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American Arbitration Association Implements Significant Changes to its Rules

By Barry R. White

Many of the contracts we prepare contain arbitration clauses. Arbitration can be preferable to litigation because it is usually quicker, more private and sometimes cheaper. Contracts that provide for arbitration frequently specify that the arbitration will be conducted by the American Arbitration Association – one of the oldest and largest providers of arbitration services in the country.

Arbitrations administered through the American Arbitration Association, or "AAA," use a comprehensive set of rules adopted by the AAA. Last month, new rules took effect which will change the way AAA arbitrations are conducted. The AAA believes that the revised rules will make the arbitrations it conducts more expeditious and cost-effective. **The five most significant rules changes are:**

1. The rules now require mediation, subject to any party's right to refuse to participate

In any case where the amount of the claim or counterclaim exceeds $75,000, the rules now require the parties to engage in mediation prior to the arbitration hearing. The mediation is not supposed to delay the arbitration unless the parties agree to such a delay. Although requiring mediation seems significant, the rule specifically allows any party to "unilaterally opt out" of the rule and not participate in mediation.

2. The prehearing conference now has an extensive checklist of issues to be considered

The AAA's rules have long provided for a preliminary hearing before the arbitrator to discuss scheduling and how the proceeding will be conducted. The rules now provide a specific checklist for the arbitrator to follow to make sure all relevant issues are discussed. Among the items on the checklist are: whether all necessary parties are included in the arbitration, whether the parties need to amend their claims, how the parties will exchange information, whether there are any threshold issues that might resolve or clarify the dispute, and the form of the arbitration award.

3. The arbitrator now has greater power to control the exchange of information

Although there is frequently less discovery in arbitrations than in litigation, the AAA rules have always contemplated that the parties would exchange documents and exhibits. With so many documents stored electronically now, the new rules give the arbitrator the power to impose reasonable parameters and limitations on searches that must be performed to retrieve electronically stored documents. They also give the arbitrator the power to decide that certain documents must be kept confidential, and allocate the cost of producing documents, including electronically stored documents, among the parties.

4. The arbitrator can now rule on dispositive motions

The AAA rules have historically tried to dissuade parties from filing motions in lieu of an evidentiary hearing. However, there are times when a dispute turns on a purely legal issue that the arbitrator can decide based on the briefs of the parties, rather than hearing testimony from witnesses. The rules now permit the arbitrator to hear and decide those motions, as long as the moving party can first convince the arbitrator that the motion is likely to succeed and will dispose of or narrow the issues in the case.

5. The arbitrator can now sanction a party for its failure to comply with the rules or an order of the arbitrator

Unlike judges, who have the inherent power to sanction parties for misconduct, arbitrators' authority to punish parties for violating the rules was much more limited. Now the arbitrator has the specific authority to limit a party's participation in the proceeding or otherwise determine issues against the party being sanctioned. Even when limiting participation or deciding issues against a particular party, the arbitrator still must require the submission of evidence and legal argument prior to entering an award. In other words, the arbitrator cannot automatically find in favor of the claimant as a sanction.

Although it is too soon to tell how much of an effect these new rules will have in practice, they seem well aimed at achieving the AAA's stated goal of making arbitrations even more expeditious and cost-effective for those involved. WBB

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The Evolution of the Quill – Recent Developments in Sales Tax Nexus

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The law with respect to sales tax nexus has never been a hotter topic or in a greater state of flux since prior to the decision in Quill v. North Dakota in 1992 than it is right now. Current legislation being debated in Congress has the potential to fundamentally alter sales tax nexus as we know it. At the same time, recent state court decisions may result in a need for the United States Supreme Court to weigh in with respect to so-called "click-through nexus."

Marketplace Fairness Act

On May 6, 2013, the United States Senate passed the Marketplace Fairness Act. This legislation enables states to pass laws requiring out-of-state retailers of goods to collect sales tax on sales delivered to customers residing in the enacting state. As passed by the Senate, a state may require out-of-state retailers to collect sales tax on sales into the state if the state meets certain requirements which include simplified tax laws and providing a central taxing authority with which the retailers will file tax returns and to whom they will remit the tax. Additionally, the Senate bill includes an exemption for smaller sellers. Those are defined as sellers having less than $1,000,000 in aggregate remote sales in a given year.

> *"'Click-through nexus uses an agency theory to establish nexus in out-of-state retailers."*

On September 19, 2013 the House Judiciary Committee released a statement of seven principles which will guide any legislation passed by the House of Representatives in the area of sales tax nexus. This list includes "tech neutrality," which means that the sales tax compliance burden should be the same for internet retailers and brick and mortar stores. While several of the principles reach further than the Senate bill, this principle suggests a willingness to enact legislation that creates more competitive balance among brick and mortar stores and internet retailers.

Click-Through Nexus

There have also been significant recent developments in the area of click-through nexus. Click-through nexus uses an agency theory to establish nexus in out-of-state retailers. This is done where an out-of-state retailer enlists the help of agents within a state to whom the retailer pays commission in exchange for customer referrals to the retailer's website via internet links on the agents' websites. Some states, most notably New York, have used the theory that the presence of these agents establishes a physical presence on the part of the retailer to subject large out-of-state retailers such as Amazon and Overstock to sales tax. This method of establishing nexus in remote sellers has been upheld by the New York Court of Appeals. Amazon and Overstock have petitioned the United States Supreme Court to review the case on Commerce Clause and Due Process grounds.

Illinois also passed a click-through nexus law. This law was challenged by Performance Marketing Associates, Inc. and on October 18, 2013, the Illinois Supreme Court ruled that the law is pre-empted by the federal Internet Tax Freedom Act (ITFA). The decision affirmed the earlier ruling of the Circuit Court of Cook County. However, the Illinois Supreme Court based its decision only on Supremacy grounds, unlike the lower court which based its decision on both Supremacy and Commerce Clause grounds. This is an important distinction because the ITFA sunsets in 2014, thereby removing the Supremacy issue and possibly allowing Illinois to reinstate the law at that time. In the event the Illinois Department of Revenue files a petition for certiorari, the United States Supreme Court may feel compelled to hear the case (something they have been reluctant to do with sales tax nexus cases since Quill) due to the confusion surrounding click-through nexus which could be caused by the split between two commercially important states.

The foregoing is only a brief synopsis of the present state of sales tax nexus law. However, it illustrates the unsettled nature of nexus at the moment. Any remote retailer and any tax professional who services remote retailers will want to pay particular attention to the sales tax legislation winding its way through Congress as well as the outcome of the litigation with respect to click-through nexus. WBB

Estate Planning in 2013 and Beyond

By Nancy M. Bonniwell

The American Taxpayer Relief Act of 2012 ("ATRA") made permanent the increased gift and estate tax exemption for individuals. The exemption is $5 Million, indexed for inflation. This year the exemption amount is $5.25 Million. In 2014, the exemption will increase to $5.34 Million per person.

In addition to the increased estate tax exemption that benefits all taxpayers, ATRA provided a benefit to married couples by making "estate tax portability" permanent. Estate tax portability is a surviving spouse's ability to use a predeceased spouse's unused gift and estate tax exemption. With a limited exception, the surviving spouse may only use his or her last predeceased spouse's unused exemption. The purpose of estate tax portability is to simplify estate planning for married couples. As with all tax laws, there is some simplicity, some complexity and some opportunity to be had.

With portability, the surviving spouse may elect to use her deceased spouse's unused estate tax exemption, either during the survivor's lifetime to make gifts or on her death. This has the potential of doubling the survivor's estate tax exemption. The first spouse to die may leave all of his assets outright to the surviving spouse without wasting his unused exemption. The executor of the estate must timely file an estate tax return to make the election, even if an estate tax return would not otherwise be required.

There are advantages to leaving all assets to the surviving spouse. There will be a basis adjustment of assets on the death of the first spouse to die, and on the death of the surviving spouse, which provides two opportunities to eliminate or at least minimize capital gains tax on the sale of the assets and depreciate capital assets from a new basis. With portability, the surviving spouse may be named as the beneficiary of the deceased spouse's retirement account and elect to use the deceased spouse's estate tax exemption. If the account comprises the majority of the deceased's estate, which is often the case, the exemption will not be wasted. Unlike other beneficiaries, a spouse may roll over the account and defer distributions until a later date.

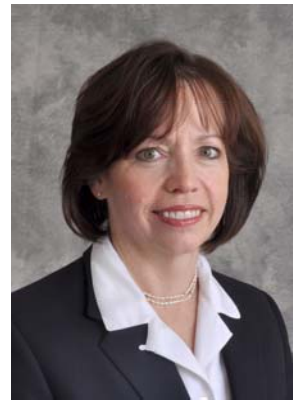
Prior to ATRA's passage, it was impossible to transfer all assets to the surviving spouse and not waste the deceased spouse's estate tax exemption. In order to preserve the deceased spouse's estate tax exemption, a credit shelter trust (also called a by-pass trust or Family Trust) was commonly used to hold assets and use the deceased spouse's exemption. When portability and the higher estate tax exemption are considered, many families will not have tax reasons to create or maintain such trusts in their estate plans, but there are myriad reasons to consider using the credit shelter trust or some other type of trust in an estate plan.

- Credit shelter trusts will provide creditor protection to the surviving spouse and other family members. Creditors may include third parties or a subsequent spouse.

- All appreciation in a credit shelter trust will escape estate taxation. That may not be the case if all assets are left to a surviving spouse whose estate is greater that the exemption amount available to him or her.

- The deceased spouse may provide for the surviving spouse through a trust and ensure that the assets will not be diverted to third parties, such as a subsequent spouse or solely to the surviving spouse's children in a blended family situation.

- For couples whose net worth is significant and whose plan includes multiple generations, use of a credit shelter trust will preserve both the estate tax exemption and generation-skipping transfer tax exemption of the deceased spouse. Portability only applies to the estate tax exemption. A surviving spouse may not elect portability with regard to generation-skipping transfer tax exemption.



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- If a surviving spouse remarries, use of a credit shelter-type trust will guarantee that the deceased spouse's estate tax exemption will be used. Only the last deceased spouse's remaining exemption may be elected. A subsequent remarriage and death of that spouse will negate the unused exemption of the first spouse to die.

Other trusts are also available to married couples to make the most of opportunities available to them, including simplicity, tax savings, flexibility and protection of loved ones. Although the higher estate tax exemption and portability can make estate planning simpler for some, it also creates more opportunities for all which should be considered in order to have the best plan for all involved . WBB

Inflation Adjusted Figures are Announced for 2014

By Philip J. Miller

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Every year about this time the Internal Revenue Service releases for the coming year those numbers which are adjusted annually for inflation. This usually occurs with very little fanfare, though it has taken on increased importance for estate planners and their clients since the estate and gift tax exemption became one of those numbers.

Enacted on December 17, 2010, the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 provided for the indexing of the "Applicable Exclusion Amount" beginning in 2012. What began as a flat $5,000,000 in 2010 and 2011, the Applicable Exclusion Amount grew to $5,120,000 in 2012, and $5,250,000 in 2013. Effective for gifts made or deaths occurring on or after January 1, 2014, the Applicable Exclusion Amount will be $5,340,000. The generation-skipping transfer tax exemption is currently the same as the Applicable Exclusion Amount and likewise will increase to $5,340,000 on January 1, 2014.

Because these numbers are so large to start with, indexing should increase them every year, even if inflation remains low. In contrast, the gift tax annual exclusion will remain at $14,000 per donee for gifts made in 2014. Because this figure only indexes upward in increments of $1,000, it usually takes the cumulative effect of several years of inflation to cause an increase.

Gifts to a spouse who is not a United States citizen do not qualify for the gift tax marital deduction. Instead, the donor spouse is allowed a higher annual exclusion. This amount is $143,000 in 2013 and will increase to $145,000 in 2014.

Estates and trusts of deceased owners of certain closely-held businesses can elect to pay a portion of the federal estate tax in installments over a period of fifteen years. The interest rate on a portion of the deferred tax is 2%. The figure used in determining the 2% portion is $1,430,000 in 2013 and increases to $1,450,000 in 2014.

Income tax rate schedules also change annually. For 2013, estates and trusts hit the top income tax bracket when taxable income exceeds $11,950. For 2014 that number will increase to $12,150. This number is also important in determining the amount of net investment income subject to the new 3.8% Medicare surtax. WBB

AT THE FIRM...

Nancy M. Bonniwell, Scott B. Fleming, Philip J. Miller, Randy S. Nelson, and **John A. Sikora** were all selected by their peers for inclusion in The Best Lawyers in America® 2014 (Copyright 2013 by Woodward/White, Inc., Aiken, S.C.).

Earlier this year, **Nancy M. Bonniwell** was nominated to the ProHealth Care Foundation Board of Directors.

This fall, a number of our attorneys presented around the state. **John A. Sikora** spoke at the 2013 Annual Real Estate Update, sponsored by the Wisconsin State Bar, in both Milwaukee and Madison, and the WICPA Annual Tax Conference in Milwaukee. **Philip J. Miller, Steven M. Szymanski, Mark W. Siler,** and **Robert B. Teuber** all presented at the State Bar of Wisconsin's Solo and Small Firm Practitioner's Conference. Additionally, **Randy S. Nelson** served as a program chair for and spoke at the 34th Annual Estate Planning Update in Milwaukee.

Weiss Berzowski Brady now has a YouTube channel. We've uploaded a few highlights from September's Tax and Business Seminar. More videos coming soon.

2014 Schedule of Events

REAL ESTATE & BUSINESS CONFERENCE
April 9, 2014

ESTATE PLANNING CONFERENCE
June 24, 2014

32nd ANNUAL TAX & BUSINESS SEMINAR
September 17, 2014

EMPLOYMENT LAW CONFERENCE
October 15, 2014

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