



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

Number: **201334045**
Release Date: 8/23/2013

Date: May 31, 2013

UIL: 501.33-00; 501.35-00; 501.36-00; 501.04-00

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,

Holly O. Paz
Director, Exempt Organizations
Rulings and Agreements

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: April 15, 2013

Contact Person:

Identification Number:

Contact Number:

FAX Number:

Employer Identification Number:

LEGEND:

B = date
C = state
D = city
E = organization

UIL:

501.33-00
501.35-00
501.36-00
501.04-00

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. The basis for our conclusion is set forth below.

Issue

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

Alternate Issue

Do you qualify for exemption under section 501(c)(4) of the Internal Revenue Code? No, for the reasons given below.

Facts

You were incorporated on B as a non-profit corporation under C law. Your Articles of Incorporation ("Articles") state, in Article IV, that your specific purpose is to: "bring a variety of farm fresh produce to the consumer in a centralized location." You have seven board members - five are vendors at the market while the other two are consumers. The market is operated exclusively by your Board of Directors.

Letter 4036(CG) (11-2011)
Catalog Number 47630W

Your Form 1023 indicates that your past, present and future activities are offering a venue where vendors of fresh, locally grown farm produce can offer their products for sale to the residents of D and the surrounding community. The market is open each Saturday morning from May to October, 9 AM to Noon, at the county fair grounds. Market vendors offer locally raised meats, locally produced baked goods, crafts and other items. Vendors apply for an inside or outside space at the market for a small weekly fee. Concession food items may also be sold by the vendors. Beginning in 20 , new vendors were required to raise a majority of their products sold at the market. The market is available to persons or organizations interested in selling produce, honey, baked goods, bread products, cheese, processed meats, crafts and flea market items, antiques and collectibles. Wearable items may only be sold if they are homemade craft items. New vendors must apply in advance to the Market Manager for a space in order to bring balance to the purpose of the market.

You stated the market is operated to meet the demands of the community. The local government is not involved with the operation of the market nor does the local community have any involvement other than making purchases. You do offer a scholarship to youth who are interested in producing and marketing locally-grown food to the customers of the market. The scholarship requirements include: must sell, as a vendor at your market, an horticultural/agricultural product that he/she raised a minimum of five times during the current market season; must participate in a mentoring program with an experienced grower/marketer; must maintain records of the project to summarize the results of the experience; is targeted for high school seniors who are enrolled in higher education. The scholarship is available to reimburse the recipient's expenses of attending an institution of higher learning.

Your website includes basic information regarding the location and hours that the market operates. In addition, a list of all vendors along with their products is provided. One of your Board members writes a column in the local paper publicizing what will be available in the market each week. You are planning on constructing a new building to house the market so you can expand the number of vendors who participate on a weekly basis. You have a close connection to a local university through advice offered by the extension officer to your board on the operation of the market. You rent your facility from E, a section 501(c)(3) organization. E has no involvement with you or your operations beyond renting you a facility. Your budgets indicate that your gross receipts consist almost exclusively of fees received from vendors to rent space at the market. You also have a small amount of gross investment income. Your expenses include salaries/wages, occupancy, professional fees and miscellaneous operating expenses.

Law – Section 501(c)(3)

Section 1.501(c)(3)-1(a)(1) of the Income Tax Regulations ("regulations") provides that, in order to be exempt as an organization described in section 501(c)(3) of the Code, 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.

Section 1.501(c)(3)-1(b)(1)(i) of the regulations provides that an organization is organized exclusively for one or more exempt purposes only if its articles of organization:

- (a) Limit the purposes of such organization to one or more exempt purposes; and
- (b) Do not expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities that in themselves are not in furtherance of one or more exempt purposes.

Section 1.501(c)(3)-1(b)(4) of the regulations provides that an organization's assets must be dedicated to an exempt purpose, either by an express provision in its governing instrument or by operation of law.

Section 1.501(c)(3)-1(c)(1) of the regulations provides that an organization will be regarded as "operated exclusively" for one or more exempt purposes only if it engages primarily in activities that accomplish one or more of such exempt purposes specified in section 501(c)(3) of the Code. An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of 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 and specifically 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. 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)(2) of the regulations provides that the term "charitable," is used in section 501(c)(3) in its generally accepted legal sense and includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.

Section 1.501(c)(3)-1(d)(3)(i) of the regulations provides that the term "educational," as used in section 501(c)(3) of the Code, relates to:

- (a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or
- (b) The instruction of the public on subjects useful to the individual and beneficial to the community.

Rev. Rul. 61-170, 1961-2 C.B. 112., An association composed of professional private duty nurses and practical nurses which supports and operates a nurses' registry primarily to afford greater employment opportunities for its members is not entitled to exemption from Federal income tax under section 501(a) of the Internal Revenue Code of 1954 as an organization described in 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 qualify for exemption from federal income tax under section 501(c)(3) of the Internal Revenue Code of 1954. The principal activities and exhibits of the fair are educational. They are planned and managed by persons whose business it is to inform the public in general, and farmers in particular, about the resources of the region, and the methods by which they may be conserved, utilized, and improved. In addition, the overall activities of the fair are conducted in such a fashion and on such subjects as will enlighten the viewers and participants on the newest and best techniques of farming, and on other matters useful and beneficial to them and to the community.

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 covering the gamut of everyday legal problems and, as such, are not specifically designed to eliminate prejudice or discrimination or to defend human and civil rights secured by law. Therefore, the lawyer referral service 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. The referral service is not exempt under section 501(c)(3) of the Code, but is exempt as a business league under section 501(c)(6).

In Better Business Bureau of Washington, D.C. v. U.S., 326 U.S. 279, 283, 66 S. Ct. 112, 90 L. Ed. 67 (1945), the Supreme Court held that the "presence of a single . . . [nonexempt] purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly . . . [exempt] purposes."

In B.S.W. Group, Inc. v. Commissioner, 70 T.C. 352 (1978), the court found that a corporation formed to provide consulting services did not satisfy the operational test under section 501(c)(3) of the Code 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, or scientific, but rather commercial. In addition, the court found that the organization's financing did not resemble that of the typical section 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 Cl. Ct. 476, 486 (1987), aff'd, 846 F. 2d 78 (Fed. Cir.) cert. denied, 488 U.S. 907, 109 S. Ct. 257, 102 L. Ed. 2d 246 (1988), the court found an organization that operated an adoption agency was not exempt under section 501(c)(3) of the Code because a substantial purpose of the agency was a nonexempt commercial purpose. The court concluded that the organization did not qualify for exemption under section 501(c)(3) because its primary activity was placing children for adoption in a manner indistinguishable from that of a commercial adoption agency. The court rejected the organization's argument that the adoption services merely complemented the health related services to unwed mothers and their children. Rather, the court found that the health-related services were merely incident to the organization's operation of an adoption service, which, in and of itself, did not serve an exempt purpose. The organization's sole source of support was the fees it charged adoptive parents, rather than contributions from the public. The court also found that the organization competed with for-profit adoption agencies, engaged in substantial advertising, and accumulated substantial profits. Accordingly, the court found that the "business purpose, and not the advancement of educational and charitable activities purpose, of plaintiff's adoption service is its primary goal" and held that the organization was not operated exclusively for purposes described in section 501(c)(3). Easter House, 12 Cl. Ct. at 485-486.

Law – Section 501(c)(4)

Section 1.501(c)(4)-1 of the regulations provides that an organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community. An organization embraced within this section is one which is operated primarily for the purpose of bringing about civic betterments and social improvements and is not an

action organization as set forth in paragraph (c)(3) of Regulation 1.501(c)(3)-1.

Section 1.501(c)(4)-1(a)(2)(ii) of the regulations provides that an organization is not operated primarily for the promotion of social welfare if its primary activity is carrying on a business with the general public in a manner similar to organizations that are operated for profit.

Revenue Ruling 78-86 denied an organization formed by various merchants to provide customer parking. A parking arrangement whereby merchants join together to provide parking for their customers at a reduced rate serves the merchants' private interests by encouraging the public to patronize their stores. Thus it cannot be said to be operated exclusively for charitable purposes under section 501(c)(3) of the Code or primarily for social welfare purposes under section 501(c)(4).

Application of Law - Section 501(c)(3)

You are not organized and operated exclusively for charitable, educational, or religious purposes consistent with Section 501(c)(3) of the Code or Section 1.501(c)(3)-1(a)(1) of the regulations and therefore fail to meet the operational test. You help facilitate the sale of produce, baked goods and other items for the benefit of the seller. Your primary activities revolve around setting up the vendor spaces in order to facilitate the sale of goods for local farmers and other members.

To demonstrate it is organized exclusively for exempt purposes, satisfying the organizational test, an organization must have a valid purpose and dissolution clause. Sections 1.501(c)(3)-1(b)(1)(i) and 1.501(c)(3)-1(b)(4) of the regulations. You do not have a valid purpose clause. Your Articles provide that your specific purpose is to: "bring a variety of farm fresh produce to the consumer in a centralized location." Your Articles do not limit your purposes to one or more exempt purposes.

Section 1.501(c)(3)-1(c)(1) of the regulations provides an organization will be regarded as "operated exclusively" for one or more exempt purposes only if it engages primarily in activities that accomplish one or more of such exempt purposes specified in section 501(c)(3) of the Code. You engage in a substantial non-exempt activity similar to a commercial enterprise by operating a market selling various goods to the public. Vendors participating in your market pay a fee to rent their space and then are free to set sales prices to maximize sales and profits for their own benefit. While you do offer a scholarship to high school seniors pursuing a college education, this activity is insubstantial in relation to your activity of providing vendor space for the sale of goods. You therefore do not operate exclusively for exempt purposes.

You help farmers and other members sell produce and other goods in order to supplement their farming/other income. Proceeds from sales at the market are provided without restrictions to the sellers, which serves the private benefit of the sellers. 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 and specifically 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. Providing space for vendors to sell produce/goods to the general public does not further educational purposes. You do not provide any classes, workshops or distribute educational materials. While your scholarship may further educational purposes it is incidental to your purpose of providing space for your vendors to sell their goods. Further, one must work as a vendor at the market to qualify for scholarship assistance.

You are similar to the organization described in Revenue Ruling 61-170 which did not qualify for exemption under 501(c)(3). In that ruling it was 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. Substantially all of your resources, purposes and activities are used to provide a commercial marketplace for vendors to sell their goods for their own benefit. You have also indicated that five of your seven board members are also vendors at the market. While the public does benefit tangentially from the operation of the market in that fresh produce and other quality products are made available at a central location, a substantial purpose of your activities is to serve and benefit your vendors and not the general public.

You are unlike the organization in Revenue Ruling 67-216, which did qualify for exemption under 501(c)(3), as your principle purpose is to facilitate vendor sales and connect buyers with sellers. You devote a majority of your time and resources to this purpose. You utilize resources to assist local and regional farmers as well as other producers to gain visibility to potential buyers through the vehicle of your farmer's market. Your website includes a vendor list that includes his/her product(s) sold at the market. You encourage the public to support the vendors at your market. Each vendor would otherwise bear the expense of providing the same services on an individual basis.

You are similar to the organization in Revenue Ruling 80-287 which stated regular commercial services, even if offered on a non-profit basis, do not directly accomplish one of the established types of charitable purposes. Your activities are directed at promoting and facilitating the sale of products selected by vendors for the purpose of increasing sales. You were formed to provide an improved market for products and expand sales opportunities. You were not formed to further exclusive section 501(c)(3) purposes. While consumers at the market may receive information about products this,

as an educational activity, is incidental to substantial non-exempt purposes. Therefore, you are not substantially serving established section 501(c)(3) purposes and do not qualify for exemption.

The presence of a single non-exempt purpose precludes exemption regardless of any valid exempt purposes (Better Business Bureau of Washington, D.C. v. U.S.). You failed to establish that you are operated exclusively for one or more exempt purposes. Your proposed activities are not exclusively charitable nor are they educational as provided in Sections 1.501(c)(3)-1(d)(2) and 1.501(c)(3)-1(d)(3)(i) of the regulations. Your expenses are directed towards making goods sold by your vendors available to the public for purchase. As you serve substantial non 501(c)(3) purposes you are similar to the organization in the court case.

The organizations in B.S.W. Group and Easter House were found to be non-exempt for conducting activities indistinguishable for commercial ventures. A substantial part of your activities consist of providing a marketplace for private individuals to sell their produce and other goods to members of the public at prices established by the vendor. Vendors are selected based upon consumer demand for their products. Vendors select and set product prices for sale to maximize their profit and sales. A lack of public contributions, primary business purposes and competition with other like for-profit businesses were cited as evidence in the above cases in determining an organization was operating for commercial and not charitable purposes. Essentially all of your income is derived from vendor fees, you conduct no activities beyond providing vendors selling space and you are in competition with like markets. You are similar to the court cases because the manner in which you operate is indistinguishable from a commercial venture.

Application of Law - Section 501(c)(4)

Treasury Regulation 1.501(c)(4)-1 provides that an organization is operated for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community. You are formed to benefit your vendors who have rented space at your market to sell products. An organization that primarily benefits a private group of citizens cannot qualify for exemption. While the community at large derives some benefit from the availability of certain products, the reason you were formed was to provide a place for these vendors to sell their products. Because you are primarily benefitting a group of private individuals, your vendors, you are not as described in the regulations.

Section 1.501(c)(4)-1(a)(2)(ii) of the regulations provides that an organization is not operated for the promotion of social welfare if it is carrying on a business similar to organizations that are operated for profit. You carry on a business similar to any for profit market in providing a varied array of products for customers. Vendors are selected based on the types of products provided so as to ensure a balanced market and are

allowed to operate generating maximized profits through individual sales at their own vendor space.

In Revenue Ruling 78-86 an organization formed by various merchants to provide parking for their customers at a reduced rate was found to be serving the merchants' private interests by encouraging the public to patronize their stores. Your market is operated primarily by vendors looking for a place to sell goods. The market is serving the private interests of your vendors, merchants, by providing a common venue for the sale of those goods. Rather than vendors having to handle their own marketing, promotion or advertising, this is done by you through publicizing of the market. Customers are in turn encouraged by you to patronize and purchase goods sold by your vendors at your market. For these reasons you too are serving private interests.

Conclusion

Based on the facts and information provided, you are not organized or operated exclusively for exempt purposes within the meaning of section 501(c)(3) of the Internal Revenue Code. The provision of a marketplace for the sale of goods is not an exclusive 501(c)(3) purpose. Therefore, you are not described in section 501(c)(3).

In the alternative, you are not described in section 501(c)(4) of the Code because you are not formed for social welfare purposes. Accordingly, you do not qualify for exemption under section 501(c)(4) of the Internal Revenue 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 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.

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

Mail to:

Internal Revenue Service
EO Determinations Quality Assurance

Deliver to:

Internal Revenue Service
EO Determinations Quality Assurance

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,

Holly O. Paz
Director, Exempt Organizations
Rulings and Agreements

Enclosure: Publication 892