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Comment No: 70783
Date: 9/25/2022

Comment Text:

I want to add two related considerations to the statutory discussion.

First, the statute was written in terms of a sequence. The first prong of the statute is whether it is based on an occurrence, and the second prong is whether it involves an enumerated activity. It was not written as two unrelated prongs ("any contracts that is both (i) based on an occurrence and (ii) involves an enumerated activity"). Instead, it was written "as any contract that is based on an occurrence, with the additional qualifier that it involves an enumerated activity." The statute is written as a sequence of first prong one and then prong two. This is the plain language and clear in the statute. This sequence indicates that prong two follows prong one, in other words, that prong two further modifies the results of prong one. This must mean that prong two, just like prong one, describes the underlying occurrence of the contract, and not the broad "contract, considered as a whole" that Nadex adopted.

A second point is that Congress made an exceptional rule here, and made the application of that rule contingent on two points. The first is that the contract is based on an occurrence (i.e. is an event contract). The second, is that the contract involves one of the specified activities. These two rules are both requirements. So the Special Rule only applies if the contract is both an event contract and also involves one of these activities. If Nadex is right, Congress would not have done it that way. Congress would have made the rule apply if either of the two prongs are met. So if the contract is an event contract, the rule applies, or if the contract involves one of these activities, the rule applies. There is no rhyme or reason why Congress would have done both an event contract AND involves one of these activities. If Congress doesn't like contracts that involve these activities, at least enough to make this special rule, why would they have said that is only for event contracts? That doesn't make any sense. The fact that Congress made both of these factors mandatory clearly shows that the two are related in scope. In fact, if prong two is, like prong one, limited to the contract's underlying occurrence, then both prongs are two components of a compound rule. The rule only applies if the contract is an event contract (prong 1) whose underlying occurrence involves one of these specific activities (prong 2). This makes perfect sense why Congress required both prong one and prong two to be satisfied. But under Nadex, that is not what Congress would have done.

This is not just a mater of a better read of the statute vs a worse read. It is the only read. The Nadex read of the statute conflicts with the way that Congress wrote the statute, and also conflicts with the way that Congress structured the two prongs. It is therefore wrong.