



TAX EXEMPT AND  
GOVERNMENT ENTITIES  
DIVISION

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

Release Number: **201347022**  
Release Date: 11/22/2013  
Date: August 30, 2013

Contact Person:  
Identification Number:  
Contact Number:  
Employer Identification Number:  
Form Required To Be Filed:  
Tax Years:

UIL: Section 501, 501.00-00, 501.06-01, 501.06-02, 501.06-03

Dear :

This is our final determination that you do not qualify for exemption from Federal income tax as an organization described in Internal Revenue Code section 501(c)(6). Recently, we sent you a letter in response to your application that proposed an adverse determination. The letter explained the facts, law and rationale, and gave you 30 days to file a protest. Since we did not receive a protest within the requisite 30 days, the proposed adverse determination is now final.

You must file Federal income tax returns on the form and for the years listed above within 30 days of this letter, unless you request an extension of time to file. File the returns in accordance with their instructions, and do not send them to this office. Failure to file the returns timely may result in a penalty.

We will make this letter and our proposed adverse determination letter available for public inspection under Code section 6110, after deleting certain identifying information. Please read the enclosed Notice 437, *Notice of Intention to Disclose*, and review the two attached letters that show our proposed deletions. If you disagree with our proposed deletions, follow the instructions in Notice 437. If you agree with our deletions, you do not need to take any further action.

If you have any questions about this letter, please contact the person whose name and telephone number are shown in the heading of this letter. If you have any questions about your Federal income tax status and responsibilities, please contact IRS Customer Service at

1-800-829-1040 or the IRS Customer Service number for businesses, 1-800-829-4933. The IRS Customer Service number for people with hearing impairments is 1-800-829-4059.

Sincerely,

Karen Schiller  
Acting Director, Exempt Organizations  
Rulings and Agreements

Enclosure  
Notice 437  
Redacted Proposed Adverse Determination Letter  
Redacted Final Adverse Determination Letter

cc:



TAX EXEMPT AND  
GOVERNMENT ENTITIES  
DIVISION

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

Date: July 22, 2013

Contact Person:

Identification Number:

Contact Number:

FAX Number:

Employer Identification Number:

UIL: Section 501, 501.00-00, 501.06-01, 501.06-02, 501.06-03

Platform =  
Rivals =  
Year =

Dear :

We have considered your application for recognition of exemption from Federal income tax under § 501(a) of the Code. Based on the information provided, we have concluded that you do not qualify for exemption under § 501(c)(6). The basis for our conclusion is set forth below.

**Facts:**

You are a Delaware nonprofit membership corporation seeking recognition as a business league exempt from tax under § 501(c)(6). You were formed to develop an industry standard for low-level components of computer operating systems built on the Linux software platform. Your members can install these components on the devices they manufacture and sell. Over the course of your application for exemption your purposes and activities have evolved.

The Platform is a software platform initially comprised nearly 100% of proprietary code provided by your founding members, and along with application program interfaces (API's) and software development kits (SDK's) only available to members. The Platform is a hardware agnostic software product, that is, the software is not configured for any particular hardware, but will try to adapt itself to any hardware on the computer system. You have methodically replaced nearly all the proprietary code with open-source licensed code and expanded publication to nonmembers and members alike. These open source compatible licenses generally permit anyone to copy, use, modify, and distribute the source code and object code, and derivative works, subject only to the open source license. You coordinated the creation of the Platform through collaborative efforts of some industry members who contribute computer code, and you market the Platform. You determine what functions should be included in the Platform, locate open source software modules that perform those functions, and make all of those modules interoperable; i.e. they will work together. You also hosted the Platform code modules on your servers which were initially only available to your members. You subsequently made them

available to members and nonmembers alike. Recently you moved code hosting to a 3<sup>rd</sup> party. You have now transferred to 3<sup>rd</sup> parties nearly all steps of developing the Platform.

Initially, only core members could commercially distribute the common Platform code with their products. Then any member could, and recently nonmembers can. Initially you made available API's and SDK's only to your members. Now you make these available to members and nonmembers alike. Contributors generally retain copyright ownership to the code they contribute. You claim ownership of API's and require API code authors to transfer all associated copyrights to you.

You formed a marketing task force to prepare an event plan in order to "position [you] as the unifying force in [software category] through impactful announcements and concrete proof points of progress while anticipating strong competing presence from rival platform providers including \*\*\*\* as a new entrant." The plan included core messaging, potential announcements, media engagement, booth presence, and device showcasing. You send representatives to conferences around the world to encourage adoption of the Platform. Your website extols the Platform virtues and provides users with assistance.

You stated your goal in an early press release of "creating the world's first globally competitive, Linux-based software platform for [computing] devices. . .", ". . .to create an innovative new business model. . .", "[Your] members will be involved in building an active ecosystem and will have the opportunity to influence the evolution of the Platform. . .", and you "will focus primarily on the joint development of a competitive Linux-based \*\*\*\* platform, built around a common source code tree that can adapt to ever evolving market requirements around the world."

Your President recommended that you disengage from collaboration discussions with a member of your industry because it "now presents a low- threat to [our] market objectives and the other scenarios are likely to distract [us] at a time when far more serious competition is emerging from other Linux-based device platform providers and lead to IPR contamination." Your Board discussed your Key Performance Indicators including the Platform market share and the Platform competitiveness against your competitors.

You describe one goal to create a 'fully independent [software] ecosystem' (that is all of the software tools useful to write Platform code and to write applications which run on the Platform) that allows you to compete against Rivals' platforms. You stated that the Platform must obtain a threshold 15% market share to achieve sustainability. Your Board minutes report plans for commercializing the Platform, and addressing the Platform weaknesses compared to Rivals' platforms. Your Board took the unanimous position that "successful [Platform] commercialization within [Year] remains the highest priority for [us]."

You developed a strategic roadmap how to respond to changes in Rivals' platforms and products. Your board discussed whether collaboration with competitors will attract followers away from the Platform, and "options to sharply improve competitiveness." One member commented favorably that another member's efforts to improve the Platform "all add up to a profound change in the competitive position of Platform. . ."

Your President explained that the Platform compliance roadmap was important because "in order to be successful [you] must both build a cohesive device platform and adopt it into commercial products in a consistent manner and at a pace that encourages the broader industry

to follow and invest in the platform.” Board discussion included how much guidance to provide software developers “considering when and if to invest in development on [Platform] vs. other industry platforms.” “All of the enabling technology in Release 1- created by [your] Founder members- has now been commercially deployed and proven within [hardware configurations] enjoyed by consumers today. . . .”

You have branded the Platform with your name. When you recently changed your name you rebranded the Platform to match.

**Law:**

Section 501(c)(6) provides for an exemption from U.S. federal income tax for business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Section 1.501(c)(6)-1 of the Income Tax Regulations provides that a business league is an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus, its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons. An organization whose purpose is to engage in a regular business of a kind ordinarily carried on for a profit, even though the business is conducted on a cooperative basis or produces only sufficient income to be self-sustaining is not a business league.

Rev. Rul. 68-182, 1968-1 C.B. 263, holds that organizations promoting a single brand or product within a line of business do not qualify for exemption from income tax under § 501(c)(6).

Rev. Rul. 68-264, 1968-1 C.B. 264, defines a particular service for individual persons for purposes of § 501(c)(6) as including an activity that serves as a convenience or economy to the members of the organization in the operation of their own businesses. The organization's activities resulted in savings and simplified operations for members.

In Bluetooth Sig Inc. v. United States, 101 A.F.T.R.2d 2008-748 (W.D. Wash. 2008), aff'd, 611 F.3d 617 (9th Cir. 2010), the Court examined an organization that was formed to advance the common business interests of its members in the development and regulation of technical standards for the compatibility and interoperability of wireless products and devices within a wireless personal area network. The organization develops specifications and use applications and promotes consumer awareness and marketing through its Bluetooth technology and trademark. The court held that the organization was not a tax-exempt business league under § 501(c)(6) because the organization's activities exclusively benefit its members, rather than an entire line of business.

In MIB, Inc. v. Commissioner, 80 T.C. 438 (1983), rev'd on other grounds, 734 F.2d 71 (1st Cir. 1984) the court ruled that exchanging insurance underwriting information among an organization's members with virtually all insurers in the nation as members was not a regular

business of a kind ordinarily conducted for profit and therefore did not preclude exemption of organization as a business league under § 501(c)(6).

In Pepsi-Cola Bottlers' Association, Inc. v. United States, 369 F.2d 250 (7th Cir. 1966) the court held that "It is unreasonable to write into the statute and regulations a limitation [the line-of-business test] wholly unsupported by the legislative history." The Service non-acquiesced in Rev. Rul. 68-182, 1968-1 C.B. 263 (1968) and the Supreme Court disapproved the 7<sup>th</sup> Circuit holding in National Muffler Dealers Ass'n, Inc. v. U. S. 440 U.S. 472 at 476, 99 S. Ct. 1304 at 1306 (U.S., 1979).

### **Analysis:**

You are not a business league exempt under § 501(c)(6). Section 501(c)(6) authorizes federal income tax exemption for business leagues defined in § 1.501(c)(6)-1. An organization must satisfy the following factors to be recognized as exempt:

- (1) It must be an association of persons having some common business interest, and its purpose must be to promote this common business interest.
- (2) It must not be organized for profit.
- (3) It must be a membership organization and have a meaningful extent of membership support.
- (4) No part of its net earnings may inure to the benefit of any private shareholder or individual.
- (5) Its activities must be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons.
- (6) Its purpose must not be to engage in a regular business of a kind ordinarily carried on for profit, even if the business is operated on a cooperative basis or produces only sufficient income to be self-sustaining.
- (7) It must be primarily engaged in activities or functions constituting the basis for its exemption.
- (8) Its primary activity cannot be performing particular services for members.

Because your primary activity has been the development of software and marketing that software for adoption by members of your industry, you fail factors (5)- (8) for a business league under § 1.501(c)(6)-1.

With respect to factor (5) of the above requirements under § 1.501(c)(6)-1, your activities are not directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons. You argue that the Platform provides several line-of-business benefits. First, computing device manufacturers can install the Platform and save the cost of developing up to 30% of an original platform. Second, even if industry members choose not to install the Platform, they can examine the code, learn from it, and incorporate bits and pieces into their own proprietary code. Third, a common platform improves compatibility of industry products. Finally, a common platform makes the industry more efficient because vendors do not have to port their products to multiple platforms.

To the extent your claims of industry benefit are true, they are outweighed by the fact that until 2012 you were producing and marketing a branded product. Organizations promoting a single

brand or product within a line of business do not qualify for exemption under § 501(c)(6). See Rev. Rul. 68-182. (Service non-acquiescence to Pepsi-Cola Bottlers' Association, Inc. v. United States, 369 F.2d 250 (7th Cir. 1966)). The Platform is a software program that controls computing devices. Your primary activity was developing the Platform and distributing it, first to your members, and then later to the public, royalty free, under open source licenses. Over the course of this application you have reduced your involvement in the Platform from complete management of development, distribution, and licensing, to shared development under open source licenses, and now you are primarily just marketing the Platform. Your one consistent activity throughout the course of your application has been marketing the Platform worldwide as an alternative to Rivals' platforms. You branded the Platform and then rebranded it when you began code harmonization with a similar platform. Accordingly, you are promoting a single brand or product within a line of business within the meaning of Rev. Rul. 68-182, and do not qualify for exemption under § 501(c)(6).

With respect to factor (6) of the above requirements under § 1.501(c)(6)-1, because your purpose is to develop and market a specific software program you are engaged in a regular business of a kind ordinarily carried on for profit even if the business is operated on a cooperative basis or produces only sufficient income to be self-sustaining. The Tax Court analyzed numerous cases and observed that "in deciding whether an association is engaged in the kind of business ordinarily conducted for profit the case law has generally focused on the existence of competing profit-oriented businesses." See MIB, Inc. v. Commissioner, 80 T.C. 438 at 453 (1983), rev'd on other grounds, 734 F.2d 71 (1st Cir. 1984)(organization non-exempt because it was performing particular services). The Tax Court summarized and applied several factors to conclude that because "petitioner has no actual or foreseeable commercial competitors, we find it was not engaged in the type of business ordinarily conducted for profit." *Id.* at 456. The factors included whether there was reasonable foreseeable competition, whether a for-profit business would or could perform a function similar to petitioner's insurance information exchange if petitioner ceased operations, and the existence of actual competition.

You claim there are no similar commercial products because the Platform was not a complete software program. In early releases, users had to write their own top-level code, such as a graphical user interface, to complete the program. However, competitors' platforms all include code to perform similar functions to the Platform. The fact that for the first few releases the Platform code was only a component of a complete platform does not render that code dissimilar to Rivals' platforms. Now that the Platform is a full software stack no arguable distinction between it and Rivals' platforms remain. Your competitors are for-profit organizations which offer proprietary and open source platforms which perform substantially the same functions as the Platform. Anyone installing the Platform on a computing device does so at the expense of your competitors. Therefore, unlike MIB, Inc. v. Commissioner, 80 T.C. 438, there is actual competition, and development of the Platform is a regular business of a kind ordinarily carried on for profit.

That fact that the Platform is distributed royalty free under open source licenses does not change our conclusion that the Platform is a regular business of a kind ordinarily carried on for profit. In Bluetooth SIG Inc. v. U.S., 611 F.3d 617 at 622-623 (9<sup>th</sup> Cir. 2010) the Court recognized that licensing intellectual property for a low-price is a business tactic to prevent competitors from forming rival technology standards:

"As the district court recognized, the Bluetooth trademark is a "valuable commodity" which is "for sale." Under different circumstances, Ericsson (or the original Promoters) might have licensed its intellectual property for a low price. Companies license their intellectual property rights all the time, and here—where competitors could just as easily come up with a different standard—the owner will likely license its intellectual property at a low enough cost to prevent the formation of rival standards. If Ericsson had decided to license the Bluetooth brand and technology, it would be engaging in business activity of the sort ordinarily engaged in for profit. A low selling price and a manufacturer-agnostic rights holder do not change the fundamental commercial nature of the transaction."

You entered a line of business with existing competitors and developed and marketed the Platform (a hardware agnostic software product) with an objective of taking at least 15% market share, which can only come at the expense of your competitors' software products. Instead of charging a low price to prevent the formation of rival products, you charge zero to persuade the market to abandon pre-existing products. The fact that the Platform is royalty free and hardware agnostic does not change the fundamental commercial nature of the transaction. Developing and licensing software is a business ordinarily carried on for profit. Accordingly, you are not exempt under § 501(c)(6).

With respect to factor (7) of the above requirements under § 1.501(c)(6)-1, you are not primarily engaged in activities or functions constituting a basis for exemption. Because more than half of your activities are the development and marketing of a software program, which we concluded above disqualifies you for exemption under § 501(c)(6), then you are not primarily engaged in activities or functions constituting a basis for exemption within § 1.501(c)(6)-1.

With respect to factor (8) of the above requirements under § 1.501(c)(6)-1, your primary activity is performing particular services for members because you are managing the development of a software program and marketing that program to hardware manufacturers. Rev. Rul. 68-264, 1968-1 C.B. 264, defines a particular service for the purposes of § 501(c)(6) as including an activity that serves as a convenience or economy to the members of the organization in the operation of their own businesses. Most of your members are hardware manufacturers, many of whom would have to either develop or purchase software similar to the Platform to install on their hardware. Your members contributed proprietary code and you managed its integration into the Platform. You performed code hosting and managed their licensing. Once the decision was made to copyright the Platform code under open source licenses you managed the conversion or replacement of proprietary code to open source licensed code, and managed the integration of code modules. You also attended numerous software conferences, issued press releases, and promoted the Platform via your website.

The management of software development, licensing, and the Platform marketing for members is a clear convenience and economy to them in their businesses, resulting in savings and simplified operations. Your program benefits your members by relieving them of a burden they would otherwise incur, which is considered to be a particular service as described in Rev. Rul. 68-264. Accordingly, this activity constitutes the performance of particular services for individual persons. Therefore, for this further reason, the organization is not exempt from Federal income tax under § 501(c)(6).

For these reasons, we conclude that you do not qualify for recognition of exemption from federal income tax under § 501(c)(6) and you must file federal income tax returns.

You have the right to file a protest if you believe this determination is incorrect. To protest, you must submit a statement of your views and fully explain your reasoning. You must submit the statement, signed by one of your officers, within 30 days from the date of this letter. We will consider your statement and decide if the information affects our determination.

Your protest statement should be accompanied by the following declaration:

*Under penalties of perjury, I declare that I have examined this protest statement, including accompanying documents, and, to the best of my knowledge and belief, the statement contains all the relevant facts, and such facts are true, correct, and complete.*

You also have a right to request a conference to discuss your protest. This request should be made when you file your protest statement. An attorney, certified public accountant, or an individual enrolled to practice before the Internal Revenue Service may represent you. If you want representation during the conference procedures, you must file a proper power of attorney, Form 2848, *Power of Attorney and Declaration of Representative*, if you have not already done so. For more information about representation, see Publication 947, *Practice before the IRS and Power of Attorney*. All forms and publications mentioned in this letter can be found at [www.irs.gov](http://www.irs.gov), Forms and Publications.

If you do not intend to protest this determination, you do not need to take any further action. If we do not hear from you within 30 days, we will issue a final adverse determination letter. That letter will provide information about filing tax returns and other matters.

Please send your protest statement, Form 2848 and any supporting documents to this address:

Internal Revenue Service  
TE/GE (SE:T:EO:RA:T:3)

You may also fax your statement using the fax number shown in the heading of this letter. If you fax your statement, please call the person identified in the heading of this letter to confirm that he or she received your fax.

If you have any questions, please contact the person whose name and telephone number are shown in the heading of this letter.

Sincerely,

Karen Schiller  
Acting Director, Exempt Organizations  
Rulings And Agreements