

NOV 5 2013

DEPT OF INSURANCE
BY 

STATE OF ARIZONA
DEPARTMENT OF INSURANCE

In the Matter of:

**METROPOLITAN LIFE INSURANCE
COMPANY (NAIC 65978),**

No. 13A-027-INS

ORDER

Petitioner.

On October 29, 2013, the Office of Administrative Hearings, through Administrative Law Judge ("ALJ") Sondra J. Vanella, issued an Administrative Law Judge Decision ("Recommended Decision"), received by the Director of the Department of Insurance ("Director") on October 30, 2013, a copy of which is attached and incorporated by this reference. The Director of the Department of Insurance has reviewed the Recommended Decision and enters the following Order:

1. The Director adopts the Recommended Findings of Fact with the following clarifications of terms and concepts used throughout the Recommended Decision:
 - a. "Retaliation" or "retaliatory tax" means the "addition to the rate of tax" as defined at A.A.C. R20-6-205(A)(1).
 - b. "Arizona based insurer" or "Arizona life insurer" means a "domestic insurer" as defined at A.R.S. § 20-203 and A.A.C. R20-6-205(A)(6).
 - c. "New York based" or "foreign" insurer means "foreign insurer" or "foreign or alien life insurer" as defined at A.R.S. §§ 20-204 and 20-201, respectively, and A.A.C. R20-6-205(A)(7) and (8), respectively.

1 d. The Department computes the addition to the rate of tax payable by Arizona
2 life insurers separately from the addition to the rate of tax payable by other
3 Arizona insurers. MLIC and PLAC are life insurers within the meaning of
4 A.A.C. R20-6-205(A)(8).

5 e. The "taxes and related fees" and "tax amounts" referred to in Paragraph 1 of
6 the Findings of Fact mean "local and regional taxes" as defined at A.A.C.
7 R20-6-205(A)(9).

8 2. The Director adopts the Conclusions of Law.

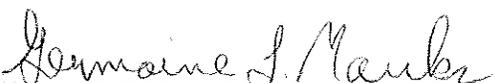
9 3. The Director denies Petitioner's appeal and affirms the 2011 and 2012
10 additions to the rate of tax published by the Department.

11
12 **NOTIFICATION OF RIGHTS**

13 Pursuant to Arizona Revised Statutes ("A.R.S.") § 41-1092.09, Petitioner may
14 request a rehearing with respect to this order by filing a written motion with the Director of
15 the Department of Insurance within 30 days of the date of this Order, setting forth the basis
16 for relief under A.A.C. R20-6-114(B). Pursuant to A.R.S. § 41-1092.09, it is not necessary
17 to request a rehearing before filing an appeal to Superior Court.

18 Petitioner may appeal the final decision of the Director to the Superior Court of
19 Maricopa County for judicial review pursuant to A.R.S. § 20-166. A party filing an appeal
20 must notify the Office of Administrative Hearings of the appeal within ten days after filing
21 the complaint commencing the appeal, pursuant to A.R.S. § 12-904(B).

22 DATED this 5th day of November, 2013.

23
24 
25 GERMAINE L. MARKS, Director
26 Arizona Department of Insurance

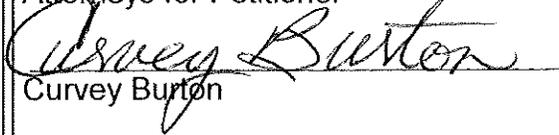
1 COPY of the foregoing mailed this
2 5th day of November, 2013 to:

3 Mary Kosinski, Executive Assistant for Regulatory Affairs
4 Catherine O'Neil, Consumer Legal Affairs Officer
5 Scott Greenberg, Chief Operating Officer
6 Arizona Department of Insurance
7 2910 North 44th Street, Suite 210
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22 
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1 and then uses the aggregate amount of taxable premiums reported by the insurer to
2 establish the retaliation rate for that state. "In each case, the addition to the rate of tax
3 payable by Arizona insurers shall be calculated by dividing the aggregate of the tax
4 obligations paid by Arizona insurers to any such city, county or other political
5 subdivision of such state . . . by the aggregate of their taxable premiums under the
6 premium taxing statute of such state . . ." A.R.S. § 20-230. A.A.C. R20-6-205(D) is the
7 correlate rule that sets forth the calculation to be utilized by the Department when
8 calculating the retaliatory tax rate.

9 3. In order for the Department to determine the tax obligations paid by Arizona life
10 insurers conducting business in other states, Arizona life insurers are required to file
11 every year by March 1st, a Survey of Arizona Domestic Insurers ("Survey"). Pursuant to
12 A.A.C. R20-6-205, the Survey requires Arizona life insurers to report the total local or
13 regional taxes paid and the total premiums taxed under the premium taxing statute of
14 another state. See Exhibits 8 and 9. The Department further requires Arizona life
15 insurers to provide supporting documentation to substantiate the information provided
16 in the Survey. The Department reviews the Surveys received and contacts insurers
17 who fail to submit the Survey or supporting documentation.

18 4. Pursuant to A.A.C. R20-6-205(D), the Department calculates the addition to the
19 rate of tax for each state by dividing the total local or regional taxes paid by Arizona life
20 insurers by the total premiums taxed by the state.

21 5. Only one local or regional tax is imposed in New York – the MTA. The MTA
22 supports the Metropolitan Commuter Transportation District ("MCTD") which includes
23 approximately 5,000 square miles and 70 percent of the state population. The MTA
24 applies to insurers that conduct business within the MCTD, based on the portion of
25 their New York premiums that insure risks within the MCTD.

26 6. In this matter, MLIC appealed the Department's computation of the 2011 and
27 2012 retaliatory tax rates for New York based life insurers that conduct business in
28 Arizona, contending that the calculation of the retaliatory tax rate is erroneous,
29 excessive, and contrary to law.

1 7. The only Arizona based life insurer that conducts business in New York and that
2 completed the Survey is Pacific Life and Annuity Company ("PLAC"). In its reporting,
3 PLAC assumed that 100 percent of its business was conducted in the MCTD,
4 notwithstanding that the MCTD only covers a portion of the state. Further, the amount
5 PLAC reported as paid represented pre-payments of MTA, which in New York are
6 estimated payments. PLAC's total pre-payments exceeded its actual MTA liability for
7 both 2010 and 2011, because PLAC overestimated its MTA tax. Essentially, MLIC
8 argued that because the Department based its retaliatory tax rate on only one insurer,
9 the result was distorted and the rate should be adjusted. MLIC argued that because
10 the Department calculated the additional rates of tax for 2011 and 2012 based on
11 overstated payments rather than actual tax liability, the rates were calculated
12 erroneously and in violation of due process and equal protection because the
13 retaliatory tax imposed is based on estimated taxes and may differ greatly from actual
14 tax liability based on PLAC's method of reporting. MLIC contended that because the
15 Department based its additional rate of tax on information provided by only one
16 taxpayer, even a small overpayment can have a significant impact on the calculation of
17 tax that MLIC would have to pay in Arizona. However, the Department asserted that it
18 does not have control over the fact that only one Arizona based life insurer was
19 conducting business in New York during the time period in question, nor does the
20 Department have control over the fact that PLAC seems to overestimate its MTA
21 surcharge liability, nor that it does not differentiate between which of its policies are
22 subject to MTA and which are not when calculating its payments.

23 8. Lori Guardado, Tax Manager for MetLife Group, testified that MLIC takes issue
24 with the Department's calculations because the Department utilized a cash-basis
25 method for calculating the additional rate of tax and the 2011 and 2012 rates exceed
26 the maximum possible MTA rate. Ms. Guardado testified that PLAC's reporting of its
27 cash payments is different from what is stated on its returns. Ms. Guardado further
28 testified that PLAC is not getting the benefit of any prior overpayments, thereby over-
29 inflating the amount of tax paid. Ms. Guardado opined that the Department's
30 calculations are skewed because the calculations are only based on one insurer, and

1 consequently, New York based insurers are "held hostage" to PLAC's Survey which
2 does not contain accurate reporting resulting in a higher retaliatory tax. Ms. Guardado
3 further opined that MLIC should not be penalized by PLAC's overpayments. Transcript
4 at 119:3-9. Thus, MLIC contends that the Department should base its calculations on
5 actual tax liability.

6 9. The Department argued that its calculations are based on amounts that each
7 Arizona life insurer reported as having been paid in New York pursuant to New York tax
8 laws. In this matter, the only Arizona life insurer conducting business in New York was
9 PLAC. The method of calculation utilized by the Department is the same whether there
10 are one or many Arizona life insurers conducting business in New York. According to
11 the Department, if there are no Arizona life insurers conducting business in New York,
12 there is no retaliatory tax imposed on New York life insurers conducting business in
13 Arizona.

14 10. Scott Greenberg, the Department's Chief Operations Officer, testified that all
15 insurers conducting business in the MCTD are obligated to pay four installments of
16 estimated MTA tax payments during the year. Transcript at 78:11-25. The estimates
17 are amounts that are actually paid. If an insurer does not make an estimated tax
18 payment timely, or pay the entire amount due, the MCTD imposes a penalty. Transcript
19 at 78:21-25; 79:1-7. Should an overpayment be made, a credit will carry over and
20 could reduce the additional rate of tax in future years, as would an underpayment be
21 reflected in future years.

22 11. MLIC further argues that the Department is placing higher burdens on New York
23 based life insurers than New York imposes on Arizona insurers because New York has
24 a maximum MTA rate of .34% if all of a New York insurer's business was conducted in
25 the MCTD. The Department has imposed a retaliatory tax rate of .465149% for 2012,
26 and .380822% for 2011, both of which exceed New York's maximum MTA rate of .34%,
27 and therefore, the tax burdens are not equalized thus defeating the purpose of the
28 retaliatory tax because the maximum MTA an Arizona insurer would be obligated to pay
29 is .34%.

1 12. The Department asserts that the Legislature could have required that the local
2 and regional retaliatory tax be based on or limited to the maximum tax that could be
3 imposed by the other state, but it did not do so. A.R.S. § 20-230 does not look to the
4 rates of tax imposed, but rather the actual tax burdens placed on Arizona insurers. The
5 Department, pursuant to regulation, requires Arizona insurers to report what they
6 actually paid in local taxes. This may be more or less than the maximum burdens or
7 there may be an offset for previous years' overpayments or underpayments.

8 13. MLIC argued that the term "tax obligation" is synonymous with the term "tax
9 liability." The Department argued that the Arizona Legislature established a simple
10 formula for calculating the burden of local and regional taxes within a specifically
11 defined time period, taking into account the nature, timing and calculation of taxes,
12 licenses and other obligations imposed in other states. The Department contends that
13 A.R.S. § 20-230 mandates that the addition to the rate of tax be calculated based on
14 the amounts paid by Arizona life insurers conducting business in New York. The
15 Department argues that the relevant statute does not allow it discretion to calculate the
16 addition to the rate of tax in a manner other than as set forth in A.R.S. § 20-230 and
17 A.A.C. R20-6-205. The Department's position is that A.R.S. § 20-230 and A.A.C. R20-
18 6-205 require it to use the "aggregate of tax obligations paid" and to base the
19 calculation on the amount of tax "reported as paid." The statute and rule do not limit
20 the calculation to "actual tax liability." The Department argued that the plain language
21 of the statute mandates that the Department use the amounts paid by insurers for local
22 and regional taxes, even if they are estimated amounts, in its calculation of the
23 retaliatory tax rate.

24 14. MLIC contended that administrative convenience cannot supersede statute and
25 rule, and that the Department's argument for a cash basis approach is for that purpose.
26 A.A.C. R20-6-205(E) requires the Department to publish retaliatory tax rates by
27 November 1st based on Survey information obtained from Arizona based insurers for
28 the preceding calendar year, on or before November 1st. Pat Wersching, Assist Vice-
29 President of the Tax Department for MetLife Group, testified that although New York
30 taxes are due on March 15th, MLIC typically files extensions until December 15th to file

1 its New York taxes with its actual MTA tax liability. Transcript at 98:3-22. As such, the
2 Department asserted that it would be impossible to publish retaliatory tax rates in
3 November if data is unavailable until December.

4 15. Mr. Greenberg testified that the statute and rule pertain to all jurisdictions, not
5 just New York, and that if the Department were to calculate the retaliatory tax as
6 proposed by MLIC, it would require the Department to become an expert in each state's
7 individual tax code, as well as regional and local taxes in order to administer the tax.
8 Transcript at 43:16-25. The Department would have to "step into New York's shoes" in
9 this case to audit surcharge reports for each jurisdiction to ensure accuracy. Transcript
10 at 79:10-21. Mr. Greenberg explained that the rule requires that retaliatory tax be
11 calculated based on actual payments made in another state, divided by the premiums
12 that are taxed in that other state. Transcript 44:8-11.

13 **CONCLUSIONS OF LAW**

14 1. MLIC bears the burden of proof, and the standard of proof on all issues is by a
15 preponderance of the evidence. A.A.C. R2-19-119.

16 2. A "preponderance of the evidence is such proof as convinces the trier of fact that
17 the contention is more probably true than not." Morris K. Udall, ARIZONA LAW OF
18 EVIDENCE, § 5 (1960). It "is evidence which is of greater weight or more convincing than
19 the evidence which is offered in opposition to it; that is, evidence which as a whole shows
20 that the fact sought to be proved is more probable than not." BLACK'S LAW DICTIONARY,
21 1182 (6th ed. 1990).

22 3. In A.R.S. § 20-230, the Arizona State Legislature established the formula for
23 calculating retaliatory tax as follows:

24 In each case, the addition to the rate of tax payable by Arizona insurers
25 shall be calculated by dividing the aggregate of the tax obligations paid by
26 Arizona insurers to any such city, county or other political subdivision of
27 such state or foreign country by the aggregate of their taxable premiums
28 under the premium taxing statute of such state or foreign country. The
29 director may issue rules to carry out the purpose of this section.

30 4. A.A.C. R20-6-205 was promulgated by the Department to implement A.R.S. §
20-230. The rule provides for how the addition to the rate of tax is calculated for

1 purposes of a retaliatory tax computation. See A.A.C. R20-6-205(D). The Department
2 makes this determination by using data that Arizona domestic insurers are required to
3 report each year. See A.A.C. R20-6-205(C). Pursuant to A.A.C. R20-6-205(D):

4 For each foreign country or other state having one or more local or
5 regional taxes on domestic insurers, the Department shall compute on
6 a statewide or foreign countrywide basis an addition to the rate of tax.
7 The Department shall compute the addition to the rate of tax payable
8 by Arizona life insurers separately from the addition to the rate of tax
9 payable by other Arizona insurers. The addition to the rate of tax
10 payable by each category of Arizona domestic insurers shall be the
11 quotient of:

- 12 1. The aggregate local or regional taxes reported as paid to the foreign
13 country or other state by domestic insurers in each category for the
14 calendar year covered by the Premium Tax and Fees Report divided
15 by,
- 16 2. The aggregate statewide or foreign countrywide premiums taxed under
17 the premium taxing statute of the other state or foreign country
18 reported by domestic insurers in each category for the calendar year
19 covered by the Premium Tax and Fees Report.

20 5. MLIC's contention that the Department should calculate the addition to the rate
21 of tax using PLAC's actual tax liability is tenable. However, MLIC's arguments do not
22 prevail over the mandate of the Arizona statute and rule regarding the calculation of
23 retaliatory taxes and additions to the rate of tax as applied by the Department. Neither
24 the statute nor the rule provides discretion to the Department to calculate retaliatory
25 taxes in a manner different than that set forth in statute and rule.

26 6. The Department argued that deference should be given to the agency's
27 construction of the statutory scheme which it is entrusted to administer. *Ariz. Water Co.*
28 *v. Ariz. Dep't of Water*, 208 Ariz. 147, 91 P.3d 990 (2004) (citing *Chevron, USA, Inc. v.*
29 *Natural Res. Def. Council, Inc.* 467 U.S. 837, 844 (1984)). The Department followed
30 the methodology and computation set forth in A.A.C. R20-6-205 and appropriately
determined the additions to the rate of tax and retaliatory taxes for calendar years 2011
and 2012 for MLIC in accordance with A.R.S. § 20-230. "In applying a statute . . . its
words are to be given their ordinary meaning unless the legislature has offered its own

1 definition of the words or it appears from the context that a special meaning was
2 intended." *Mid Kansas Federal Savings and Loan Ass'n of Wichita v. Dynamic*
3 *Development Corp.*, 167 Ariz. 122, 128, 804 P.2d 1310, 1316 (1991).

4 7. The Administrative Law Judge concludes that MLIC failed to prove by a
5 preponderance of the evidence that the Department incorrectly calculated its retaliatory
6 taxes and additions to the rate of tax for calendar years 2011 and 2012.

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ORDER

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2 **IT IS ORDERED** that MLIC's appeal be denied and the retaliatory taxes and
3 additions to the rate of tax the Department calculated for MLIC for the calendar years
4 2011 and 2012 are affirmed.

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6 *In the event of certification of the Administrative Law Judge Decision by the*
7 *Director of the Office of Administrative Hearings, the effective date of the Order will be*
8 *five (5) days from the date of that certification.*

9
10 Done this day, October 29, 2013.

11
12 /s/ Sondra J. Vanella
13 Administrative Law Judge

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15 Transmitted electronically to:

16 Germaine L. Marks, Director
17 Department of Insurance
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