



TAX EXEMPT AND  
GOVERNMENT ENTITIES  
DIVISION

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

Release Number: **201505040**  
Release Date: 1/30/2015  
Date: 11/06/2014  
UIL Code: 501.00-00  
501.03-00

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. We also sent you a letter notifying you of your right to request a review of your application by the Appeals Office, and gave you 30 days to request review in writing. Since we did not receive a protest or request for review within the requisite 30 days, the proposed adverse determination is now final.

Because 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. File the returns in accordance with their instructions, and do not send them to this office. Failure to file the returns timely may result in a penalty.

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

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

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

Sincerely,

Tamera Ripperda  
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: 05/22/2014

Contact Person:

Identification Number:

Contact Number:

FAX Number:

Employer Identification Number:

UIL: Section 501, 501.00-00, 501.03

Legend:

Date =  
State =  
T =

Dear :

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

**Facts**

You are a State non-profit non-membership corporation formed on Date for charitable and scientific purposes. Your Articles of Incorporation ("Articles") state that you are organized and operated exclusively for charitable and scientific purposes within the meaning of § 501(c)(3). Your Articles forbid inurement and campaign intervention, limit legislative activities, and upon dissolution your assets must be distributed to § 501(c)(3) organizations. You also have a conflict of interest policy.

You were formed to develop free and open source software that lets users easily work with photos, audio, and video modules in the T software environment including a photo organizing tool, a programmer tool, an audio editing tool, and a video editing tool (i.e. the "Tools"). You state that your specific activities are: (1) writing free and open source software, (2) maintaining a website including online forums, a wiki, and user guide, and (3) awareness campaigns and fundraising activities. Ninety percent (90%) of your activities are developing open source software. The remaining ten percent (10%) is divided between fundraising and promotion of open source software and maintaining your website.

You publish the Tools under the GNU Lesser General Public License 2.1 which grants every person the royalty free rights "to reproduce, prepare derivative works of, sub-license, and distribute their contributions and derivative works thereof." It also allows any person to run,

copy, redistribute, and modify code for any purpose provided distribution of modified and unmodified works are subject to the same license. The Tools will be included in the major I distributions by other persons to be used by users around the world. You are not publishing or distributing these I distributions.

You also state that the Tools are included in a free and open source software operating system that is intended for school use. The software is assembled by private persons for distribution to schools districts. However, you have not provided a copy of the software package, description of the other software the Tools are bundled with, or even reported how many copies of the Tools were distributed to school districts. You are not publishing or distributing this software package.

You describe your charitable purpose as providing free software, complete with documentation, user-guides and responsive support and that your main activity is the promotion and development of free and open source software that benefits the general public. Your "production of free and open source software aims to provide a no-cost alternative to software that can sell for as much as \$1,000 a license." You "aim to construct services and tools provided free to all, that will allow the poor access to what would otherwise likely be inaccessible tools" thereby providing relief to the poor or underprivileged. However, the Tools have been downloaded many times, but you do not know who the users are or whether they use them for exempt or private purposes. You also do not know how many users, if any, are poor or underprivileged.

You state that the Tools, along with the source code and user guides "enable artistic production of non-commercial and commercial works of art" by supporting the development of digital artistic media and is thereby promoting the arts. You do not screen the content produced using the Tools to ensure it is not political campaign activity, lobbying, unsupported opinion, or furthering any other prohibited purpose or limited activity.

Although not included in your Articles, you also claim exemption through educational activities. You state that you are educating because the primary characteristic of open source software, the required sharing of source and object code, has allowed people around the world to learn and apply their skills by studying and improving the Tools code. Publishing the source code allowing people to study it comprises most of your educational efforts: "Free and open source software fundamentally has an educational component to it." You do provide training and educational materials without charge but that is an insubstantial amount of your efforts.

When asked to provide specific information and detail regarding your educational activities, you provided your website address which included user guides and Wikis for the Tools and provided links to websites for other organizations' materials. You state that you provide, maintain and update these educational guides for users and specifications and documentation for both users and developers in conjunction with each of your projects. You participated in some conferences but did not describe or provide educational materials. You state that you also intend to provide instruction on how to use the Tools but have not provided copies of any educational or instructional materials. You state that you provide mailing lists where the public can ask questions and your engineers are available from time to time via Internet Relay Chat to discuss the Tools with the public. However, these activities are an insubstantial part of your efforts.

You did not provide detailed information on how your activities further scientific purposes except

to state that a "free and open source software project creates a public domain of technical knowledge that anyone can learn and use." You also state that by creating programs as free and open source software, you hope "to spur innovation and education in the computer science, software engineering, photography, sound engineering, and video engineering fields. You do make the Tools source code and object code available to the general public on a nondiscriminatory basis by publishing it on your website for unrestricted downloading, subject to the open source licenses.

You will own any copyrights to code authored by your employees. However, the Tools incorporate code licensed to you by the authors who are the copyright holders. You require such code be licensed to you under open source compatible licenses so you "have standing to protect the code so that it can remain viable over the long term for the user community, ensuring the broadest public benefit." You do not require code authors donate copyrights to their code to you. These copyright holders retain the power to relicense the code they own under a non-free license.

## Law

I.R.C. § 501(a) provides for the exemption from federal income tax for organizations described in § 501(c)(3). Such organizations are recognized if they are organized and operated exclusively for religious, charitable, educational purposes, or other exempt purposes.

Treas. Reg. § 1.501(c)(3)-1(c)(1) 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 § 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.

Treas. Reg. § 1.501(c)(3)-1(d)(2) provides that the term "charitable" is used in § 501(c)(3) in its generally accepted legal sense and includes, among other things, lessening the burdens of government, relief of the poor and distressed or of the underprivileged, advancement of education or science, erection or maintenance of public buildings, monuments, or works, and promotion of social welfare by organizations designed to accomplish any of the above purposes, or in part to defend human and civil rights secured by law.

Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) provides that the term educational 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.

Treas. Reg. § 1.501(c)(3)-1(d)(3)(ii), Example 2 provides that an educational organization includes an organization whose activities consist of presenting public discussion groups, forums, panels, lectures, or other similar programs. Such programs may be on radio or television.

Treas. Reg. § 1.501(c)(3)-1(d)(5) provides that a scientific organization must be organized and operated in the public interest. Therefore, the term scientific, as used in § 501(c)(3), includes the carrying on of scientific research in the public interest. Scientific research does not include

activities of a type ordinarily carried on as an incident to commercial or industrial operations, as, for example, the ordinary testing or inspection of materials or products or the designing or construction of equipment, buildings, etc. Scientific research will be regarded as carried on in the public interest: (a) If the results of such research (including any patents, copyrights, processes, or formula resulting from such research) are made available to the public on a nondiscriminatory basis; (b) If such research is performed for the United States, or any of its agencies or instrumentalities, or for a State or political subdivision thereof; or (c) If such research is directed toward benefiting the public.

Section 4.03 of Rev. Proc. 2014-9, 2014-2 I.R.B. 281 .03 requires applicants describe "proposed activities . . . in sufficient detail to permit a conclusion that the organization will clearly meet the particular requirements for exemption pursuant to the section of the Code under which exemption is claimed," that "mere restatements" of exempt purposes does not meet this requirement, that "[t]he organization must fully describe all of the activities in which it expects to engage, including the standards, criteria, procedures, or other means adopted or planned for carrying out the activities. . . .", and that "[w]here the organization cannot demonstrate to the satisfaction of the Service that it qualifies for exemption pursuant to the section of the Code under which exemption is claimed, the Service will generally issue a proposed adverse determination letter or ruling."

In Rev. Rul. 65-1, 1965-1 C.B. 226, an organization that made research grants for the development of new machinery to be used in particular commercial operations and retained all the rights to the new developments, did not qualify for exemption under § 501(c)(3).

Rev. Rul. 65-2, 1965-1 C.B. 227 holds that a foundation operated exclusively to teach children a sport by holding clinics conducted by qualified instructors in schools, playgrounds, and parks and by providing free instruction, equipment, and facilities qualifies for exemption under § 501(c)(3).

Rev. Rul. 66-179, 1966-1 C.B. 139 provides illustrations under which garden clubs may establish exemption as charitable or educational organizations, civic organizations, horticultural organizations, or as social clubs.

Rev. Rul. 66-255, 1966-2 C.B. 210 holds that a nonprofit organization which through meetings, films, forums, and publications educates the public in a particular method of painless childbirth is entitled to exemption.

Rev. Rul. 70-186, 1970-1 C.B. 128, held that an organization formed to preserve a lake as a public recreational facility and to improve the condition of the water in the lake to enhance its recreational features qualified for exemption under § 501(c)(3) as a charitable organization that erected or maintained a public work. The ruling determined that, by treating the water, removing algae, and otherwise improving the condition of the water, the organization ensured the continued use of the lake for public recreational purposes and therefore performed a charitable activity. Furthermore, the benefits of the organization's activities flowed principally to the general public through the maintenance and improvement of public recreational facilities.

In Rev. Rul. 71-29, 1971-1 C.B. 150, we held that providing the city transit authority with the funds necessary to insure that bus service for the city is continued, is a charitable disbursement furthering exempt purposes. The charitable element in facilitating public transportation is

established in the Statute of Charitable Uses, 43 Eliz. I, c.4 (1601), which recognized as charitable the 'repair of bridges, ports, havens, causeways . . . and highways'.

Rev. Rul. 76-443, 1976-2 C.B. 149, a nonprofit organization that makes facilities and equipment available to the general public for the production of noncommercial educational or cultural television programs for communication to the public via public and educational channels of a commercial cable television company qualifies for exemption under § 501(c)(3).

In Rev. Rul. 77-42, 1977-1 C.B. 142, the Service held that a nonprofit organization that sets up closed-circuit radio transmitting equipment in multiple residence structures such as nursing homes, rest homes, and convalescent homes, providing senior citizens within the buildings an opportunity to listen to free, non-commercial and educational broadcasts concerning their special needs, is operated exclusively for charitable and educational purposes and qualifies for exemption under § 501(c)(3).

In Rev. Rul. 79-369, 1979-2 C.B. 226, the Service held that an otherwise qualifying organization created to develop and promote an appreciation of contemporary symphonic and chamber music by recording and selling, primarily to libraries and educational institutions, new works of unrecognized composers as well as neglected works of more established composers is exempt under § 501(c)(3). The music selected for recording has a limited commercial market and is not generally produced by the commercial music publishing and recording industry for sale to the public. Some records are provided free to radio stations operated by educational institutions.

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 Syrang Aero Club Inc. v. Commissioner, 73 T.C. 717 (1980), the tax court upheld the Service's position that the organization was not conducting educational activities since it did not provide any formal instruction, it did not provide classes, lectures or instructional material. The Court determined that the organization did not serve an "educational" or "charitable" purpose even though it was conducting flying lessons.

American Campaign Academy v. Commissioner, 92 T.C. 1053, 1076 (1989) discussing Columbia Park & Recreation Assn. v. Commissioner, 88 T.C. 1, 18-21 (1987), aff'd. without published opinion 838 F.2d 465 (4th Cir. 1988).

### **Application of Law**

You are organized exclusively for charitable and scientific purposes. However, you are not described in § 501(a) because you are not operating for exclusively charitable or scientific purposes. You also claim that you are organized for educational purposes, but based on the information provided you are not operated for educational purposes. You have a substantial nonexempt purpose. Your purpose is to produce a product. You do not to serve a charitable class, educate individuals, or perform scientific research in the public interest.

## 1. You Have A Substantial Nonexempt Purpose

You have a substantial nonexempt purpose because you develop software published under open source compatible licenses that authorize use by any person for any purpose, including nonexempt purposes such as commercial, recreational, or personal purposes, including campaign intervention and lobbying. In Better Business Bureau of Washington, D.C. Inc. v. United States, 326 U.S. 279 (1945) the Supreme Court found that even though an organization has some exempt activities, if there is one activity that is substantial and does not further an exempt purpose, the organization will not qualify for exemption. Open source software is published under licenses that allow any person to use the software, or parts of the software, for any purpose including nonexempt purposes such as commercial, recreational, or personal purposes. Therefore you have a nonexempt purpose. As developing software is your primary activity it is a substantial activity. Accordingly, you have a substantial nonexempt purpose, and are not exempt under § 501(c)(3).

## 2. Developing Open Source Software Does Not Further A Charitable Purpose

Your activities do not further a charitable purpose because you do not limit your service to a specific charitable class. The class of people served by the Tools must be both indefinite and have charitable characteristics. See American Campaign Academy v. Commissioner, 92 T.C. 1053, 1076 (1989) discussing Columbia Park & Recreation Assn. v. Commissioner, 88 T.C. 1, 18-21 (1987), aff'd. without published opinion 838 F.2d 465 (4th Cir. 1988). Indefinite means that the specific members comprising the class are not fixed. The public is an indefinite class, as are the users of the T operating system whom are the users of the Tools. The magnitude and breath of the benefited class does not cause it to be inherently charitable. *Id.* The large size of the benefited class does not diminish the need for the class to have charitable characteristics.

Charitable characteristics are analyzed qualitatively. The court in American Campaign Academy at 1077 stated:

Class size is only one factor to be considered in our qualitative analysis; it is not the sole determinant. Accordingly, petitioner must show that republican entities and candidates possess charitable characteristics in order that the entities and candidates be deemed members of a charitable class. See § 1.501(c)(3)-1(d)(2), Income Tax Regs., for a noninclusive list of charitable characteristics: poor, distressed, underprivileged, religious, educational, scientific, etc. The large size of the Republican party, which petitioner submits is ultimately benefited by its graduates, does not diminish the need for such showing.

You have not shown that all members of public share any charitable characteristics. The general public is by definition not poor (i.e. income <60% of the area median income), distressed, elderly, underprivileged, or sharing any other charitable characteristic and do not meet the definition of a charitable class. Similarly, users of the T operating system and the Tools do not share any charitable characteristics: the only common characteristic they have is that they are users of the T software environment. We also note that the Tools licensing allows programmers to incorporate some or all of the Tools code into their own software programs. You have not shown that programmers are a charitable class.

You cite *Jacobsen v. Katzer*, 535 F.3d 1373 (Fed. Cir. 2008) to argue that “multiple agency approvals of comparable organizations all support the charitable nature of nonprofit free software organizations generally.” However, at issue was “the ability of a copyright holder to dedicate certain work to free public use and yet enforce an ‘open source’ copyright license to control the future distribution and modification of that work.” The court used terms like ‘public use’, ‘public license’, ‘use by the public’, ‘dedicate works to the public’, and the like in the context of Copyright law, not within the meaning of § 501, the underlying regulations, or administrative or judicial rulings. Copyright and tax-exempt laws are not co-extensive. Copyright owners are not a recognized charitable class.

Whatever public good the Tools provide, it is not the type of benefit to the community contemplated by § 501(c)(3). Not all organizations which incidentally enhance the public good will be classified as “public” organizations within the meaning of § 501(c)(3). For example, while political campaigns clearly provide a benefit to the community as part of the democratic process, § 501(c)(3) expressly prohibits participation by exempt organizations. Any amount of campaign intervention disqualifies an otherwise exempt organization. See I.R.C. § 501(c)(3). Similarly, commerce clearly provides an economic benefit to the community, but § 1.501(c)(3)-1(c)(1) and §§ 511-514 limit the kinds and amounts of commerce exempt organizations may conduct. It is significant that Congress enacted special exemption provisions for certain types of organizations which would be unable to meet the stricter § 501(c)(3) tests which require service to public interests rather than to private ones. Accordingly, because you do not limit use of the Tools to a charitable class, the development and distribution of the Tools to the public under open source licenses is not the type of benefit to the community contemplated by § 501(c)(3) and does not further a charitable purpose.

#### A. You Do Not Serve the Poor Or Underprivileged

You claim that developing and publishing the Tools under open source licenses serves the poor and underprivileged. You state that while you know how many times the Tools or components of the Tools are downloaded, you do not know who the users are nor for which purposes they use the Tools. You also do not know if any users are poor or underprivileged, much less the percent of all users whom are members of a charitable class. Mere publishing under open source licenses for all to use does not show that the poor and underprivileged actually use the Tools. Unlike the organization in Rev. Rul. 77-42, *supra*, you have not shown the Tools are focused on the special needs of the poor or underprivileged. Applicants bear the burden of demonstrating their activities exclusively further exempt purposes. See § 4.03(3) of Rev. Proc. 2014-9, 2014-2 I.R.B. 281 (“Where the organization cannot demonstrate to the satisfaction of the Service that its proposed activities will be exempt, the Service will generally issue a proposed adverse determination letter or ruling.”). Because you have not shown that the Tools in fact benefit members of a charitable class, you are not operated exclusively for charitable purposes within the meaning of § 501(c)(3).

#### B. Your Tools Do Not Further A Charitable Purpose

You note the Tools “enable artistic productions of non-commercial and commercial works of art” and therefore promotes the arts. Promotion of the arts is a charitable purpose. Unlike the organization in Rev. Rul. 79-369, *supra* that promoted the arts in part by recording and

distributing performances of new works of unrecognized composers as well as neglected works of more established composers, primarily to educational institutions you are providing the digital equivalent of paint, paintbrushes, and canvases which artists use to create art. You do not limit your distribution and do not know who uses the Tools much less if they use them for artistic purposes. Unlike the organization in Rev. Rul. 76-443, *supra*, which provided facilities and equipment for members of the public to use to produce noncommercial educational and cultural content for broadcast via public and educational channels, you do not know who uses the Tools much less what kind of content they create with the Tools.

Also, you specifically pointed to the royalty free nature of the Tools as an alternative to existing commercial products costing up to \$1,000 per license; the very antithesis of the organization in the Rev. Rul. 79-369. You lack the essential tax characteristics that qualified the organizations described in Rev. Ruls. 79-369 and 76-443 for exemption. Accordingly, developing and distributing the Tools to the public under open source licenses does not promote and develop the arts in a way that is recognized as furthering a charitable purpose.

### C. Software Is Not A Public Work

You state that your “main activity in producing free and open source software is effectively the erection of a public work” because your primary expense is “the employment of engineers to build software tools that, through free and open source licensing, are dedicated to the public.” The development and distribution of software is not a public work even if published under open source or creative commons compatible licenses because software is not a facility ordinarily provided to the community at public expense. Treas. Reg. 1.501(c)(3)-1(d)(2) defines the term charitable to include “erecting or maintaining public buildings, monuments, or works.” This language slightly broadens the original formulation from four centuries ago. The Statute of Charitable Uses, 43 Eliz. I, c.4 (1601) recognized as charitable the ‘repair of bridges, ports, havens, causeways . . . and highways’. Quoted in Rev. Rul. 71-29. The regulation also closely parallels the synthesis provided by Restatement 3<sup>rd</sup> Trusts § 28 which defines charitable to include government or municipal purposes such as the “construction or maintenance of public buildings, bridges, streets, highways or other public facilities. . .” The charitable purpose underlying public works is to provide the “community with facilities . . . ordinarily provided at public expense.” See Comment (k) Restatement 3<sup>rd</sup> Trusts; Scott and Ascher on Trusts 5<sup>th</sup> ed. § 38.6. This same consistency of language is also found in the ordinary meaning of “public works” defined variously as: “[s]tructures, such as roads or dams built by the government for public use and paid for by public funds.” Black’s Law Dictionary, 7th ed.; “[a]ll works of a fixed nature, such as highways, canals, waterworks, docks, etc., constructed by public bodies for public use, protection, or enjoyment.” Ballentine’s Law Dictionary; and, “construction or engineering operations carried out by or for the State or local government on behalf of the community.” Oxford’s English Dictionary. Our rulings adhere very closely to these definitions.

The regulations, restatements, treatises, cases, and our rulings are remarkably consistent with the original formulation in the Statute of Charitable Uses (1601). In the face of such consistency of the key characteristics over four centuries we are constrained from extending the term public works to encompass intangibles such as software. Even if we were not so constrained, we also conclude that software fails several other key tax characteristics of public works. First, software is not a facility. It is not a lake, park, or like any other public work described in Rev. Ruls. 66-358 and 70-186, *supra* or any of the many other tax and trust authorities we reviewed. Software

is intangible, and by its very nature software is not fixed; its perpetual existence and access by the public relies upon private persons hosting the code on private servers, and anyone may alter the Tools. Second, software is not “ordinarily provided at public expense.” It is not something ordinarily constructed by public bodies for use by members of the public. Third, a public work cannot be owned by private persons. Much of the Tools code is owned by private persons. Fourth, even if the Tools were otherwise a public work, the benefits of the program flow to individuals who use it to watch movies and video for nonpublic purposes. Anyone can appropriate it or portions of its code for nonpublic uses, which you encourage. We described above how private persons can use the Tools for nonexempt purposes. We have not found any authority that authorizes a member of the public to use a public work for nonpublic purposes. Finally, public works must serve a community. Open source licensing ensures the Tools are accessible to the world. We have not found any authority for the proposition that the world is a community within the meaning of § 501(c)(3).

You imply that because the court in Jacobsen v. Katzer, 535 F.3d 1373 (Fed. Cir. 2008) recognized that free and open software licenses are used by “software engineers ...to dedicate certain works to the public” and Rev. Rul. 71-29, *supra* recognized that purposes beneficial to the community as a whole have been deemed charitable, then open source licensed software can be a public work. You are the copyright holder of some Tools code. Private persons are the copyright holders of the portion of Tools code you do not own. Even if an exempt organization copyright holder retained sufficient ownership rights via its open source license to satisfy the public ownership requirement of public works, software cannot satisfy other essential tax characteristics. The charitable purpose underlying public works is to provide the “community with facilities . . . ordinarily provided at public expense.” See Restatement 3<sup>rd</sup>, *supra*; Scott and Ascher 5<sup>th</sup>, *supra*. Software is not a facility nor is it ordinarily provided at public expense. The fact that digital goods can, after development, be duplicated ad infinitum at a price approaching zero does not satisfy this tax characteristic. Under Copyright law dedicating certain works to the public appears to include mere licensing to the public that does not divest the copyright holder of all right, title, and interest to the work. See Jacobsen v. Katzer, 535 F.3d 1373 (Fed. Cir. 2008). As noted above, complete public ownership is an essential tax characteristic of “public works” within that term’s meaning under § 501(c)(3). Therefore, even though you are the copyright holder to a portion of Tools code, the portion of the Tools code owned by private persons cannot be a public work within the meaning of § 501(c)(3).

Because open source software fails each of these essential tax attributes of public works, you do not qualify under § 501(c)(3) as an organization erecting or maintaining public buildings, monuments, or works within the meaning of § 1.501(c)(3)-1(d)(2).

### **3. Publishing Source Code, Object Code, and User Manuals Is Not Educational**

You also claim that you are entitled to exemption because you engage in educational activities by publishing, developing, maintaining and updating source code, object code, user guides, manuals, and wikis. These activities related to “free and open source software enables people to learn how software actually works.” However, these activities are not educational because you do not instruct or train people. Treas. Reg. 1.501(c)(3)-1(d)(3) defines educational as the instruction or training of the individual for the purpose of improving or developing his capabilities; or the instruction of the public on subjects useful to the individual and beneficial to the community. Unlike the organizations in Rev. Ruls. 65-2, 66-179, and 66-255, *supra*, which

provided instructional training, lectures, workshops, exhibits and presentations, your method is to publish the Tools source code with user manuals without any additional activity. First, the purpose of source code is so that people can modify the code and compile it into object code that controls a computer to perform tasks. Anything learned by people studying the source code is incidental. Second, the purpose of publishing object code is so that users can avoid compiling the source code and just install the program on their computer. Third, the purpose of the user manuals is to provide information about your product to the public. By publishing source code, object code, and user manuals you are not providing training or instruction like the organizations in Rev. Rul. 65-2, Rev. Rul. 66-179, or Rev. Rul. 66-255, *supra*.

You are similar to the organization described in Syrang Aero Club Inc. v. Commissioner, 73 T.C. 717 (1980) because you provide a product with an insubstantial amount of classes, lectures or instructional materials. The organization in Syrang Aero Club Inc. provided airplanes for use without any classes, lectures, or instructional materials. Even though you provide user guides on your website, you do not provide any formal or informal instruction on how to use the Tools or other open source software. Accordingly, your activities are not educational within the meaning of § 1.501(c)(3)-1(d)(3).

#### **4. Scientific Purposes: Developing Open Source Software Is An Activity Ordinarily Carried On As An Incident To Commercial Or Industrial Operations**

You also claim to qualify for tax-exemption as a scientific research organization for your activities related to the continued research and development of the Tools. To qualify as a § 501(c)(3) scientific research organization, an organization must (1) engage in scientific research; (2) the scientific research must not include activities that are incident to commercial or industrial operations; and, (3) the scientific research must be undertaken in the public's interest. See Treas. Reg. § 1.501(c)(3)-1(d)(5).

The information you have provided shows that you are developing software far beyond the point where research principles, if any, are established. You are manufacturing products ready for use. To the extent you are testing the software you are just fixing errors in programming and not testing to validate scientific hypotheses. These activities can best be described as routine product development, which are a type incident to commercial operations. Your self-described activities of developing and improving the Tools are also similar to the two organizations described in Rev. Ruls. 65-1, and 68-373, *supra* in that you are engaging in routine software design, development, testing, and distribution, similar to that which a commercial software company engages in to create new products or adapt their products to new uses in order to be competitive in the market. In fact, you describe your Tools as "a no-cost alternative to high-cost systems created by for-profit companies," which places you in direct competition with those companies. As such, your activities are incidental to commercial operations and do not further a § 501(c)(3) scientific purpose.

To the extent that your research, if any, is scientific research it does not benefit the public. You do not publish the results of scientific research. Rather, you make the Tools source code, object code, and documentation, not the results of your research, if any, available to the public. The release of the Tools software's source code is akin to the release of a commercial product and the release of object code is just like the release of a commercial product, not like the publication of scientific research. Therefore, your software development is not directed to

benefiting the public.

You have failed to describe what scientific research you conduct, what research methods you use and why they constitute scientific research within the meaning of the regulations. You have failed to show that the Tools are not incident to commercial or industrial operations. You have not shown that developing the Tools is in the public interest within the meaning of § 501(c)(3). You have only stated that "a free and open software project creates a public domain of technical knowledge anyone can learn from and use." Substantially all of your activity is designing and developing specific software. Accordingly, you are not a scientific research organization exempt under §501(c)(3).

### **Conclusion**

Based on the foregoing, we have determined that you were formed for the purpose of creating, developing, and publishing a specific product. Substantially all of your activities do not serve a charitable class, further an educational purpose, or further a scientific purpose. Therefore, you are not operated exclusively for exempt purposes described in § 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.

Your protest statement should be accompanied by the following declaration:

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

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

If you do not 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 protest as a failure to exhaust available administrative remedies. 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 this address:

Internal Revenue Service

1111 Constitution Ave, N.W.  
Washington, DC 20224

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,

Michael Seto  
Manager, Exempt Organizations  
Technical

cc: