



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

Number: **201152020**
Release Date: 12/30/2011

Date: October 4, 2011

Contact Person:

Identification Number:

Contact Number:

Employer Identification Number:

Form Required To Be Filed:

Tax Years:

UIL: 501.03-00; 501.33-00; 501.35-00

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.

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

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.

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



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

Date: August 17, 2011

Contact Person:

Identification Number:

Contact Number:

FAX Number:

Employer Identification Number:

LEGEND:

A = state
B = date
C = city
D = business
E = business
F = business

UIL #'s:

501.03-30
501.33-00
501.35-00

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:

Do you qualify for tax exemption under section 501(c)(3) of the Code? No, for the reasons stated below.

Facts:

You were incorporated under the laws of the State of A on B. Your Articles of Incorporation provide that your purposes are exclusively charitable, religious, educational, and scientific. You also indicate that you will provide a community activity which fosters social gathering and interaction and improve the value of produce available in your community.

You were formed to bring local and regionally grown produce to your community. A group of growers were looking to expand retail sales opportunities of area growers by

establishing producer markets. As a result, your governing body formed your market. You are seeking exemption to secure a permanent location to be used primarily as a vendor's pavilion. By acquiring this location, you would be able to expand the operational hours of your farmer's market and create more entrepreneur opportunities for your members. Your bylaws state that you will employ a market supervisor to manage your daily market operations, which will run one day a week for six months.

You have submitted news articles indicating that you were formed at the request of local growers and organizational members alike who were interested in finding a better market for one another's produce. You then created an environment that benefits local farmers by supplementing the farmer's existing income. All organizational members, including your governing body, participate in your farmers market as vendors. Vendors set the prices for the items they sell and recapture the entire sale price less a nominal set up fee. You distribute materials to the general public to advertise your farmer's market.

You have listed a close working relationship with the city of C as well as being endorsed and sponsored by the C Chamber of Commerce and the University of A Extension Office. You have indicated no further relationships or affiliations with these entities beyond this support. Further, you also list as sponsors and supporters alongside the above entities for profit businesses such as D, E and F.

In addition to running the market, at an annual agricultural conference, you will present information on your organization including growth and availability of products, market regulations, your seasonal meetings, and the days and operating hours of your market. Aside from this, between the months of October and May when the market is not open you conduct no other activities. Vendors have the opportunity to educate consumers on site about their practices or methods and products and information is on display at the market on the availability of seasonal produce.

You indicated that farmers joined your market as vendors due to the increased viability of potential buyers. You currently see no need to limit the number of vendors participating at your market – the number of vendors is driven by consumer demand. The market has increased overall sales and reduced the amount of set up time required of vendors. Although you have stated that yours is the only market of its kind within a 20 mile radius and there are no other venues or competitors in C you indicated that most of your vendors sell their products at other markets.

Membership is open to all farmers from any location via a membership application. You run an advertising campaign in your area labeled your "call for vendors" ads to attract new vendors to your market. Vendors selling produce at your market are asked to abide by your vendor policies and pay a yearly membership fee. Your organization has seen

growth in membership year over year. In the first year of operations, you averaged roughly 6-8 vendors. Now you currently average around 18-20 vendors with 46 total vendors in 2010.

You are funded primarily by membership and vendor fees and secondly by gifts, grants and contributions from the general public. Vendors pay a set up fee for the right to sell produce at your farmer's market. Your expenses are used for general advertising, fundraising and other operating expenses.

Law:

Section 501(c)(3) of the Code provides, in part, for the exemption from federal income tax of organizations organized and operated exclusively for charitable, religious or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Section 1.501(c)(3)-1(a)(1) of the Regulations states that in order to qualify under section 501(c)(3) of the Code, an organization must be both organized and operated exclusively for one or more exempt purposes. If an organization fails to meet either the organizational or operational test, it is not exempt.

Section 1.501(c)(3)-1(c)(1) of the regulations provides that an organization operates exclusively for exempt purposes only if it engages primarily in activities that accomplish exempt purposes specified in section 501(c)(3) of the Code. An organization must not engage in substantial activities that fail to further an exempt purpose.

Section 1.501(c)(3)-1(d)(1)(ii) of the regulations provides that an organization is not organized or operated exclusively for exempt purposes unless it serves a public rather than a private interest. To meet this requirement, it is necessary for an organization to establish that it is not organized or operated for the benefit of private interests.

Section 1.501(c)(3)-1(d)(3)(i) of the regulations provides, in part, that the term "educational" as used in section 501(c)(3) of the Code relates to the instruction of the public on subjects useful to the individual and beneficial to the community.

Rev. Rul. 61-170, 1961-1 C.B. 112., holds that an association composed of professional private duty nurses and practical nurses which supported and operated a nurses' registry primarily to afford greater employment opportunities for its members was not entitled to exemption under section 501(c)(3) of the Code. Although the public received some benefit from the organization's activities, the primary benefit of these activities was to the organization's members.

Rev. Rul. 67-216, 1967-2 C.B. 180., A nonprofit organization formed and operated

exclusively to instruct the public on agricultural matters by conducting annual public fairs and exhibitions of livestock, poultry, and farm products may be exempt from tax. §1.501(c)(3)-1. (Sec. 501, '86 Code.)

Rev. Rul. 80-287, 1980-2 C.B. 185, involved a non-profit lawyer referral service that arranges, at the request of any member of the public, an initial half-hour appointment for a nominal charge with a lawyer whose name is on an approved list maintained by the organization. As a general rule, providing services of an ordinary commercial nature in a community, even though the undertaking is conducted on a nonprofit basis, is not regarded as conferring a charitable benefit on the community unless the service directly accomplishes one of the established categories of charitable purposes. The organization's activities are directed toward assisting individuals in obtaining preventive or remedial legal services and, as such, are not specifically designed to eliminate prejudice or discrimination or to defend human and civil rights secured by law and does not confer a charitable benefit on the community. Although the lawyer referral service provides some public benefit, a substantial purpose of the program is promotion of the legal profession.

In Better Business Bureau v. United States, 326 U.S. 279 (1945), the Supreme Court stated that the presence of a single nonexempt purpose, if substantial in nature, will preclude exemption under section 501(c)(3) of the Code, regardless of the number or importance of statutorily exempt purposes. Thus, the operational test standard prohibiting a substantial non-exempt purpose is broad enough to include inurement, private benefit, and operations that further nonprofit goals outside the scope of section 501(c)(3).

In B.S.W. Group, Inc. v. Commissioner, 70 T.C. 352 (1978), the court found that a corporation formed to provide consulting services was not exempt under section 501(c)(3) because its activities constituted the conduct of a trade or business that is ordinarily carried on by commercial ventures organized for profit. Its primary purpose was not charitable, educational, nor scientific, but rather commercial. In addition, the court found that the organization's financing did not resemble that of the typical 501(c)(3) organizations. It had not solicited, nor had it received, voluntary contributions from the public. Its only source of income was from fees from services, and those fees were set high enough to recoup all projected costs and to produce a profit. Moreover, it did not appear that the corporation ever planned to charge a fee less than "cost." And finally, the corporation did not limit its clientele to organizations that were section 501(c)(3) exempt organizations.

In Easter House v. U.S., 12 Ct. Cl. 476 (1987), aff'd 846 F. 2d 78 (Fed. Cir 1988), the court found that adoption services were the primary activity of the organization. In

deciding that the organization conducted adoption services for a business purpose rather for a charitable purpose, the court considered the manner in which the organization operated. The record established a number of factors that characterize a commercial activity and which were evident in the operations of Easter House also. The court determined that the organization competed with other commercial organizations providing similar services; fees were the only source of revenue; it accumulated very substantial profits, because it set its fees in order to generate a profit; the accumulated capital was substantially greater than the amounts spent on charitable and educational activity; and the organization did not solicit and did not plan to solicit contributions.

Application of Law:

You are not organized and operated exclusively for charitable, educational, or religious purposes consistent with Section 501(c)(3) of the Code nor Section 1.501(c)(3)-1(a)(1) of the Income Tax Regulations and therefore fail to meet the operational test. You help facilitate the sale of produce for the benefit of the seller, advertise, promote and inform potential buyers about your market, and your primary activities revolve around setting up a vendor pavilion as a catalyst for facilitating produce sales for local farmers and organizational members alike.

Section 1.501(c)(3)-1(c)(1) of the Regulations provides that an organization operates exclusively for exempt purposes only if it engages primarily in activities that accomplish exempt purposes specified in section 501(c)(3) of the Code. You engage in a substantial non-exempt activity similar to a commercial enterprise and marketing service by operating an open market. Vendors participating in your market are free to set sales prices to their benefit and to maximize sales and profits. You therefore do not operate exclusively for exempt purposes.

Section 1.501(c)(3)-1(d)(1)(ii) of the Regulations provides that an organization is not organized or operated exclusively for exempt purposes unless it serves a public rather than a private interest. Your organization will help farmers sell produce in an effort to supplement their farming income. Proceeds from produce sales are provided without restrictions to the sellers, which privately benefit the sellers. Although quality products are delivered to the public for their benefit your overall purpose is to benefit your vendors rather than your consumers.

Section 1.501(c)(3)-1(d)(3)(i) of the Regulations provide, in part, that the term "educational" as used in section 501(c)(3) of the Code relates to the instruction of the public on subjects useful to the individual and beneficial to the community. As described above, your facilitation of produce sales is not educational nor is advertising your farmer's market at various conferences. These activities are a means of pairing potential buyers with sellers and soliciting potential vendors. Within your organization, only a limited amount of time and resources are devoted to educational and charitable

activities and purposes within the meaning of section 501(c)(3) of the Code. For these reasons you are not serving exclusively educational purposes.

An organization is not operated exclusively for charitable purposes, and thus will not qualify for exemption under section 501(c)(3), if it has a single non-charitable purpose that is substantial in nature (Better Business Bureau v. United States). You devote a substantial amount of your time, resources and activities to creating an event for vendor sales. Your expenses are directed towards attracting potential buyers and facilitating produce sales. You maintain a vendor list and are actively involved in the sales process. As these are not serving exclusively 501(c)(3) purposes and are not insubstantial in nature you are similar to the organization in the above ruling.

You are similar to the organizations described in B.S.W. Group, Inc. v. Commissioner and Easter House v. U.S., where the conduct of a trade or business ordinarily carried on by commercial ventures was found to be a non-qualifying activity. You have established a marketplace for vendors to come together and sell products to the general public at vendor established prices. Your activities are aimed at pairing potential buyers with sellers and facilitating sales transactions. Vendors are selected based not on charitable criteria but on consumer demand. Vendors select and set product prices for sale to maximize sales and profits. Also, as seen in B.S.W. Group, a lack of public support is good evidence that an organization is operating for commercial purposes and not for charitable purposes. A substantial amount of your current income comes from vendor fees. Your financial data shows that you will heavily depend on vendor fees from sales, not donations and grants. Since your inception, over 75% of your gross receipts are derived from vendor and membership fees. Because you conduct activities similar to a commercial business you do not meet the qualifications for exemption under 501(c)(3).

You are similar to the organization described in Revenue Ruling 61-170. This ruling noted that any public benefit provided by the organization was superseded by the primary benefit established for organizational members which precluded exemption under section 501(c)(3) of the Code. In your case, substantially all of your resources, purposes and activities are used to arrange a commercial market for vendors. You have also indicated that your organizational members formed the farmer's market and participate as vendors. While the public does benefit from an increase in market selection the overall purpose of your organization is to serve and benefit the members and vendors selling at the market and not the general public. Therefore, you do not qualify for exemption.

You are not like the organization in Revenue Ruling 67-216 because your principle purpose is to facilitate produce sales and pair buyers with sellers. You devote a majority of your resources and time to this purpose. You utilize resources to help local and regional farmers gain visibility to potential buyers through the vehicle of your farmer's market. You maintain a vendor list and distribute marketing materials and sales

information to buyers in the effort to encourage the public to support farmers at your market. Therefore, you do not qualify for exemption.

You are similar to the organization in Revenue Ruling 80-287 which stated that when regular commercial services, even if done on a non profit basis, did not directly accomplish one of the established categories of charitable purposes an organization does not qualify for exemption. Because your activities are directly promoting and facilitating the sale of produce, products are selected by vendors for the benefit of increasing sales, and you were formed to provide a better market for products and expand sales opportunities you were not formed to further exclusive 501(c)(3) purposes. While consumers at the market may receive information about products this is not serving an exclusive educational purpose. Also, since vendors are setting prices sales of products confer no charitable benefit to the community. Therefore you are not substantially serving established 501(c)(3) purposes and do not qualify for exemption.

Conclusion:

You help facilitate the sale of produce for the benefit of the seller. We have concluded that you are not an organization described in section 501(c)(3) of the Code because you are not operated exclusively for one or more exempt purposes set forth in section 501(c)(3) of the Code.

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 that 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 declared true under penalties of perjury. This may be done by adding to the appeal the following signed 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."

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. To be represented 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. 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, 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 to you. That letter will provide information about filing tax returns and other matters.

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 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,

Lois G. Lerner
Director, Exempt Organizations

Enclosure, Publication 892