



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

Release Number: **201505041**

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:

IRS Form 1120

Tax Years:

2011, 2012, 2013

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



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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

Date: 03/06/2014

Contact Person:

Identification Number:

Contact Number:

FAX Number:

Employer Identification Number:

Legend:

Date =
Player =
State =
Player =
Website =

Dear :

We have considered your application for recognition of exemption from Federal income tax under Internal Revenue Code § 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.

I. FACTS

You were incorporated under the laws of State on Date for § 501(c)(3) purposes. Specifically your purposes are to coordinate and promote the development, production distribution and use of Free and Open Source Software useful for recording, converting and playing audio and video, including the program and the software library together known as Player; to make the software available for free to the public to use, change, or distribute it as Free and Open Source Software. Your activities consist of promoting the activities of an association of programmers whom develop and maintain Player. You spend eighty percent of your time promoting Player, which includes identifying and supporting important work on multimedia software across community supported projects. Player records, converts, and streams multimedia files, and related files. The programmers assemble Player from source and object code licensed by more than 100 software developers worldwide, including almost all of your directors who are "the world's leading experts in the [Player]." Those developers, and your directors, own the code they authored. Dozens of multimedia applications incorporate Player; many are commercial programs. Player is downloaded thousands of times per month, but no one tracks who downloads and uses the Player. Player is "essential to many other free and open source video-related applications for use with the Linux operating systems, which is a no cost

alternative to expensive proprietary software.”

You describe three components of Player which you claim specifically serve exempt organizations or other charitable classes. First, is code written to improve Player functionality for the hearing impaired. Second, is improvements to code for digitally archiving videos used by government archival agencies and nonprofit libraries. Third, by reverse engineering abandoned and obscure video formats and building support for them into the Player, you hope Player users would preserve archival footage and other media that might otherwise be lost forever. These components are written and owned by private persons. However, you have not provided any information as to how you support these purposes.

You also state the Player furthers an educational purpose because it “makes the technical knowledge underlying the software universally available.” By publishing the source code and documentation on a website anyone can study it. The Player code documentation is not published on your Website. It is published on the website maintained by the association of programmers. Your Website links to that website. Your Website does not include any this documentation.

You connect mentors to students as part of the _____ and the _____. They mentor student software developers in developing projects related to the Player. A few of your directors and officers also participate as mentors.

The programmers’ website your Website links to includes a “consulting” page advertising how to hire any of seven programmers, including four of your directors, as an “expert, i.e. one of the original developers... [we] highly recommend these people to be hired by your business.” A brief bio of each describes their technical expertise and provides an e-mail address.

You do not require code licensors to assign to you their copyright, trademark, or other interests in licensed code, although you may accept such assignments in the future. You will not enforce copyrights, trademarks, or other intellectual property owned by private persons.

You will fundraise primarily in person, by e-mail, and by applying for grants. Your Website has a donations page which accepts e-commerce donations. You also plan to persuade other websites to link to your donation page.

II. LAW

Section 501(c)(3) exempts from taxation any corporation organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition, or for the prevention of cruelty to children or animals, provided no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Section 1.501(c)(3)-1(a)(1) provides that, in order to be exempt as an organization described in § 501(c)(3), an organization must be both organized and operated exclusively for one or more of the purposes specified in § 501(c)(3). If an organization fails to meet either the organizational or operational test, it is not exempt.

Section 1.501(c)(3)-1(b) provide that an organization is organized exclusively for one or more exempt purposes only if its articles of organization limit the purposes of such organization to one or more exempt purposes; and do not expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes.

Section 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 which 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.

Section 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.

Section 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.

Section 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.

Rev. Rul. 59-310, 1959-2 C.B. 146, held that an organization that established, maintained, and operated a public swimming pool, playground, and other recreation facilities for the children and other residents of a community qualified for exemption under § 501(c)(3). Facility users were primarily low income individuals who could not afford privately sponsored recreation facilities.

Rev. Rul. 66-255, 1966-2 C.B. 210, describes an educational organization providing public information about a particular method of painless childbirth using meetings, films, forums, and publications to educate the public. The organization carried out its exempt purpose through (a) public programs of films followed by discussions with doctors and members of the organization; (b) presentations on local radio stations; (c) meetings conducted by a doctor or a registered nurse for expectant parents; and (d) pamphlets, manuals, and books which are distributed to libraries, hospitals, and obstetricians.

In Rev. Rul. 68-489, 1968-2 C.B. 210, the Service held that an organization making grants to foreign organizations that are not exempt under § 501(c)(3) does not jeopardize its exemption where it retains control and discretion as to the use of the funds and maintains records establishing that the funds granted to foreign organizations were used for its § 501(c)(3) purposes.

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.

Rev. Rul. 70-584, 1970-2 C.B. 114, held that an organization that recruited college students for government internship programs that related to their course of study qualified for exemption under § 501(c)(3). The internship program advanced the students' education because it trained the individual for the purpose of improving or developing his capabilities in his chosen field of study.

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. 75-284, 1975-2 C.B. 202, held that an organization that provided high school graduates and college students with uncompensated work experience in selected trades or professions qualified for exemption under § 501(c)(3).

Rev. Rul. 77-365, 1977-2 C.B. 192, describes an educational organization that conducted clinics, workshops, lessons, and seminars at municipal parks and recreational areas to instruct and educate individuals in a particular sport.

Rev. Rul. 78-310, 1978-2 C.B. 173, held that an organization that provided law students with practical experience in exempt public interest law firms and legal aid societies qualified for exemption under § 501(c)(3).

In Rev. Rul. 79-19, 1979-1 C.B. 195, the Service held the physically handicapped are distressed persons within the meaning of § 501(c)(3) and therefore a charitable class.

In Better Business Bureau of Washington, D.C., v. U.S., 326 U.S. 279, 66 S.Ct. 112 U.S. (1945) the Supreme Court said that in order to fall within the claimed exemption, an organization must be devoted to exempt purposes exclusively. This plainly means 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.

In Retired Teachers Legal Defense Fund v. Commissioner, 78 T.C. 280, 286 (1982) the tax court defined private benefit to include any "advantage; profit; fruit; privilege; gain or interest."

In Columbia Park and Recreation Ass'n., Inc. v. C.I.R., 88 T.C. No. 1, 88 T.C. 1, pg. 25-26 (1987) the court concluded that an organization that developed and operated facilities and services for a private real estate development of 100,000 residents, such as pathways (bicycle and pedestrian), parks, swimming pools, neighborhood and community centers, tennis courts,

golf courses, a zoo, ice rink, boat docks, and athletic clubs, was not exempt because, in part, control of the organization by residents was a personal interest within the meaning of § 1.501(c)(3)-2(c).

In American Campaign Academy v. C.I.R., 92 T.C. No. 66, 92 T.C. 1053 (1989) the court held that an organization providing private benefit that was not incidental to Republican party entities was not exempt. The organization trained campaign workers and all known graduates worked for Republican party entities. The facts that no portion of the organization's net earnings inured to the benefit of private shareholders or individuals, and that the Republican entities were unrelated third parties did not avoid disqualification under § 501(c)(3).

III. RATIONALE

An organization seeking tax-exempt status under § 501(c)(3) must be both organized and operated exclusively for charitable, scientific, literary, educational, or other exempt purposes with no part of its net earnings inuring to the benefit of any private shareholder or individual. See § 1.501(c)(3)-1(a)(1). Purposes and activities with certain effects, such as prohibited private benefit, more than insubstantial amount of lobbying, and campaign intervention, will preclude exemption for an organization otherwise described in § 501(c)(3). If an organization fails to meet either the organizational or operational test, it is not exempt. Based upon a review of your activities, you are not described as a § 501(c)(3) organization as explained below because you have a substantial non-exempt purpose.

A. Promoting The Development And Distribution Of Open Source Software Furthers A Substantial Nonexempt Purpose

You have provided information that you are promoting the development and distribution of open source compatible licensed software created by another organization. Section 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 which 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. The Supreme Court held in Better Business Bureau v. United States, 326 U.S. 279 (1945), that a single nonexempt purpose, if substantial in nature, would preclude an organization from qualifying under § 501(c)(3) no matter the number or importance of truly exempt purposes.

Based on the information that you have provided, you have not been able to sufficiently describe how your activities further exempt purposes as described in § 501(c)(3). You have not shown that there is an underlying exempt purpose in promoting the third parties multimedia software as described in § 1.501(c)(3)-1(c)(1) and Better Business Bureau v. United States.

B. Promoting Development And Distribution of Software Owned by Your Directors is Private Inurement

Because you promote the development and distribution of software code owned by your directors then you are providing them private inurement. Section 501(c)(3) precludes exemption unless "no part of the net earnings of which inures to the benefit of any private shareholder or individual." No amount of private inurement is permitted. The benefit does not have to be

economic. See American Campaign Academy v. C.I.R., 92 T.C. No. 66, 92 T.C. 1053 (1989)(campaign training accrued to the benefit of unrelated Republican entities and candidates). In Retired Teachers Legal Defense Fund v. Commissioner, 78 T.C. 280, 286 (1982) the tax court defined private benefit to include any "advantage; profit; fruit; privilege; gain or interest."

At least four of your board members own code incorporated into Player. Private persons generally own property for personal purposes which are not per se exempt purposes. Moreover, your Website links to the association of programmers' website that has a Consulting Tab where some of your board members offer their consulting services to the public for a fee as "the world's leading experts in the [Software]." Your activities of 'promoting' the Player are marketing activities that provide an "advantage; profit; fruit; privilege; gain or interest" to those board members who own Player code. Because you provide private inurement within the meaning of § 501(c)(3) you are not operated exclusively to further § 501(c)(3) exempt purposes.

C. Charitable Purposes: Software Is Not A Public Work

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. Section 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 language also closely parallels the synthesis provided by Restatement 3rd 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 3rd Trusts; Scott and Ascher on Trusts 5th 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.

In Rev. Rul. 66-358, 1966-2 C.B. 218, the Service reasoned that establishing and maintaining a public park is an activity similar to the erection or maintenance of public buildings, monuments, or works and may qualify as charitable within the meaning of § 1.501(c)(3)-1(d)(2). In Rev. Rul. 70-186, 1970-1 C.B. 128, 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.

Our other rulings referring to § 1.501(c)(3)-1(d)(2) primarily ground their holdings in the charitable basis of lessening the burdens of government. See Rev. Rul. 59-310, 1959-2 C.B. 146 (constructing, maintaining, and operating a public beach, playground, and bathing facilities for the residents of the Cold Harbor School District No. 8 is lessening the burdens of government where the property is dedicated to public use); Rev. Rul. 71-29, 1971-1 C.B. 150 (grant to city transit authority to facilitate public transportation until city can acquire assets of privately owned bus company).

The regulations, restatements, treatises, 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 characteristics of public works.

You claim that the Player is a public work because it is not closed and proprietary and it benefits more than the developers and those able to pay for a license to use closed software. The "software is available freely on terms that allow others to use, study, modify, and even profit from it without making any payment to [you]." It is part of "a public library that will always be free to everyone." The charitable purpose underlying public works is to provide the "community with facilities . . . ordinarily provided at public expense." See Restatement 3rd, *supra*; Scott and Ascher 5th, *supra*.

First, software is not a facility. It is not a lake, park, or like any other public work described in Rev. Rul. 66-359, Rev. Rul. 70-186, 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 Player. 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. The Player code is owned by private persons. Fourth, even if the Player 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 commercial companies use the Player to conduct their businesses. 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. You point out that the open source licensing ensures the Player serves the world. We have not found any authority for the proposition that the world is a community within the meaning of § 501(c)(3). We think that proposition untenable because it would include the governments of nations whom are our enemies. Aiding our enemies does not further an exempt purpose.

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).

D. Educational Purposes

Providing product manuals, how-to guides, and documentation related to the Player does not make an organization educational. The term "educational", as used in § 501(c)(3) 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. Section 1.501(c)(3)-1(d)(3)(i). The regulations provide several examples of organizations that qualify as educational organizations, including "organizations whose activities consist of presenting public discussion groups, forums, panels, lectures, or other similar programs." See § 1.501(c)(3)-1(d)(3)(ii), example (2). In Rev. Rul. 66-255, 1966-2 C.B. 210, an organization formed to educate the public as to a particular method of painless childbirth carried out its purpose through (a) public programs of films followed by discussions with doctors and members of the organization; (b) presentations on local radio stations; (c) meetings conducted by a doctor or a registered nurse for expectant parents; and (d) pamphlets, manuals, and books which are distributed to libraries, hospitals, and obstetricians. The educational organization in Rev. Rul. 77-365, 1977-2 C.B. 192, conducted clinics, workshops, lessons, and seminars at municipal parks and recreational areas to instruct and educate individuals in a particular sport.

You claim the Player furthers an educational purpose because it "makes the technical knowledge underlying the software universally available." Publishing the source code and documentation on a website is not educational. Any educational benefit people obtain by independently studying these materials is incidental to the true objective of developing and distributing a functional product; in this case software. Independent study is not like the examples recited in the regulations: e.g. public discussion groups, forums, panels, lectures, or other similar programs. See § 1.501(c)(3)-1(d)(3)(ii), example (2). Even if this were educational you are merely linking to these materials published on a website of unknown provenance. You are conducting a de minimis amount of educational activities described in the Revenue Rulings above.

Your only educational activity is connecting mentors to students as part of the _____ and the _____. They mentor student software developers in developing projects related to the Player. A few of your directors and officers also participate as mentors. You also propose to recruit other software professionals to mentor students in developing projects related to the Player. Educational organizations have recruited college students to participate in a government internship program (Rev. Rul. 70-584), provided high school graduates and college students with uncompensated work experience in selected trades and professions (Rev. Rul. 75-284), and provided law students with practical experience in exempt public interest law firms and legal aid societies (Rev. Rul. 78-310).

While connecting students with work experiences is similar to the organizations described above you have not shown that this activity is a substantial exempt purpose. Therefore you have not shown that you are operating for a substantial exempt purpose within the meaning of § 501(c)(3).

IV. CONCLUSION

Based on the above, we have determined that you fail to meet the requirements necessary to be recognized as a tax-exempt organization under § 501(c)(3) because you are not operated exclusively to further exempt purposes. 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, 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

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,

Kenneth C. Corbin
Acting Director, Exempt Organizations

cc