951). The Respondent also cites *W.Va. Health Care Cost Rev. Auth. v. Boone Mem'l Hosp.*, 196 W.Va. 326, 472 S.E.2d 411 (1996). In *W.Va. Health* the West Virginia Supreme Court held that "[i]f the language of an enactment is clear within the constitutional authority of the law-making body which passed it, courts must read the relevant according to its unvarnished meaning, without any judiciary embroidery" Syl. Pt. 3

The Petitioner, through its witnesses, states that the clear and unambiguous language of the Statute is that if you have elected the back-end taxpayer option, then the tax is not required until annuitization occurs. Ms. Ridenour testified that the tax is only applied on "considerations received and interest and dividends applied to the annuitization of that contract." However, the word annuitization does not appear in W.Va. § 33-3-15.

The net result of this interpretation is that if an insured makes premium contributions and then withdraws the monies prior to when the annuity begins distribution ("annuitization"), there is no tax paid at all. In fact, Mr. MacNeil testified that only 5% of insureds actually remain clients at the time when the annuity begins distribution. Therefore, that means 95% of annuity customers of the Petitioner pay zero taxes. Under the contracts provided by the Petitioner, the customer can

[5] In 2021 the West Virginia Legislature abolished the 1% annuity tax.

withdraw all deposits as long as they do it sixty to ninety days, depending on the contract, before the annuity begins its payout.

It does not seem reasonable that the West Virginia Legislature would impose a tax wherein 95% of the individual customers of the Petitioner could simply avoid the tax imposed by the Legislature by withdrawing the deposited money prior to the Annuity beginning distributions.

However, even assuming that the position of the Petitioner is that when you are a back-end company you do not pay any taxes until the annuity is purchased, the question then is when is the annuity purchased. The Petitioner refers to the actual payout of the annuity as the annuitization period, therefore there is no tax due until that occurs, under the Petitioner's interpretation.

In West Virginia Code § 33-3-15, in relevant parts, states "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 either be considered by the life insurer to be collected and received upon receipt or upon actual application to the purchase of annuities." (emphasis added) The Statute never uses the word annuitization but the act of purchasing the annuity.

The issue then is when is an annuity purchased. The Petitioner contends that the annuity is not purchased until it actually begins paying out funds. It calls this event annuitization. The contract presented by the Petitioner contains mortality and morbidity risks as well as a death benefit -- these are characteristics of an annuity. This is the only agreement signed by the insured. There is no later agreement to enter into an annuity. Based on the facts that the contract has mortality and morbidity risks and a death benefit as well and there is no separate contract to purchase an annuity, the Petitioner's contract appears to be the actual purchase of an annuity.

During the hearing the Petitioner provided a copy of its contract. At the very top of the contract provided are the words "Single Premium Deferred Annuity Contract." It is the WVOIC's position that this contract, since it is the only contract, is the actual purchase of the annuity, therefore, moneys paid are taxable as soon as this contract is signed. The Petitioner's argument would be more persuasive if it could prove that there were two contracts, one allowing the deposit of funds and another purchasing the annuity.

The plain and unambiguous language of the Statute is that the tax must be paid when there is an application to purchase an annuity, not when it annuitizes. If it was the intent of the West Virginia Legislature to levy the tax when the annuity annuitizes, that phrase would appear in the Statue, which it does not. The argument of the Petitioner, that the plain and unambiguous meaning to the words of the statute is binding, is an accurate determination of West Virginia law. However, in this instance the plain and unambiguous meaning of the words of the Statute is that the tax must be paid when the annuity is purchased. The reliance of the Petitioner on the plain and unambiguous reading of the Statute is faulty because under the language of its own contract it indicates that the annuity is purchased when the contract is signed. 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 purchase is the date of the only contract signed and that is the event that triggers the imposition of the taxes. Any contributions received after the contract is signed are also taxed when received.

One of the arguments the Petitioner presents is that if there are any questions as to the construction of a statute then the Petitioner gets the benefit of the doubt. The Petitioner asserts

that this is long standing law citing *Consolidation Coal Co. v. Krupica*, 163 W.Va. 74, 254 S.E.2d 813 (1979), *Coordinate Council for Independent Living v. Palmer*, 209 W.Va. 274, 546 S.E.2d 454 (2001)

While Petitioner correctly states the law, as discussed above, there are no questions as to the meaning of West Virginia Code § 33-3-15. The law states that the 1% annuity tax is due when the application is made to purchase an annuity and not when it annuitizes. The Petitioner's own contract states that it is for a purchase of an annuity. In addition, the contract's language does not indicate that the purchase of the annuity will occur upon annuitization.

A question may arise if it is the position of the WVOIC that the annuity tax should be paid when the contract is signed then what is the benefit of taking the back-end option. Whenever an insurer selects the front-end option then the tax is only applied on the deposit amount and not on any interest gained with the use of the money. On the back-end option taxes are applied on both the deposit amount and any interest gained over the time the insurer holds the deposit until the annuity is purchased. If the Petitioner had taken money from the insured to possibly purchase an annuity in the future, then when that annuity was purchased the 1% tax would be due. Any interest gained from the money deposited would also be taxed. However, the problem for the Petitioner is that the annuity was purchased when the contract was signed thus making the tax due at that time.

The Petitioner also claims that it relied on an email that had been sent to several insurance companies by Drema Goolsby on November 17, 2015. The purpose of this email, according to the Petitioner's witnesses, was to determine when to make tax payments. In that email, Ms. Goolsby did state 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 (sic) cannot be deferred."

Ms. Ridenour believed that she was being instructed to report as annuitized, annuities' death benefits, death benefits that were paid out, as well as guaranteed withdrawal benefit payouts. What is very telling is that Ms. Ridenour testified that she was confused by the instruction because she said it appeared that the WVOIC considered that distributions can be taxed even though the distribution happened before the annuitization occurred.

I agree with Ms. Ridenour that the email from Ms. Goolsby is confusing, however, as she testified, it was her impression at the time that Ms. Goolsby was requiring distributions to be taxed. At the very least Ms. Ridenour or someone in the Petitioner's organization should have contacted the WVOIC for a clarification as to that one issue, but no one did.

Ms. Hartwell testified that the word annuitization, as used in the email, simply meant that the annuity had been purchased. In other words, the email instructed the insurance companies to tax the premiums and interest when the annuity was purchased. The fact that the Petitioner interpreted the annuitization incorrectly is not the fault of the WVOIC.

The Petitioner contends that after the email from Ms. Goolsby, there were no other instructions from the WVOIC. This implies that if the Petitioner did not understand the original email, the WVOIC should have issued a clarification. Again, this argument is without merit. There is no requirement for any agency to clarify a position unless some insurance company presents questions to the WVOIC which would make the WVOIC aware of the confusion. According to Ms. Hartwell, the WVOIC believed that it was being consistent in its instructions. There was no evidence presented at the hearing that showed that the Petitioner ever communicated with the WVOIC that there was confusion on its part as related to the Goolsby email.

Since there was no evidence that the Petitioner asked for clarification and by its own testimony that they considered the email confusing, it cannot rely on its own interpretation of the email.

Therefore, the Petitioner's alleged reliance on the Goolsby email to justify not paying tax on annuity accounts that have been purchased is not persuasive.

The Petitioner takes the position that the WVOIC's decision to issue the 2023 Notice of Underpayment is inconsistent with earlier positions taken by the WVOIC. *Appalachian Power Co. v. State Tax Dep't of W.Virginia,* 195 W.Va. 573, 466 S.E.2d 424 (1995). This argument is based on its contention that the email issued by Ms. Goolsby indicated that insurance companies that elected the back-end option did not have to pay annuity taxes until the annuity began distribution. The Petitioner asserts that the Notice of Underpayment in 2023 was a different position than the 2015 email.

As was discussed above, the Petitioner should not have interpreted the 2015 email without obtaining clarification, especially after Ms. Ridenour testified that it was confusing and appeared to require that taxes be paid on distributions.

It was the testimony of Ms. Hartwell that it was the position of the WVOIC in 2015 that annuitization means to purchase the annuity. This is the exact same position that the WVOIC took when it issued the 2023 Notice of Underpayment.

The Petitioner has the burden of proof to prove that the WVOIC was inconsistent in its interpretation of when the tax should have been paid. The Petitioner has failed to meet that burden based on its own witness testimony that the 2015 email appeared to require that the tax be paid on distributions, as well as the testimony of Ms. Hartwell. The underpayment amount as well as the interest and penalty found in the Notice of Underpayment in 2023 was not proven to be inconsistent

with the 2015 email, thus the contention of the Petitioner that the WVOIC changed its position is unfounded.

The Petitioner also asserts the position taken at the hearing in support of the WVOIC's 2023 Notice of Underpayment is an argument arising out of a position being taken during litigation and should not be given any deference. *Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W.Va. 573 at fn. 17, 466 S.E.2d 424, 439 (1995)

The bases of the Petitioner's argument are that the WVOIC ignored the directive in the Goolsby email, and the 2022 Notice of Underpayment were indications that the WVOIC's current interpretation of the law was adopted solely for the purposes of litigation.

The directive of the Goolsby email was discussed thoroughly above and the Petitioner failed to prove that the email was a directive to only pay the annuity tax when the annuity began to disburse funds.

The second basis of the Petitioner's argument is that the 2022 Notice of Underpayment attempted to tax disbursements and not deposits, on annuity contracts. The Petitioner was correct that the 2022 Notice of Underpayment taxing disbursements was not authorized by W.Va. Code § 33-3-15. When the Petitioner challenged the 2022 Notice, the WVOIC reversed its position and admitted that it had been wrong. The 2023 Notice of Underpayment was then issued taxing deposits, which as stated above is consistent with the Statute.

The Petitioner's allegation that the WVOIC's position concerning the validity of the 2023 Notice of Underpayment, was raised solely for litigation purposes is difficult to understand. While it is true that the 2022 Notice was incorrect under the law, it appears to be an aberration which was rightly corrected. The email instructions of 2015 are consistent with the arguments of the WVOIC during this litigation. This means that the WVOIC's position during litigation is consistent and

was not raised simply for litigation purposes. If the litigation had revolved around the 2022 Notice, then this argument made by the Petitioner would be valid but dealing with the 2023 Notice, it is not.

In its brief, the Petitioner asserts that the WVOIC is attempting to contort the plain language of the Statute and should be rejected. Syl. Pt. 5 *CNG Transmission Corp. v Craig*, 211 W.Va.170, 564 S.E.2d 167 (2002) The Petitioner goes on to state that the judiciary is the final authority on statutory construction and not the agency when the agency's construction is contrary to the clear language of a Statute. Syl. Pt. 2 *Domestic Violence Survivors' v. W.Va. Dep't of Health & Hum. Res.*, 238 W.Va. 566, 797 S.E.2d 543 (2017)

These decisions would only be applicable to this matter if the WVOIC is acting to contort the law or if its actions were contrary to the clear language of the Statute. As discussed above, the actions of the WVOIC when it issued the 2023 Notice of Underpayment was aligned with the plain and unambiguous language of the W.Va. Code § 33-15-3.

The Petitioner also states that deference cannot be given to an agency's interpretation of a Statute if the Statue is not ambiguous. *Steager v. Consol Energy Inc.*, 242 W.Va. 209, 832 S.E.2d 135. According to a plain reading of the Statute, the WVOIC's interpretation does not require deference since its actions are in complete harmony with the Statute.

The Petitioner argues that since the law in California dealing with back-end option taxation is similar to West Virginia and it was not penalized after a recent audit, West Virginia should take the same position. Even though the law in California is similar, that does not mean that the decisions of the California Insurance Commission bind the interpretation of West Virginia law to the same outcome.

The Petitioner believes that it is entitled to a credit on the 2023 Notice of Underpayment because it does not reflect any payments to the Insurance Commissioner on prior annuity payments. Ms. Hartwell explained that the payments that were paid by the Petitioner were annuities that occurred in prior years, before 2019 and 2020. Other than the statements by Mr. MacNeil, there was no evidence presented that would indicate that the WVOIC erred in its decision not to give the Petitioner credit on the Notice of Underpayment.

At the end of the Petitioner's brief, it requested that the penalties and interest be waived because the actions of the Petitioner were neither willful nor negligent. There was no proof that the actions of the Petitioner were willful; however, the failure of the Petitioner to clarify the Goolsby letter of 2015 can be construed as negligent. In addition, the Petitioner knew or should have known that allowing insured 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.

The Petitioner argued that there was no motive on its part to avoid taxes because the taxes imposed would be passed on to its insured. This argument ignores the fact that the Petitioner could offer higher rates to its insured because of the option to withdraw all contributions and avoid taxes. This fact alone gave the Petitioner a competitive advantage.

Conclusions of Law

The following are made as conclusions of law:

1. The West Virginia Offices of the Insurance Commission has jurisdiction over the action pursuant to West Virginia Code § 33-3-24a

2. The Petitioner has the burden of proof to prove, by a preponderance of the evidence, that the WVOIC erred when it issued the 2023 Notice of Underpayment to the Petitioner.

3. When a statute is clear and unambiguous on its face it cannot be interpreted by the courts and should be given its full force and effect. Citing Syl. Pt. 2, *State v. Epperly* 135 W.Va. 877, 65 S.E.2d 488 (1951).

4. West Virginia Code § 33-3-15 is clear and unambiguous, on its face, in that it states that the annuity tax must be paid when there is an application to purchase an annuity.

5. The Petitioner's contract with its insured indicates that the contract is a purchase of an annuity, therefore, under W.V. Code § 33-3-15, the annuity tax is levied on the day the contract is signed.

6. When there are any questions as to the construction of a statute then the Petitioner gets the benefit of the doubt. *Consolidation Coal Co. v. Krupica*, 163 W.Va. 74, 254 S.E.2d 813 (1979), *Coordinate Council for Independent Living v. Palmer*, 209 W.Va. 274, 546 S.E.2d 454 (2001)

7. The Petitioner failed to prove, by a preponderance of the evidence, that there were any questions of the construction of W.Va. Code § 33-3-15.

8. The Petitioner failed to prove, by a preponderance of the evidence, that the WVOIC contorted the language of W.Va. Code § 33-3-15, therefore the Petitioner's reliance on Syl. Pt. 5 *CNG Transmission Corp. v Craig*, 211 W.Va.170, 564 S.E.2d 167 (2002) is unfounded.

9. The WVOIC did not act contrary to the clear language of W.Va. Code § 33-3-15. Therefore, the Petitioner cannot rely on Syl. Pt. 2 *Domestic Violence Survivors' v. W.Va. Dep't of Health & Hum. Res.*, 238 W.Va. 566, 797 S.E.2d 543 (2017)

10. Since the actions of the WVOIC when determining the 2023 Notice of Underpayment, do not require deference, based on W.Va. Code § 33-3-15, *Steager v. Consol Energy Inc.*, 242 W.Va. 209, 832 S.E.2d 135, is not applicable.

11. The positions of the WVOIC in the 2015 email and the 2023 Notice of Underpayment are consistent with each other; therefore, no deference is necessary to the WVOIC's interpretation. *Appalachian Power Co. v. State Tax Dep't of W.Virginia,* 195 W.Va. 573, 466 S.E.2d 424 (1995)

12. The WVOIC did not prove that the Respondent acted with willful intent when it failed to pay annuity tax on the date that it entered into a contract with its insured.

13. The Petitioner was negligent by failing to ask for clarification from the WVOIC when it was confused by the 2015 Goolsby email.

14. The Petitioner is not entitled to credit from previously paid annuity taxes, since the taxes were for annuity contracts entered into during years prior to 2019 and 2020.

Recommended Decision

It is recommended that the complaint filed by the Petitioner that the 2023 Notice of Underpayment was vacated is without merit and should be dismissed.

MARK W. CARBONE
HEARING EXAMINER

Date: June 13, 2023