THE BOND BUYER

How IRS ruling will impact airport projects

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WASHINGTON – Airport authorities will have an easier time signing leases at their bond-financed terminals for prohibited uses such as retailers specializing in the sale of regional wines under a new Internal Revenue Service private letter ruling.

The ruling publicly released Friday allows floating private equity to be used for a prohibited use for a tax-exempt bond-financed airport terminal renovation.

Floating private equity refers to money that is not the proceeds of a bond sale that can be moved around as needed, rather than dedicated to a specific location. Prohibited uses include stores specializing in the sale of alcohol for off-site consumption, health clubs and gambling facilities such those featuring slot machines.

The ruling applies to exempt facility bonds, the same concept the IRS used in a 2015 rule that allows floating private equity to be applied to private use in a government bond financed project.

Ed Oswald, a former Treasury official who is a partner at Orrick Herrington & Sutcliffe in Washington, joined with John Stanley, an associate at Orrick's San Francisco office, in making the request to the IRS on behalf of an unnamed client.

The IRS letter ruling did not identify the airport owner, but did say the terminal complex "includes boarding areas, which have a wide variety of retail shops, bars, restaurants, coffee shops, and similar passenger amenities" operated by third parties under leases.

The airport, according to the IRS, is in the process of making "substantial renovations to portions of the terminal complex" that include "the complete demolition and reconstruction of the boarding area" and will finance part of the costs of the renovations with the proceeds of a bond issuance.

The request to the IRS indicated that private money other than the funds from the tax-exempt bond sale will be set aside for non-qualified uses.

Oswald said in an interview the ruling allows airports to more easily move prohibited use facilities to other parts of their terminals with the application of the floating private equity.

“We can borrow from the thinking from the 2015 private use regulations regarding private activity bonds and adopt a similar theme and allow equity to flow to these prohibited facilities,” Oswald said.

“Although duty-free shops have long sold bottled alcohol, those shops generally offer a wide range of other products for sale,” Oswald and Stanley wrote in their summary of the ruling. “This newer trend in airport concessions is towards smaller spaces that primarily or exclusively sell bottled alcohol, particularly in wine-growing regions.”

Charles Almond at Bracewell in Houston described the IRS letter ruling as “not surprising, but helpful.”

“Big airports are in some respects almost like big cities,” Almond said. “There’s lots of stuff going on there. There are tens of thousands of people going through an airport and you see the types of retail have developed into a pretty wide variety.”

Almond said the ruling is an extension of the 2015 rule for government bonds issued under section 141, applying the same principle to qualified use bonds issued under section 142.

“I think large airports would be wise to use this to avoid pitfalls where a kind of prohibited use sneaks up on you,” Almond said. “I think it’s a positive development.”

Almond said there have been workarounds to allow prohibited uses in bond-financed airport terminals “if you were constantly vigilant about the types of retail that were going into your facility and had great communication between the finance people are the airport and the people who were doing the retail leasing and planning.’’

Going forward, Almond said, “You can allocate those prohibited uses to that equity wherever they are located and avoid those sort of uh-oh moments.”