



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

Number: **201126039**
Release Date: 7/1/2011

Date: April 8, 2011

UIL: 501.03-21

Contact Person:

Identification Number:

Contact Number:

Employer Identification Number:

Form Required To Be Filed:
1120

Tax Years:
All Years

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)(3). 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.

Since you do not qualify for exemption as an organization described in Code section 501(c)(3), donors may not deduct contributions to you under Code section 170. 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.

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, you should follow the instructions in Notice 437. If you agree with our deletions, you do not need to take any further action.

In accordance with Code section 6104(c), we will notify the appropriate State officials of our determination by sending them a copy of this final letter and the proposed adverse letter. You should contact your State officials if you have any questions about how this determination may affect your State responsibilities and requirements.

Letter 4038 (CG) (11-2005)
Catalog Number 47632S

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,

Lois Lerner
Director, Exempt Organizations

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



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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

Date: October 15, 2010

Contact Person:

Identification Number:

Contact Number:

FAX Number:

Employer Identification Number:

LEGEND:

UIL: 501.03-21

B-Date
C-State
D-Applicant
E- Supplement Name
F- Founder
G- Website
H- *Book title*
J- Board Member

Dear :

We have considered your application for recognition of exemption from federal income tax under Internal Revenue Code section 501(a). Based on the information provided, we have concluded that you do not qualify for exemption under Code section 501(c)(3). The basis for our conclusion is set forth below.

Issues:

Are you operating exclusively for charitable purposes within the meaning of Section 501(c)(3)? No, for the reasons described below.

Letter 4036 (CG) (11-2005)
Catalog Number 47630W

Facts:

You were incorporated on B in the state of C. Your board consists of two individuals; your founder, F, and J. F is an Internal Medicine resident, and has a Doctor of Philosophy in the field of health and biochemistry. He also has a Master of Arts in sociology and is a medical scientist. J is your vice President and secretary. Before your incorporation, F developed a theory concerning healthy longevity. This theory involves the triangle of health consciousness, rest sleep hygiene, and the use of E vitamin supplements. F dedicated years of his life to this research, which involved promoting health, preventing and fighting disease, and ensuring healthy longevity. He also developed scientific principles resulting in the development of E vitamin supplements.

The first article of your Articles of Incorporation describes your purpose as follows:

D is organized to continue research and development of health maintenance and E based on the published work of F and to provide health education to people in developing countries and to educational institutions in the USA and to provide subsidy for people to benefit from such E.

E are vitamin supplements that consist of unique combinations of various known biochemical and nutritional supplements such as Beta Carotene, Glucosamine and Riboflavin. They come in capsules, pills or tablets. You purport that these vitamin supplements have documented evidence that they are beneficial to one's health and are essential for healthy living.

As a result of his research, F wrote a manuscript titled H. It explains his theories in detail concerning healthy longevity and the role that the consistent use of E vitamin supplements has in promoting healthy longevity. You indicated your primary activity is to conduct seminars educating people about E, and to educate people on the topics of health consciousness and the relativity of healthy longevity. H is intended to set the stage for the content of your seminars. These seminars will promote the use of E by explaining the role they have in healthy longevity. Both you and F will share the copyrights of H.

You have set up a dedicated website, G, where you market and sell these vitamin supplements to the general public. In order to purchase E, interested individuals complete a form found on your web site detailing their medical history and pay a \$55.00 consultation fee. You evaluate each individual based on the information on the form to determine what unique regimen of these products is ideal for their health. After the evaluation, you customize a personal regimen of E vitamin supplements specifically targeting the individual's health. Thus, regimens and pricing will vary greatly from person to person according to each person's individual health and the unique

combination of E vitamin supplements recommended for his/her condition. Interested individuals will then receive a cost analysis in advance and decide from there if they will purchase E. After an individual receives the first regimen, he/she may decide to stop receiving E and pay nothing. The actual amount an individual pays for his personalized regimen of E is based on manufacturing costs, processing fees and the shipping costs. In addition, a potential customer may request free samples and pay only shipping costs. Like, H the rights to E will be shared by you and your founder, F.

Some of the claims you make on your website about E is that they can help individuals recover from chronic diseases, they may prevent medical crisis that require hospitalization, they are the best approach to preventing any diseases for which an individual may have a family history or risk factors such as cancer or heart disease, and they may prevent the recurrence of disease. You also claim that E can boost immune mechanisms and help individuals acquire resistance to diseases, including infectious diseases, such as malaria.

The following phrases are found on your website:

“We guarantee that the first regimen of E will boost your health and life. If not, stop and pay no consultation fees”. and “Need to Know More. Evaluation of Your Condition at No Cost”

To emphasize E’s effectiveness, your website has a page devoted to testimonials of very satisfied individuals who have used E.

To date you have only tested E on volunteers and state that E has not been for sale to the public. You indicated that you purchase the components of E from vendors in the United States. However, you were unable to provide any contracts. You and your founder will also share the trademark rights to E until you can afford to enter into an agreement.

You listed other future activities such as the support of research and the development of E, and the promotion of health consciousness and E as tools for reducing the costs of health and medical insurance for everyone.

Fees charged for E vitamin supplements will fund your operations. Expenses consist of advertising and costs of procuring and distributing E.

Tax Law:

Section 501(c)(3) of the Internal Revenue Code provides for the exemption from federal income tax of organizations organized and operated exclusively for charitable purposes.

Section 1.501(c)(3)-1(c)(2) of Internal Revenue Regulations states that an organization whose net earnings inure to the benefit of private shareholders or individuals or which is operated for the benefit of private interests is not operated exclusively for exempt purposes.

In Rev. Rul. 72-369, 1972-2 C.B. 245, an organization was formed to provide managerial and consulting services for section 501(c)(3) organizations to improve the administration of their charitable programs. The organization enters into agreements with unrelated section 501(c)(3) organizations to furnish managerial and consulting services on a cost basis. This revenue ruling stated that::

An organization is not exempt merely because its operations are not conducted for the purpose of producing a profit. To satisfy the 'operational test,' the organization's resources must be devoted to purposes that qualify as exclusively charitable within the meaning of section 501(c)(3) of the Code and the applicable regulations. Providing managerial and consulting services on a regular basis for a fee is a trade or business ordinarily carried on for profit. The fact that the services in this case are provided at cost and solely for exempt organizations is not sufficient to characterize this activity as charitable within the meaning of section 501(c)(3) of the Code. Furnishing the services at cost lacks the donative element necessary to establish this activity as charitable.

In Old Dominion Box Co. v. United States, 477 F.2d 344 (4th Cir. 1973) cert. Denied 413 U.S. 910 (1973) the court held that operating for the benefit of private parties constitutes a substantial non-exempt purpose.

Harding Hospital, Inc. v. United States, 505 F.2d 1068 (1974), holds that an organization seeking a ruling as to recognition of its tax exempt status has the burden of proving that it satisfies the requirements of the particular exemption statute. Whether an organization has satisfied the operational test is a question of fact.

In B.S.W. Group, Inc. v. Commissioner, 70 T.C. 352 (1978), the Tax Court held that an organization did not qualify for exemption under section 501(c)(3) of the Code because it was primarily engaged in an activity that was characteristic of a trade or business and ordinarily carried on by for-profit commercial businesses. The Tax Court stated: "We must agree with the Commissioner that petitioner's activity constitutes the conduct of a consulting business of the sort which is ordinarily carried on by commercial ventures organized for profit."

In Living Faith Inc. v. Comm'r, 60 T.C.M., 710, 713(1990), aff'd 950 F.2d 365 (& Cir. 1991) the court wrote that the activities were conducted as a business and the organization was in direct competition with other restaurants and health food stores; thus it did not qualify for exemption under Section 501(c)(3). The appellate court stated

the factors that the court relied on to find commerciality and thus offered the best contemporary explanation of the commerciality doctrine. These factors include:

- 1) The organization sold goods and services to the public.
- 2) The organization was in direct competition with for profit businesses (Food stores and restaurants).
- 3) The prices set by the organization were based on pricing formulas common in retail food businesses.
- 4) The organization utilized promotional materials and "Commercial catch phrases" to enhance sales.
- 5) The organization advertised its services and food.
- 6) The organization did not receive any charitable contributions.

Application of Law:

You are not described in section 501(c)(3) of the Code because a substantial portion of your activities consists of selling health supplements for a fee in a commercial manner. You are not organized and operated exclusively for charitable purposes.

As described in section 1.501(c)(3)-1(c)(2) of the Regulations, you are not operated exclusively for exempt purposes because your net earnings inure to the benefit of private shareholders or individuals. This is evidenced by the fact that your activities consist of marketing and selling H and E, which were both created by F. The fact that F still owns the rights to these items shows that you have a substantial purpose of benefiting F.

You are like the organization described in Rev. Rul. 72-369, 1972-2 C.B. 245 because you are operating in a commercial manner. A substantial portion of your activities consists of marketing and selling commercial goods. The organization described in the revenue ruling was conducting commercial services only for organizations exempt under section 501(c)(3) and was still found to be conducting commercial activities. The fact that you sell commercial products to the general public shows that you are operated in even more of a commercial manner than the organization described in the revenue ruling. As explained in the ruling, the fact that the services in this case are provided at cost is not sufficient to characterize this activity as charitable within the meaning of section 501(c)(3) of the Code. Furnishing the services at cost lacks the donative element necessary to establish this activity as charitable.

You are like the organization in Old Dominion Box Co. v. United States, 477 F2d 344 (4th Cir. 1973) cert. Denied 413 U.S. 910 (1973) because you are operating for the benefit of your founder. This is substantiated by the fact that you market and sell the products and book created by your founder. Also, your founder owns a substantial part of the rights. Even the "educational seminars" you conduct appear to simply be a vehicle to promote and sell these products.

You are also operating like the organization in Harding Hospital, Inc. v. United States, 505 F2d 1068 (1974). The facts indicate that all of your resources are either directly or indirectly targeted at the promotion and sales of E. Your activities are conducted in a commercial manner and you have not met your burden of proving that you are operated exclusively for charitable purposes.

You are operating like the organization in B.S.W. Group, Inc. v. Commissioner, 70 T.C. 352 (1978) because you are substantially engaged in the commercial activity of marketing and selling vitamin supplements. This activity constitutes the conduct of a commercial business of the sort which is ordinarily carried on by commercial ventures organized for profit.

You are also like the organization in In Living Faith Inc. v Comm'r, 60 T.C.M., 710, 713(1990), aff'd 950 F.2d 365 (& Cir. 1991) because you are operating as a business and are in direct competition with all other businesses that sell vitamins. You are promoting and selling E on the dedicated web site G like a commercial business and using pricing formulas that seem no different than that of a for profit enterprise. You are also using marketing terms and catch phrases characteristic of a commercial business. This is evidenced by the phrases displayed on your website described above. Finally, the fact that you have testimonials of individuals who have achieved success with your product is also a common technique used by for profit businesses.

Applicant's Position:

You believe that your activities are educational and promoting health within the meaning of Section 501(c)(3). You believe that you are not operating in a commercial manner because you have no obligation to investors. You are an advocate of the people against entities that may exploit their pain and distress in the name of profit. You are not organized to yield financial returns to a few.

Service Response to Applicant's Position:

You have failed to prove that your activities are exclusively educational or charitable within the meaning of section 501(c)(3) of the Code. Even if some of your activities are considered to be educational and promoting health, the facts show that you have the substantial purpose of marketing and selling products in a commercial manner and substantially benefitting an individual, namely your founder. The fact that you have no obligation to investors and are not organized to yield financial returns does not prove that you are not operating in a commercial manner. As explained in Revenue Ruling 72-369, the fact that the products are provided at cost is not sufficient to characterize this activity as charitable within the meaning of section 501(c)(3) of the Code. Furnishing the services at cost lacks the donative element necessary to establish this activity as charitable.

Conclusion:

You are marketing and selling E, which was created by your founder, F. This activity is being conducted in a commercial manner. Also, since F shares the rights to these products with you, your activities inure to the private benefit of F. Therefore, you are not operating exclusively for charitable purposes within the meaning of Section 501(c)(3).

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. If your statement does not provide a basis to reconsider our determination, we will forward your case to our Appeals Office. You can find more information about the role of the Appeals Office in Publication 892, *Exempt Organization Appeal Procedures for Unagreed Issues*.

Types of information that should be included in your appeal can be found on page 2 of Publication 892, under the heading "Regional Office Appeal". The statement of facts (item 4) must be accompanied by the following declaration:

"Under penalties of perjury, I declare that I have examined the statement of facts presented in this appeal and in any accompanying schedules and statements and, to the best of my knowledge and belief, they are true, correct, and complete."

The declaration must be signed by an officer or trustee of the organization who has personal knowledge of the facts.

Your appeal will be considered incomplete without this statement.

If an organization's representative submits the appeal, a substitute declaration must be included stating that the representative prepared the appeal and accompanying documents; and whether the representative knows personally that the statements of facts contained in the appeal and accompanying documents are true and correct.

An attorney, certified public accountant, or an individual enrolled to practice before the Internal Revenue Service may represent you during the appeal process. If you want representation during the appeal process, you must file a proper power of attorney, Form 2848, *Power of Attorney and Declaration of Representative*, if you have not already done so. You can find more information about representation in 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, Forms and Publications.

If you do not file a protest within 30 days, you will not be able to file a suit for declaratory judgment in court because the Internal Revenue Service (IRS) will consider the failure to appeal as a failure to exhaust available administrative remedies. Code section 7428(b)(2) provides, in part, that a declaratory judgment or decree shall not be issued in any proceeding unless the Tax Court, the United States Court of Federal Claims, or the District Court of the United States for the District of Columbia determines that the organization involved has exhausted all of the administrative remedies available to it within the IRS.

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.

We have sent a copy of this letter to your representative as indicated in your power of attorney.

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

Mail to:

Internal Revenue Service
EO Determinations Quality Assurance
Room 7-008
P.O. Box 2508
Cincinnati, OH 45201

Deliver to:

Internal Revenue Service
EO Determinations Quality Assurance
550 Main Street, Room 7-008
Cincinnati, OH 45202

You may 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,

Robert S. Choi
Director, Exempt Organizations
Rulings & Agreements

Enclosure, Publication 892