



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

Release Number: **201237019**
Release Date: 9/14/2012
Date: June 19, 2012
UIL code: 501.30-02
501.03-30
501.35-00

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

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: May 1, 2012

Contact Person:

Identification Number:

Contact Number:

FAX Number:

Employer Identification Number:

Legend:

B = state
C = date
D = individual
F = individual
G = individual
H = business
J = program
K = program
L = program
M = program
N = program
P = program
w = number
x = dollar amount
y = dollar amount

UIL Codes:

501.30-02
501.03-30
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 exemption under section 501(c)(3) of the Code? No, for the reasons set forth below.

Does the inurement of earnings to your insiders, D and F, preclude exemption under section 501(c)(3) of the Code? Yes, for the reasons set forth below.

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

Do you operate in a substantially commercial manner, which would preclude exemption? Yes, for the reasons set forth below.

Facts

D, your president, and F, your vice president, are employed by the for-profit company, H, which was organized by F. F acts as the president and sole director of H. D and F both work 30 and 40 hours a week, respectively, for H.

H offers corporate training to employed people, including management skills training, sales training and customer service training, to help the workplace be more efficient and productive.

H, doing business as N, started with a program, P, as a test marketed to both job seekers hoping to improve interview skills, and employed executives looking to improve their presentation skills. The fee charged for P was x dollars. Due to high levels of unemployment, the program gained popularity, and H refocused the content exclusively to those seeking jobs. To make the program more affordable you started providing scholarships and gifts. You realized in forming a non-profit entity you could raise funds to supplement program fees. D and F decided to use P as initial material, which was then rebranded into J, as described below.

With the removal of P, H currently offers eight different training programs, for fees, aimed at corporations/group corporate training to help improve business processes for those already employed and/or wanting to improve segments of their company. The difference between you and H is that your training focuses on teaching unemployed people skills on being a successful interviewer and getting employed, while H's trainings focus on training current employed workplace teams. H is working in a private manner while you work in a public venue. You have stated the non-profit was formed to secure grants and other contributions to sponsor individuals who could not afford the fees associated with your services.

You were formed in B as a nonprofit corporation on C (date). Your Articles of Incorporation indicate your purpose is:

to develop and facilitate educational programs and workshops for America's workforce and empower our participants with interviewing skills and careering tools to 1) get a job and become re-employed; 2) build a career that aligns their background, purpose and capabilities; and 3) give participants vision, a plan and a process to go forward.

You also submitted Bylaws reflecting similar purposes, as well as a Conflict of Interest policy, which was not signed.

Your governing body consists of D (president), F (vice-president) and G (secretary/treasurer). D and F share the same household as domestic and business partners. G is F's daughter. Both D and F are compensated as independent contractors for their roles as "training managers". They both work in this capacity approximately 30 hours per week.

You will offer the following programs:

J: A 12-hour in-person program for job seekers held at regional level includes on-camera training and personal coaching. Seminars usually have approximately 15 participants to keep the individual coaching and learning retention at a high level. This highly successful interview skills training program (initially run by H) has been held in a public venue every month since 2009.

K: A 12-hour in-person program for transitioning to a new career held at regional level including on-camera training and personal coaching. This program was introduced during 2011.

L: One-on-one coaching includes four 90-minute sessions either in person or via Skype including behavioral inventory. This program has been offered as a stand-alone product and also as a supplemental product after participants have gone through the J training.

M: An online learning application, which uses a combination of self-paced training modules, personal branding modules and interactive training on the internet with individuals and groups. This training is targeted to wider audiences across the United States.

You offer your trainings on a fee basis. The schedule of fees is as follows:

1) x dollars (same as previously charged by H) if job-seeker has been out of work for less than six months

2) x dollars–25% (25% discount) if job-seeker has been out of work for more than six months

3) x dollars–50% (50% discount) if job seeker has been out of work for 14 months or longer (and does not receive unemployment compensation)

4) x dollars–75% "Work Study" Fee (75% discount) if job seeker wants training, cannot afford anything else and agrees to do volunteer work for you which you have stated equals 24 hours of volunteer work

5) FREE if jobseeker is long term unemployed and been out of work for over three years

Participants in your programs receive a copy of a book written by D and F, labeled as a trail guide workbook. Participants are also given the opportunity to schedule one-on-one coaching sessions with D or F at a rate ranging between \$75-\$100 hourly. The program itself is held in a church, which has given use of the space to you rent free.

Over the course of one year, you had w people attend your trainings. Of them, around 18% received free services. The remainder paid varying rates, including the full asking price of x dollars.

Optimally, you would like to see grants cover all fees and costs of the training for all unemployed job seekers and those job-seekers who are employed but need financial assistance. If such grants are secured, they would pay the full price of x dollars for each recipient covered. You could not provide independent comparative data related to the fees you charge as you have stated there are no organizations offering the particular services you offer.

Thus far, all of your income has been from fees for services. We requested a breakdown of your expenses on more than one occasion, however, you never elaborated on the expenses you have or expected to incur. You have projected compensation for both D and F of approximately \$ 15,000 annually.

F, who provides facilitation of the program, is paid approximately \$ 75/hour through H. D receives 20% of a contract price as a sales commission and for assisting in facilitating the program of H, which is approximately \$30/hour. You have included a service contract for both D and F that provides compensation averaging around \$55/hour for F and \$20-\$25 for D. While G is not listed as a contracted employee she is listed in your training book as an expert facilitator.

The pricing contract broke down the costs for services to you both D and F will provide, which ranged between \$500-\$1000 each, including facilitation, camera work and editing, program management and coordination and marketing. D and F have stated the contract was negotiated arms length because the fees they charge are fair market. The amounts charged were based on the hourly compensation rates for both D and F. The contract did not cap or place any limit on the compensation that D and F could receive.

Law

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

Income Tax Regulation ("Regulation") section 1.501(c)(3)-1(c)(2) provides that an

organization is not operated exclusively for one or more exempt purposes if its net earnings inure in whole or in part to the benefit of private shareholders or individuals. Regulation section 1.501(c)(3)-1(d)(1)(ii) provides that an organization is not organized or operated exclusively for one or more of the purposes specified in subdivision (i) of this subparagraph unless it serves a public rather than a private interest. Thus, to meet the requirement of this subdivision, it is necessary for an organization to establish that it is not organized or operated for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled, directly or indirectly, by such private interests.

In Revenue Ruling 69-266, 1969-1 CB 151, an organization formed and controlled by a doctor of medicine, "hired" to conduct research programs consisting of examining and treating patients who are charged the prevailing fees for services rendered, is not exempt under section 501(c)(3) of the Code. Under the facts described the operation of the medical practice by the organization does not differ significantly from the private practice of medicine for profit. The organization's primary function is to serve the private interest of its creator rather than a public interest.

In Revenue Ruling 69-632, 1969-2 C.B. 120, a nonprofit organization composed of members of a particular industry to develop new and improved uses for existing products of the industry is not exempt under section 501(c)(3) of the Code. The association's members select research projects in order to increase their sales by creating new uses and markets for their product. The primary purpose of the association's research is to serve the private interests of its creators, rather than the public interest.

In Revenue Ruling 72-369, 1972-2 CB 245 an organization formed to provide managerial and consulting services at cost to unrelated exempt organizations did not qualify for exemption under section 501(c)(3). 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 Better Business Bureau of Washington D.C., Inc. v. United States, 326 U.S. 279 (1945), the Supreme Court held that the presence of a single non-exempt purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly exempt purposes. The Court found that the trade association had an "underlying commercial motive" that distinguished its educational program from that carried out by a university.

In B.S.W. Group, Inc. v. Commissioner, 70 T.C. 352 (1978), the court found that a

corporation organized to provide counseling 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 as a commercial venture organized for profit. The corporation's primary purpose was not charitable, educational or scientific, but rather commercial in nature. Further, the court found that the organization's financing did not resemble that of a typical 501(c)(3) organization as it had not solicited, nor had it received voluntary contributions from the public. Its only source of income was from the fees for services that it collected. Those fees were set high enough to recover all projected costs and produce a profit. Moreover, it did not appear that the corporation ever planned to charge a fee less than "cost."

In Airlie Foundation v. Commissioner, 283 F. Supp. 2d 58 (D.D.C., 2003), the court relied on the "commerciality" doctrine in applying the operational test under section 501(c)(3). Because of the commercial manner in which the organization conducted its activities, the court found that it was operated for a non-exempt commercial purpose, rather than for a tax-exempt purpose. The case noted that among the major factors that courts have considered in assessing commerciality are competition with for-profit entities, pricing policies, the extent and degree of below cost services provided and the reasonableness of financial reserves. Additional factors include whether the organization uses commercial promotional methods (such as advertising) and the extent to which the organization receives charitable donations.

Application of Law

You are not 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) of the Income Tax Regulations and therefore fail to meet the operational test. Specifically, the facts above indicate that you are not operated for exempt purposes but that you are operated in a commercial manner to market and sell your training programs. You are not distinguishable from any commercial operation in that you charge similar fees for all of your products, market these products to the general public, and are carrying on similar operations of a still active for profit entity.

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 the training programs J, K, L and M, which were created by D and F, and originally sold through their for-profit entity, H. In addition, D and F control you and receive contracted compensation in direct correlation to the amount of programs sold.

You have not established that you are organized and operated for the benefit of public rather than private interests as required in Regulation 1.501(c)(3)-1(d)(1)(ii). You are carrying on the activities previously conducted by a for-profit entity still in existence and under the control of your founders, D and F, while charging the same fees for services.

Many of the products you will use are trademarked and/or created by D and F, and you have not established that D or F will not benefit from the use and marketing of these products. All three of your governing body members are related. Compensation was not decided in an arms length manner. Further, there has been no definitive maximum level set for the wages that could potentially be received by D and F through one-on-one coaching services.

You are similar to the organization in Revenue Ruling 69-266 in that your operations do not differ significantly from the private, for-profit entity D and F still own and operate, H. You offer the same training program started by H, P. You hired your controlling governing body members, D and F, to provide services for fees. Although you have indicated that the fees charged are in most cases reduced, your pricing policy has not changed since the services were first offered under H. The rates charged are similar, and in some cases, identical to what H charged. You are compensating D and F similar rates to what they are paid for training and counseling under H. You have not demonstrated how your rates materially differ from prevailing fair market rates for such services. You also intend to ensure that the full price is paid regardless of any fee reduction by securing grants to supplement anyone who cannot pay full price.

Similar to the organization denied exemption in Revenue Ruling 69-632, you were created to provide a new market for the services previously offered by a related for-profit. You were formed to expand the client base of D and F by creating an additional pool of services for which fees are charged supplemented by grant funding you expect to receive. The eventual use of grant funding will allow you to service more individuals at full price, which means more compensation to D and F. Even though you are providing educational job training services the private interests being served outweigh the public benefit.

You are similar to the organization described in Revenue Ruling 72-369 as you are providing a business service on a regular basis for a fee. Although you provide some discounted services your operations are not distinguishable from a regular commercial business. You use paid staff with salaries comparable to similar for profit operations, you charge fees in line with similar for profit operations, and you market your products similar to for profit operations.

As noted in B.S.W. Group and Airlie Foundation, *supra*, your trainings are counseling services that constitute a business ordinarily carried on as a commercial venture. You have not, thus far, received any contributions from private or public sources. Your only source of income is fees for services. Your fees are set high enough to cover the projected costs and produce a profit. Comparatively, you charge fees that resemble the for-profit rates of H. As noted previously, the costs associated for the services of D and F are similar to costs charged in their for-profit employment at H. Although you have provided some services at a reduced price, you intend to secure grants only so that you

are paid the full price for those who cannot afford your fees. These factors show the commerciality of your services. Further, by using the same key directors and employees as H, rebranding a product of H, charging the same fees as H, and operating in the same location where programs were initially conducted by H, you are indistinguishable from H. Providing some free or reduced cost services does not change the manner in which you operate which is commercial in nature.

Since your operations are commercial in nature, they are distinguishable from an exclusively charitable and educational program, which would be exempt in nature. This underlying commercial motive is similar to what caused denial of exemption in Better Business Bureau of Washington D.C., *supra*.

Applicant's Position

You contend that you have demonstrated you are operating in an exempt manner and should be granted exemption under section 501(c)(3) of the Code.

Service Response to Applicant's Position

Due to your commercial operations and the private benefit to your insiders, D and F, you are not operated exclusively for an exempt purpose under section 501(c)(3) of the Code.

Conclusion

Based on the facts presented above, we hold that you are not exclusively charitable within the meaning of section 501(c)(3) of the Code. You do not meet the operational test as you are commercial in nature and your operations serve private, rather than public interests. Accordingly, we conclude you fail the operational tests and do not qualify for exemption under IRC 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*.

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.

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,

Lois Lerner
Director, Exempt Organizations
Rulings & Agreements

Enclosure: Publication 892

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