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How Poker Reminded Me That the Rev. Proc. 97-13 Safe Harbors for Management Contracts Live On: Squire Patton Boggs

Poker has a well-established hierarchy of winning hands. If you're holding a full house, you've got a right fine hand, but if you reach for the pot when the last bets are called and another player has four deuces, you will at best be the object of ridicule and at worst the subject of grievous bodily harm or death (it all depends on with whom you are playing). Legal authorities also have a strict order of priority. The most extreme adverse consequences that can befall one who forgets the priority of winning poker hands are unlikely to meet one who forgets which legal authorities take precedence over others, but it's good practice to be mindful of the hierarchy of legal authorities.

The recent issuance of Rev. Proc. 2017-13 is a case in point. As Bob Eidnier discussed in his recent post on this Revenue Procedure, the Internal Revenue Service issued it in response to requests from the National Association of Bond Lawyers and others for clarification of Rev. Proc. 2016-44 (which superseded Rev. Proc. 97-13)[1] that a management contract does not result in the manager receiving net profits from the managed facility (and, thus, in private business use of the tax-exempt bond proceeds that financed that facility) if the qualified user of the facility pays the manager a form of compensation permitted under Rev. Proc. 97-13 (percentage of gross revenue or expense (but not both), per-unit fees, capitation fees, periodic fixed fees, and certain types of incentive compensation) and the manager also bears some amount of the cost of operating the managed facility. Stated another way, NABL requested that the IRS make clear that the various management contract compensation arrangements permitted under the Rev. Prov. 97-13 safe harbors from private business use not be treated as the sharing of net profits of the managed facility under Rev. Proc. 2016-44.

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