Internal Revenue Service
Appeals Office

Release Number: **201543019**
Release Date: 10/23/2015
Date: July 29, 2015
Officer

Department of the Treasury

Employer Identification Number:
Person to Contact:

Employee ID Number:
Tel:
Fax
EIN:

UIL: 501.03-30

Certified Mail

Dear

This is a final adverse determination regarding your exempt status under section 501(c)(3) of the Internal Revenue Code (the "Code"). It is determined that you do not qualify as exempt from Federal income tax under section 501(c)(3) of the Code, effective September 14, 2009.

Our revocation was made for the following reasons:

1. You are not operated exclusively for exempt purposes within the meaning of Internal Revenue Code § 501(c)(3) and Treasury Regulation § 1.501(c)(3)-1(d). You do not engage primarily in activities that accomplish one or more of the exempt purposes specified in Internal Revenue Code § 501(c)(3). More than an insubstantial part of your activities are in furtherance of an non-exempt purpose.

2. You are not operated primarily for a public purpose as is required by Internal Revenue Code § 501(c)(3) and Treasury Regulation § 1.501(c)(3)-1(d)(1)(ii). You operate for the benefit of private interests.

Alternatively, you are a private foundation because you do not meet the requirements of Internal Revenue Code § 501(a)(3) to be classified as a supporting organization.

Contributions to your organization are not deductible under section 170 of the Code.

You are required to file Federal income tax returns on Forms 1120. File your return with the appropriate Internal Revenue Service Center per the instructions of the return. For further instructions, forms, and information please visit www.irs.gov.

If you were a private foundation as of the effective date of the adverse determination, you are considered to be taxable private foundation until you terminate your private foundation status under section 507 of the Code. In addition to your income tax return, you must also continue to file Form 990-PF by the 15th Day of the fifth month after the end of your annual accounting period.

Processing of income tax returns and assessments of any taxes due will not be delayed should a petition for declaratory judgment be filed under section 7428 of the Code.

We will make this letter and the proposed adverse determination letter available for public inspection under Code section 6110 after deleting certain identifying information. We have provided to you, in a separate mailing, Notice 437, *Notice of Intention to Disclose*. Please review the Notice 437 and the documents attached that show our proposed deletions. If you disagree with our proposed deletions, follow the instructions in Notice 437.

If you decide to contest this determination, you may file an action for declaratory judgment under the provisions of section 7428 of the Code in one of the following three venues: 1) United States Tax Court, 2) the United States Court of Federal Claims, or 3) the United States District Court for the District of Columbia. A petition or complaint in one of these three courts must be filed within 90 days from the date this determination letter was mailed to you. Please contact the clerk of the appropriate court for rules for filing petitions for declaratory judgment. To secure a petition form from the United States Tax Court, write to the United States Tax Court, 400 Second Street, N.W., Washington, D.C. 20217. See also Publication 892.

You also have the right to contact the office of the Taxpayer Advocate. Taxpayer Advocate assistance is not a substitute for established IRS procedures, such as the formal appeals process. The Taxpayer Advocate cannot reverse a legally correct tax determination, or extend the time fixed by law that you have to file a petition in a United States Court. The Taxpayer Advocate can however, see that a tax matters that may not have been resolved through normal channels get prompt and proper handling. If you want Taxpayer Advocate assistance, please contact the Taxpayer Advocate for the IRS office that issued this letter. You may call toll-free, 1-877-777-4778, for the Taxpayer Advocate or visit www.irs.gov/advocate for more information.

If you have any questions, please contact the person whose name and telephone number are shown in the heading of this letter.

Sincerely Yours,

Appeals Team Manager

Enclosure: Publication 892 and/or 556

Department of the Treasury
Internal Revenue Service
Tax Exempt and Government Entities Division
985 Michigan Avenue, 10th Floor
Detroit, MI 48226

Date:
April 18, 2013
Taxpayer Identification Number:

Form:

Tax year(s) ended:
12/31/20XX, 12/31/20XX and 20XX
Person to contact / ID number:

ORG

Contact numbers:
Phone Number:
Fax Number:
Manager's name / ID number:

Manager's contact number:
Phone Number:
Response due date:

Certified Mail - Return Receipt Requested

Dear

Why you are receiving this letter
We propose to revoke your status as an organization described in section 501(c)(3) of the Internal Revenue Code (Code). Enclosed is our report of examination explaining the proposed action.

What you need to do if you agree
If you agree with our proposal, please sign the enclosed Form 6018, *Consent to Proposed Action – Section 7428*, and return it to the contact person at the address listed above (unless you have already provided us a signed Form 6018). We'll issue a final revocation letter determining that you aren't an organization described in section 501(c)(3).

After we issue the final revocation letter, we'll announce that your organization is no longer eligible for contributions deductible under section 170 of the Code.

If we don't hear from you
If you don't respond to this proposal within 30 calendar days from the date of this letter, we'll issue a final revocation letter. Failing to respond to this proposal will adversely impact your legal standing to seek a declaratory judgment because you failed to exhaust your administrative remedies.

Effect of revocation status
If you receive a final revocation letter, you'll be required to file federal income tax returns for the tax year(s) shown above as well as for subsequent tax years.

What you need to do if you disagree with the proposed revocation
If you disagree with our proposed revocation, you may request a meeting or telephone conference with the supervisor of the IRS contact identified in the heading of this letter. You also may file a protest with the

ISSUE I

Should the ORG's [ORG] tax exemption, under Section 501(c)(3)[1] of the Internal Revenue Code, be revoked?

A. FACTS

1. Determination Letters

A determination letter dated August 10, 20XX was issued to the ORG conferring tax-exempt status as an organization described under IRC § 501(c)(3) and further classified as a public charity status under IRC § 509(a)(3) Type 2. This letter instructed ORG to file a Form 990.

On January 13, 20XX a determination letter was issued to ORG instructing ORG that it was not required to file a Form 990 as it met the criteria for classification as an integrated auxiliary of a church as described in section 1.6033-2(h) of the Treasury Regulations.

2. ORG is under examination by the Internal Revenue Service [IRS/Service] and has advised the Service that:

- ORG does not solicit funds from the general public.[2]
- ORG does not have any brochures or pamphlets explaining its operations.[3]
- ORG does not have employees.[4]
- ORG does not have volunteers.[5]
- ORG does not have a website.[6]
- ORG does not have a conflict of interest policy.[7]
- ORG does not have a document retention and destruction policy.[8]
- ORG does not have an annual report.[9]
- ORG does not have audited financial statements.[10]
- ORG does not have any internal control reports.[11]
- Two of ORG's three Board members have business relationships with the other Board members.

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[1] *All section references are to the Internal Revenue Code of 1986 unless otherwise indicated.*

[2] *Information Document Request (IDR) #10*

[3] *IDR #10*

[4] *IDR #6*

[5] *IDR #6*

[6] *IDR #11*

[7] *IDR #9*

[8] *IDR #9*

[9] *IDR #13*

[10] *IDR #9 and IDR #16*

[11] *IDR #17*

3. Board of Directors and Relationships[12]

The Board of Directors[13], which has remained the same since inception, consists of:

i. **Director-1,**
ii. **Director-2,**
iii. **Director-3.**

Additionally, the Service learned Director-1 has relatives [wife, Individual-1, and mother-in-law Individual-2, Individual-3's wife] who are partners in the CO-1, which in turn is the general [managing] partner of ORG's sole asset, namely, the Partnership. Also, Individual-1 indirectly owns a portion of CO-1. Through indirect attribution, Director-1 owns a portion of CO-1.

Director-1 and Director-3 share a relationship to CO-1 which is a "for-profit" corporation engaged in the food service business.

Director-3 is a manager of CO-2 which is wholly owned by CO-1.

In addition to this, CO-1 is managed by a Board of Advisors. The Board of Advisors is comprised of the five individuals listed below. Four of the five individuals have a relationship with CO-1 which is a "for-profit" corporation engaged in the food service business. These five individuals control whether or not the Foundation receives distributions from the Partnership:

i. **Advisor-1,**
ii. **Advisor-2,**
iii. **Advisor-3,**
iv. **Advisor-4, and**
v. **Advisor-5.[14]**

4. Minutes

ORG's Board of Directors met on April 29, 20XX and excerpts from said meeting follows[15]:

> "A meeting of the Board of Directors of the ORG was held on Friday, April 29, 20XX in City, Country. Directors Director-3 and Director-1 were present in person and Director Director-2 was present via speaker telephone. Also present was Advisor-3.
>
> Director-1 reported that a determination letter had been received from the Internal Revenue Service, dated August 10, 20XX, confirming that the ORG is tax exempt under IRC Section 501(c)(3) and is a public charity as a Type 2 supporting organization under IRC Section 509(a)(3). Although the initial determination letter had stated that the ORG was required to file Forms 990, that determination was appealed by Individual-13 and overturned. By a

[12] *IDR #9*

[13] *IDR # 6 and Form 1023, Application for Exemption.*

[14] *Relationships and organizational structure of the for-profit entities obtained from LB&I agents' examination.*

[15] *Information Document Request (IDR) #12*

determination letter, dated January 13, 20XX, the Internal Revenue Service ruled that the ORG is not required to file Form 990 because it meets the criteria for classification as an integrated auxiliary of a church as described in Section 1.6033-2(h) of the Treasury Regulations.

Director-3 reminded the Directors that the ORG was initially funded by a grant from the Foundation of 0 shares of the Common Stock in CO-3, a REIT which owns and holds certain real estate assets. Together with the other owners of CO-3, the ORG formed the Partnership, a Delaware limited partnership (the "Partnership"), and transferred the shares of the Common Stock of CO-3 to that Partnership in exchange for an 0% Limited Partnership Interest in the Partnership. The primary source of funding of the ORG will be distributions from the Partnership."

5. *ORG's Articles of Incorporation[16] which were filed in the State of State, September 14, 20XX, states its purpose [mission] in part as:*

"...receiving and administering funds for the benefit of other charitable organizations."

6. *ORG's By-Laws[17] state, in part:*

"**ARTICLE I**

NAME, MISSION AND PURPOSES

Section 1.1. Name. This corporation shall be known as ORG.

Section 1.2. Purposes. The purpose of this corporation is to further the Kingdom of God through the support of the beneficiary Organizations, as defined in Article II of these Bylaws, as an integral part of the Evangelical purposes of the beneficiary Organizations and the worldwide Evangelical Christian missions and activities being carried on by the beneficiary Organizations.

This corporation is formed for religious, charitable, scientific, Literary or educational purposes within the meaning of Section 501(c)(3) of the United States Internal Revenue Code of 1986, as amended from time to time, and any successor, corresponding provisions of future United States Internal Revenue laws (the "Code"), and, more specifically, to receive, administer and distribute funds for the beneficiary Organizations and the churches, missions and activities which are a part of the beneficiary Organizations.

Section 1.3. Mission. Philosophy and Purposes. The mission of this corporation is to further the Kingdom of God through the support of the beneficiary Organizations and in

[16] *IDR #2*

[17] *IDR #3 and Form 1023 provide copies of articles of incorporation and bylaws from September of 20XX.*

furtherance, but not in limitation, of this mission and the charitable, religious and educational purposes as set forth in Section 1.2, this corporation shall support those lawful activities of the beneficiary Organizations which may be necessary, useful or desirable for the furtherance, accomplishment and attainment of the mission, purposes and activities of the beneficiary Organizations, including, but not limited to, the following:

(a) To further the proclamation of the Gospel throughout the world in order to increase awareness of God's saving grace and the eternal purpose of man;

(b) To teach, advance and extend the doctrines of Evangelical Christianity;

(c) To promote discipleship and nurturing of Christians throughout the world:

(d) To train, send forth and support Christian missionaries from and for various Christian churches on an interdenominational basis to help fulfill the Scriptural responsibility of those Christian churches to world evangelization;

(e) To develop and encourage interest in Christian missions;

(f) To preach the Gospel of our Lord Jesus Christ with the aim of establishing churches which are self-propagating;

(g) To provide relief and health care services in the event of disaster, famine and other catastrophes; aid and development assistance in areas of need, and training of personnel for such services;

(h) To engage in charitable, religious and missionary work throughout the world, including,, but not limited to, (i) the propagation of the Christian Gospel through communication media or any other method, (ii) the production, publication and distribution of literature, records, videos and films, (iii) the operation of theological, educational, linguistic translation and leadership development programs of an Evangelical Christian nature, (iv) the provision of health care and the related training of personnel for such services, and (v) the receipt and forwarding of funds so received for the support of such organizations or missionaries as shall devote themselves to the work of missions, and to have charge of and direct missionary efforts in any region or locale; and

(i) To receive, account for and forward property and funds given to this corporation by donors for the support of the beneficiary Organizations and such projects and missions which carry out the purposes and objectives of the beneficiary Organizations.

Section 1.4. Powers and Limitations on Powers. This corporation may engage in any activity in connection with its purposes, mission and philosophy and for which a nonprofit corporation may be organized under the State Nonprofit Corporation Act of 1982. However, this corporation shall not carry on any other activities not permitted to be carried on by (i) a corporation exempt from federal income tax under Section 501(c)(3) of the Code and (ii) a corporation to which contributions are deductible under Section 170(c)(2) of the Code.

This corporation has not been formed for pecuniary profit or gain. No part of the assets, income or profit of this corporation shall inure to the benefit of any member of the Board of Directors or officer of this corporation or any other private person. However, this corporation shall be authorized and empowered to pay reasonable compensation for services rendered, except for compensation to "disqualified persons" as defined in Section 4941 of the Code, and to make payments and distributions in furtherance of the purposes, mission and philosophy set forth in this Article I.

No substantial part of the activities of this corporation shall be the carrying on of propaganda or otherwise attempting to influence legislation. This corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office.

ARTICLE II

BENEFICIARY ORGANIZATIONS

Section 2.1. Beneficiary Organizations. The beneficiary Organizations to be supported by this corporation are CO-4, of City, State USA, a nonprofit corporation duly organized and validly existing under the laws of the State of State and a tax exempt, public charity qualified as an association of churches under Sections 501(c)(3) and 509(a)(1) of the Code ("CO-4"), its related churches, missions, organizations, affiliates, programs and activities, and similar Christian Evangelical churches, missions, organizations, programs and activities which carry on the same purposes, mission and philosophy of this corporation.

Section 2.2. Support of Beneficiary Organizations. In furtherance of its purposes, mission and philosophy, this corporation may make distributions, grants, gifts and donations to projects, missions, programs, activities or ventures sponsored or supported by any of the beneficiary Organizations, may expend funds to operate and carry on projects, missions, programs, activities or ventures of any of

the beneficiary Organizations, or make distributions, grants, gifts and donations to, or expend funds to operate and carry on, projects, missions, programs, activities or ventures sponsored or supported by similar Christian Evangelical organizations that carry on the same purposes, mission and philosophy of this corporation.

Section 2.3. Change of Beneficiary Organization. The Board of Directors shall have the right to appoint a successor beneficiary Organization, in accordance with this Article II, in the event that (i) any beneficiary Organization fails to continue to be qualified under Section 501(c)(3) of the Code, (ii) there is a substantial change in the purpose or operation of the beneficiary Organization that is inconsistent with the purposes, mission and philosophy of this corporation, or (iii) any beneficiary Organization is dissolved and liquidated. The Board of Directors shall have the right to substitute one or more new beneficiary Organizations which (i) have a similar purpose, mission and philosophy to the original purpose, mission and philosophy of the beneficiary Organization for which it is being substituted and similar purpose, mission and philosophy to this corporation and (ii) are qualified as a tax exempt, public charity under Section 501(c)(3) and Section 509(a)(1) or (2) of the Code.

Section 2.4. Distributions of Income. In accordance with the provisions of these Bylaws and as permitted by law, the Board of Directors of this corporation may from time to time, and in its discretion, distribute portions or all of the net income to one or more of the beneficiary Organizations and for the purpose, mission and philosophy of this corporation or accumulate the net income of this corporation as it may consider appropriate. This corporation may not at any time distribute any portion of the assets or principal of this corporation to any beneficiary Organization, except (i) in compliance with the provisions of Section 2.5 of these Bylaws or (ii) upon dissolution and liquidation of this corporation in accordance with Article IX of these Bylaws.

Section 2.5. Distributions of Assets or Principal. In the event that the Board of Directors, by unanimous action, determines that the purpose, mission and philosophy of this corporation may be better achieved by another organization or organizations qualified under this Section 2.5, the Board of Directors may make a grant of a portion or all of the assets of this corporation to that organization or organizations to carry on the purpose, mission and philosophy of this corporation. Any organization to which any portion of the assets of this corporation are to be transferred shall (i) have a similar purpose, mission and philosophy as this corporation and (ii) be qualified as a tax exempt, public charity under Section 501(c)(3) and Section 509(a) of the Code.

Section 2.6. No Claims by Beneficiary Organizations. Neither a beneficiary Organization nor the creditors of any beneficiary Organization shall, at any time, have any claim against the assets of this corporation, except as any claim may be created by the Bylaws or the resolutions of the Board of Directors of this corporation.

ARTICLE III

BOARD OF DIRECTORS

Section 3.1. Board of Directors: Number. The property, business and affairs of this corporation shall be under the direction and control of a Board of Directors. The Board of Directors shall consist of not less than three (3) members, as designated by the Board of Directors in accordance with this Article III, from time to time. The number of Directors may be increased, but not decreased, and the provisions of this Article III as to the qualifications and election of the Directors, may be modified only by action of the Board of Directors at a meeting duly called for that purpose.

Section 3.2. Qualifications for Election of Board of Directors. The Board of Directors shall be elected by the Directors at each annual meeting in accordance with the provisions for directorship corporations under the State Nonprofit Corporation Act, the provisions of this Article III and the following qualifications:

(a) The members of the Board of Directors shall be persons who are representative of the worldwide Evangelical Christian community and are supportive of the mission, philosophy and purposes of this corporation, and who have special knowledge and expertise that will contribute to the success of the mission, philosophy and purposes of this corporation.

(b) A majority of the members of the Board of Directors shall be a member of the governing board of CO-4, or one of its affiliates, or one of the other beneficiary Organizations, and representative of the Evangelical Christian community from which the beneficiary Organizations are chosen.

(c) One (1) member shall be a member of the governing board of CO-5, a State limited liability company, or its successor organization ("CO-5") or a descendant, or spouse of a descendant, of Individual-1 or Advisor-5, of City, State.

Section 3.8. Powers and Duties of Board of Directors. The Board of Directors shall have all lawful powers to do such business as necessary to carry out the purpose, mission and philosophy of this corporation and as the governing board of a nonprofit corporation is permitted under the State Nonprofit Corporation Act, being Act No. 162 of the Public Acts of

1982, including, but not in limitation thereof, the following powers:

(a) To accept or refuse to accept any bequests, gifts or grants which are proposed to be made to this corporation based upon the discretion and judgment of the Directors, taking into consideration the nature of the proposed gift, any conditions or restrictions placed upon the gifts, and the appropriateness of such gift to the purposes, mission and philosophy of this corporation.

(b) To make final approval of all grants, gifts, donation and expenditures by this corporation which may be in furtherance of the charitable and religious purposes, mission and philosophy of this corporation.

(c) To accept advice and counsel from CO-5 for identifying and recommending grants to the Board of Directors, assessing the effectiveness of prior grants and carrying out the charitable and religious purposes, mission and philosophy of this corporation. CO-5 shall not act for this corporation and the advice and counsel of CO-5 is strictly advisory and the Board of Directors is not required to follow the advice and counsel of CO-5.

ARTICLE IX

DISSOLUTION AND DISTRIBUTION OF ASSETS

Section 9.1. Permissive Dissolution. The dissolution of this corporation shall be authorized only by the unanimous vote of the Directors then holding office and the approval of the beneficiary Organizations. Notice of the meeting to authorize the dissolution of this corporation shall be given to each Director then holding office and the beneficiary Organizations not less than Ninety (90) days prior to the meeting and shall state the purpose of the meeting and shall state that the purpose of the meeting is to vote on the dissolution of this corporation. The notice of the meeting shall include a written plan for the distribution of the assets of this corporation.

If the dissolution of this corporation is approved, this corporation shall cease to conduct its affairs except as may be necessary for the winding up of this corporation. It shall immediately cause a Certificate of Dissolution to be executed and filed with the State of State setting forth (i) the name of this corporation, (ii) the date and place of the meeting of the Directors approving the dissolution, and (iii) a

statement that dissolution was approved by the requisite vote of the Directors.

Section 9.2. Distribution of Assets. In the event of dissolution of this corporation, by permissive dissolution or by law, all assets of this corporation, real and personal, shall be distributed to any of the beneficiary Organizations as agreed to by the unanimous approval of the Board of Directors and the executive committee of the governing board of CO-4, or its successor, as a beneficiary Organization, and as are qualified as tax exempt under Section 501(c)(3) of the Code at that time."

7. Sole Investment

ORG's sole source of funding/support are distributions from, as noted in ORG's April 29, 20XX Board meeting, the Partnership. The partners of Partnership own CO-3 [a Real Estate Investment Trust with an effective date of November 1, 20XX].[18] The CO-3 Stock was received on November 1, 20XX as a gift from another organization, Foundation. CO-3 owns property used by the CO-6 for CO-2 retail stores, vacant land, parking land, office buildings, processing plants, a transportation building, and distribution centers. The properties are located in State, State, State, State, State, State, State, State, State, and State.

Prior to contributing ORG's share [0%] of CO-3 stock into the Partnership, ORG was entitled to receive cash distributions of approximately 0% of CO-3's yearly distributions. CO-3 is a REIT and each year is required to distribute 0% of its ordinary taxable income to its shareholders. By contributing the CO-3 stock to the Partnership, ORG significantly reduced the distributions it was entitled to receive. Therefore, ORG went from a position of guaranteed yearly distributions to a position of uncertain yearly distributions subject to the sole discretion of the General Partner. ORG is involved in this partnership as a passive investor with absolutely no control over the partnership's activities.

Excerpts from the* Partnership *agreement follow:

"PARTNERSHIP
LIMITED PARTNERSHIP AGREEMENT

This PARTNERSHIP AGREEMENT (this "Agreement") is executed by and among **CO-1,** a Delaware limited liability company, as the general partner (the "General Partner"), and **LLP-1,** a Delaware limited partnership, **LLP-2,** a Delaware limited partnership, **Foundation-2,** a non-profit corporation organized, existing and in good standing in the State of State and qualified as a tax exempt, charitable organization under Section 501(c)(3) of the Code, and **ORG,** a non-profit corporation organized, existing and in good standing in the State of State and

[18] ***The Co-3 Stock was purportedly received on November 1, 20XX as a gift from another organization, Foundation.***

qualified as a tax exempt, charitable organization under Section 501(c)(3) of the Code, as the limited partners (the "Limited Partners" and, together with the General Partner, the "Partners"), to be effective as of November 1, 20XX (the "Effective Date"). The names and addresses of the current General Partner and Limited Partners are listed on Schedule A. which is attached to, and made a part of, this Agreement.

Recitals

The General Partner caused the **Partnership** (the "Partnership") to be formed as a Delaware limited partnership with the filing of a Certificate of Limited Partnership (the "Certificate") in the State of Delaware on November 12, 20XX. The Partners, collectively, own and hold all of the shares of the Common Stock of **CO-3,** a Delaware corporation ("CO-3"), and have agreed to utilize the Partnership for holding and owning these shares of Common Stock (the "CO-3 Shares"). CO-3 has filed an election to be treated as a Real Estate Investment Trust ("REIT") for federal tax purposes and the Partners anticipate that CO-3, as a REIT, will be making distributions of income on the CO-3 Shares. The Partners now desire to contribute the CO-3 Shares to the Partnership for the purposes of receiving and administering those income distributions from the REIT, owning and holding the CO-3 Shares and the governance of CO-3 and its subsidiaries. This Agreement is entered into by the Partners to set forth the ownership and governance structure for the Partnership and other terms and conditions that will apply to the ownership and governance of the CO-3 Shares.

Agreement

In consideration of the mutual covenants contained in this Agreement, the General Partner and the Limited Partners have agreed as follows:

ARTICLE I

FORMATION, NAME AND ORGANIZATION OF LIMITED PARTNERSHIP

1.1 Formation of Limited Partnership. The Partnership has been formed as a limited partnership pursuant to the Delaware Revised Uniform Limited Partnership Act, as now ***amended*** or as subsequently **amended** (the "Act"), upon the **terms and** conditions set forth in this **Agreement.**

1.2 Name. The business of the Partnership shall be conducted under the name of the **"Partnership."** The Partnership may also conduct its business under such other names as the General Partner may designate in writing to the Limited Partners.

1.3 Partnership Purpose and Business. The general purpose of the Partnership is to engage in the ownership and governance of CO-3 as a REIT in the manner which the General Partner determines to be appropriate, and to provide for common management and efficient administration of the investments which are assets of the Partnership.

The Partnership shall have all powers necessary or convenient to accomplish these purposes. The Partnership is also authorized to engage in any activity permitted, and shall have **all** powers granted, under the **Act.** Further, should the Partnership sell or otherwise dispose of any portion or all of its investment in any asset, the Partnership, in the absolute discretion of the General Partner, may retain the proceeds of such sale or disposition (subject to the provisions of Article III) to make additional investments by the Partnership.

ARTICLE II

CAPITAL CONTRIBUTIONS, PARTNERSHIP INTERESTS AND VOTING RIGHTS OF PARTNERS

2.10 Voting. The General Partner shall have the sole voting rights in the management and operation of the Partnership. Except as otherwise provided in this Agreement, the Limited Partners shall have no vote in the management of the Partnership.

ARTICLE III

CASH DISTRIBUTIONS AND ALLOCATIONS OF PROFITS AND LOSSES

3.1 Cash Distributions.

(a) Cash distributions to the Partners shall be made only as and when determined and declared by the General Partner and shall be distributed among the Partners in the manner determined by the General Partner in its sole discretion at the time the General Partner declares a cash distribution. Such cash distributions may be distributed among all Partners, among only certain classes, tiers or categories of Partners or only to certain designated Partners, and in accordance with any established record date, all as determined and declared in the sole discretion of the General Partner.

(b) Notwithstanding the provisions of Section 3.1(a), the General Partner shall distribute on or before April 15 of each year, to each Partner that is subject to federal, state or local income tax on the distributive share of Partnership income, an amount equal to such Partner's distributive share of the Partnership's taxable income for its prior Fiscal Year as determined for federal income tax purposes multiplied by the highest effective individual combined federal, state and

local income tax rates applicable to any Partner who is subject to tax for such year.

ARTICLE IV

RIGHTS, OBLIGATIONS, AND POWERS OF THE GENERAL PARTNER

4.1 Management and Control of the Partnership.

(b) No Limited Partner shall participate in or have any control over the Partnership business nor shall any Limited Partner have any authority or right to act for or bind the Partnership. The Limited Partners consent to the exercise by the General Partner of the powers conferred on it by this Agreement.

ARTICLE VIII

DISSOLUTION AND LIQUIDATION OF THE PARTNERSHIP

8.4 No Obligation to Replenish Negative Capital Account. Except as otherwise provided by law, no Partner shall have an obligation to contribute any funds to the Partnership to replenish any negative balance in its Capital Account.

ARTICLE X

POWER OF ATTORNEY AND AMENDMENTS

10.1 Appointment of General Partner as Attorney-in-Fact.

(a) Each Limited Partner, by the execution of this Agreement, irrevocably constitutes and appoints the General Partner to act either jointly or individually as the Limited Partner's true and lawful attorney-in-fact with full power and authority in its name, place and stead to execute, acknowledge, deliver, swear to, file and record at the appropriate public offices such documents as may be necessary or appropriate to carry out the provisions of this Agreement, including but not limited to..."

PARTNERSHIP
Capital Contributions and Partnership Interests of Partners
November 1, 20XX

General Partner	Capital Contribution	General Partnership Interest
CO-1	0 Shares of Common Stock of CO-3	0%

Limited Partners	Capital Contribution	Limited Partnership Interest

LLP-1	0 Shares of Common Stock of CO-3	0%
LLP-2	0 Shares of Common Stock of CO-3	0%
Foundation-2	0 Shares of Common Stock of CO-3	0%
ORG	0 Shares of Common Stock of CO-3 Real Estate,	0%

8. PARTNERSHIP Distributions

During the Partnership's initial year of operation, ORG's share of the partnership's net income was $0, but the General Partner only distributed $0 to ORG. [19] For the next year of operation, ORG's share of the partnership's net income was $0, but the General Partner only distributed $0 to ORG;[20] however, in contrast to this, the General Partner's [CO-1] share of income was $0 and the General Partner took distributions of $0[21]. This depleted the CO-1 ending capital account to zero. Per the partnership agreement, the General Partner has no obligation to replenish their capital account. [See ARTICLE III 3.1 (a) Cash Distributions quoted above.]

9. CO-3 Income Stream

In 20XX, CO-3 distributed $0 to the Partnership. The Partnership distributed $0 to ORG. If ORG had not contributed the 0 shares of CO-3 to the Partnership, it would have received $0 ($0 * 0%).

In 20XX, CO-3 distributed $0 to the Partnership. The Partnership distributed $0 to ORG. If ORG had not contributed the 0 shares of CO-3 to the Partnership, it would have received $0 ($0 * 0%).

10. Grants and Contributions Made by ORG

During the calendar year ending December 31, 20XX, ORG made no grants or contributions to any public charity or expenditures for charitable purposes. For the year ending December 31, 20XX, ORG made grants of $0[22] as reported by them [see Exhibit B]. However, no direct grants to ORG's Supported Organization, CO-4, is reported on the schedule provided. For the year ending December 31, 20XX, ORG made total grants of $0[23] as reported by them [see Exhibit C]. However, the only grant to CO-4 noted on this schedule is one for $0 made for Ministry Support. This seems to indicate that less than 0% of all grants made by ORG went to the organization they state is their supported organization, namely, CO-4.

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[19] *Form K-1 filed for year ending 12-31-20XX.*

[20] *Form K-1 filed for year ending 12-31-20XX.*

[21] *Form 1065 filed for year ending 12-31-20XX for Partnership.*

[22] ***ORG response to IDR #19.***

[23] ***ORG response to IDR #19.***

B. LAW

Section 501(c)(3) of the Internal Revenue Code recognizes as exempt from federal income tax entities that are organized and operated exclusively for charitable purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual.

Section 1.501(c)(3)-1(c)(1) of the regulations states 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 section 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)(1)(ii) of the regulations provides that an organization is not organized or operated exclusively for one or more exempt purposes unless it serves a public rather than a private interest. Thus, to meet the requirements of this subdivision, it is necessary for an organization to establish that it is not organized or operated for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled, directly or indirectly, by such private interests.

Rev. Rul. 67-5, 1967-1 C.B. 123, holds that a foundation controlled by the creator's family was operated to enable the creator and his family to engage in financial activities that were beneficial to them, but detrimental to the foundation. This resulted in the foundation's ownership of common stock that paid no dividends of a corporation controlled by the foundation's creator and his family, which prevented it from carrying on a charitable program

Rev. Proc. 96-32, 1996-1 C.B. 717, sets forth procedures for determining whether an organization that provides low-income housing will be considered charitable as described in section 501(c)(3) of the Code because it relieves the poor and distressed. Section 7 provides that if an organization furthers a charitable purpose such as relieving the poor and distressed, it nevertheless may fail to qualify for exemption because private interests of individuals with a financial stake in the project are furthered.

In Rev. Rul. 98-15, 1998-1 C.B. 718, the Service surveyed the judicial authorities pertaining to a section 501(c)(3) organization in a partnership with for-profit organizations. The ruling reasoned that the activities of a partnership (including an LLC treated as a partnership for federal tax purposes) are considered to be the activities of a nonprofit partner when evaluating whether the nonprofit organization is operated exclusively for exempt purposes under section 501(c)(3) of the Code. A section 501(c)(3) organization may form and participate in a partnership and meet the operational test if participation in the partnership furthers a charitable purpose, and the partnership arrangement permits the exempt organization to act exclusively in furtherance of its exempt purpose and only incidentally for the ben

efit of the for-profit partners. Similarly, a section 501(c)(3) organization may enter into a management contract with a private party, giving that party authority to conduct activities on behalf of the organization and direct the use of the organization's assets, provided that the organization retains ultimate authority over the assets and activities

being managed and the terms and conditions of the contract are reasonable, including reasonable compensation and a reasonable term. However, if a private party is allowed to control or use the non-profit organization's activities or assets for the benefit of the private party, and the benefit is not incidental to the accomplishment of exempt purposes, the organization will fail to be organized and operated exclusively for exempt purposes. The nonprofit in Situation 1 continued to be operated exclusively for charitable purposes where the partnership's governing documents gave priority to charitable purposes over maximizing profits for the owners, the partnership's board structure gave the nonprofit's appointees voting control, and the nonprofit appointed community members familiar with the hospital to the partnership board. The nonprofit in Situation 2 was held not to be operated exclusively for exempt purposes where there was no binding obligation in the partnership's governing documents to serve charitable purposes, the nonprofit shared control of the partnership with its for-profit partner and thus could not necessarily give priority to charitable concerns over profits, the primary source of information for the nonprofit's board members was the chief executives (who had a prior relationship with the for-profit partner), and the management company was a subsidiary of the for-profit with broad discretion over the partnership's activities and assets.

In **Better Business Bureau of Washington, D.C. v. United States, 326 U.S. 279, 283, 66 S. Ct. 112, 90 L. Ed. 67, 1945 C.B. 375 (1945)**, the court held that an organization was not organized and operated exclusively for charitable purposes. The court reasoned that the presence of a single non-exempt purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of exempt purposes.

In **Harding Hospital, Inc. v. United States, 505 F.2d 1068 (6th Cir. 1974)**, a non-profit hospital with an independent board of directors executed a contract with a medical partnership composed of seven physicians. The contract gave the physicians control over care of the hospital's patients and the stream of income generated by the patients while also guaranteeing the physicians thousands of dollars in payment for various supervisory activities. The court held that the benefits derived from the contract constituted sufficient private benefit to preclude exemption.

Christian Stewardship Assistance, Inc. v. Commissioner, 70 T.C. 1037 (1978) concerns an organization that was organized to support the relationships between charitable organizations and their contributors by providing financial planning services to wealthy individuals. The Court concluded that because the organization's sole activity was financial planning which had a substantial nonexempt purpose of counseling individuals to reduce personal and estate tax liability, the nonexempt purpose transcended the charitable purpose. Thus, the organization could not be said to be organized and operated exclusively for exempt purposes.

In **Plumstead Theatre Society, Inc. v. Commissioner, 74 T.C. 1324 (1980), aff'd, 675 F.2d 244 (9th Cir. 1982)**, the Tax Court held that a charitable organization's participation as a general partner in a limited partnership did not jeopardize its exempt status. The organization co-produced a play as one of its charitable activities. Prior to the opening of the play, the organization encountered financial difficulties in raising its share of costs. In order to meet its funding obligations, the organization formed a limited partnership in which it served as general partner, and two individuals and a for-profit corporation were the limited partners. One of the significant factors supporting the Tax Court's holding was its finding that the limited partners had no control over the

organization's operations or over the management of the partnership. Another significant factor was that the organization was not obligated for the return of any capital contribution made by the limited partners from its own funds.

In **Housing Pioneers, Inc. v. Commissioner, T.C.M. 1993-120, aff'd, 49 F.3d 1395 (9th Cir. 1995), amended, 58 F.3d 401 (9th Cir. 1995)**, a substantial nonexempt purpose was found where a nonprofit organization entered into limited partnerships with for-profit entities to operate low-income housing projects. While the nonprofit served as a co-general partner, its actual authority was narrowly circumscribed. The organization had no on-site management authority, no authority to screen or select tenants, and could describe only a vague charitable function of surveying tenant needs and ensuring that requirements for federal tax credits under sections 38 and 42 of the Code were met. The organization had been formed to promote low-income housing, but the court found that the "keystone" of its plan was "achieving the objective of property tax reduction," and that it "has made no attempt to adopt any actual plan by which [it] expects to use its hoped-for share of property tax reductions to implement its stated objectives." The Tax Court concluded that the organization did not qualify under section 501(c)(3) because it had a substantial non- exempt purpose and served private interests by conferring federal and State tax benefits on the for-profit partnership and partners, and therefore did not reach the Service's inurement argument based on the indirect participation by insiders in the partnerships. On appeal, the Ninth Circuit did not reach the inurement argument either, but held that the organization had a substantial nonexempt purpose because it failed to "'materially participate' . . . in the development and operation of the project . . . . It has shown no regular, no continuous, no substantial activity in developing or operating the projects", and instead allowed the for-profit partners to control the activities. The court distinguished **Plumstead** as not involving a situation where the partners included insiders of the nonprofit organization.

Redlands Surgical Services v. Commissioner, 113 T.C. 47 (1999), aff'd, 243 F.3d 904 (9th Cir. 2001), held a nonprofit organization was not operated exclusively for exempt purposes under section 501(c)(3) of the Code where its sole activity was participating as co-general partner with a for-profit corporation in a partnership that was general partner of an operating partnership that owned and operated an ambulatory surgery center. The court reasoned that an organization's purposes may be inferred from its operations, and that to the extent it cedes control over its sole activity to for-profit parties having an independent economic interest in the same activity and having no obligation to put charitable purposes ahead of profit-making objectives, the organization cannot be assured that the partnerships will in fact be operated in furtherance of charitable purposes. The court determined from the facts involved that the nonprofit organization had ceded effective control over the operations of the partnerships and the surgery center to the for-profit partners and Management Company, impermissibly benefiting private interests. Nothing in the partnership agreement or any binding commitments relating to the operation of the surgery center established any obligation that charitable purposes be put ahead of economic objectives in the center's operations. The nonprofit lacked formal control over the partnerships in several significant respects. For example, the management contract between the operating partnership and management company (an affiliate of the for-profit partner) gave the latter broad power to make contracts, negotiate with third-party payors, and set patient charges. The contract provided for fees of 6 percent of gross revenues, providing an incentive to maximize profits. The term of the contract ran for at least 15

years, terminable for cause only by majority vote of the managing directors. Also, nothing in the record indicated that the nonprofit exercised informal control over the surgery center.

St. David's Health Care System v. United States, 349 F.3d 232 (5th Cir. 2003), held that a factual issue existed whether a nonprofit hospital was operated for substantial non-exempt purposes through its participation in a partnership with a for-profit organization. The court reasoned that when a non-profit organization forms a partnership with a for-profit entity, the non-profit should lose its tax-exempt status if it cedes control to the for-profit entity (citing **Redlands** and Rev. Rul. 98-15 with approval).

C. GOVERNMENT'S POSITION DISCUSSION

To the extent an organization cedes control over its sole activity to for-profit parties having an independent economic interest in the same activity and having no obligation to put charitable purposes ahead of profit-making objectives, the organization cannot be assured that the partnerships will in fact be operated in furtherance of charitable purposes. **Redlands, supra**.

If a private party is allowed to control or use the non-profit organization's activities or assets for the benefit of the private party, and the benefit is not incidental to the accomplishment of exempt purposes, the organization will fail to be organized and operated exclusively for exempt purposes. Rev. Rul. 98-15, supra.

ORG's purpose, as stated in its Articles of Incorporation, is: "...receiving and administering funds for the benefit of other charitable organizations." Therefore, ORG is a conduit entity receiving funds for distribution to other charitable organizations. However, aside from its holdings in a REIT, ORG has no other way to receive funds for distribution to other charitable organizations [i.e., they have no fundraising programs].

Nevertheless, ORG contributed its sole asset to a limited partnership [Partnership] and relinquished all controls over said asset to a for-profit [LLC] General Partner [CO-1].

There are no assurances that the LLC will place charitable objectives above the other partners' for-profit interests. In fact, the Partnership is structured so as to place the General Partner's interest above all other partners' interest. As noted, not only does the General Partner have complete control over the management of the partnership [i.e., ORG's sole asset], but it [the General Partner] has complete control over how much support [ORG's sole source of funding] said partnership will provide [i.e., cash distributions are at the General Partner's sole discretion].

During the partnership's initial year of operation, ORG's share of the partnership's net income was $0, but the General Partner only distributed $0 to ORG. For the next year of operation, ORG's share of the partnership's net income was $0, but the General Partner only distributed $0 to ORG. However, in this year (20XX), the General Partner's [CO-1] share of income was $0 and the General Partner took distributions of $0. The General Partner's ending capital account became zero.

If the General Partner elects to distribute more of the partnership's net income to other partners, or to the General Partner, in such amounts that a negative capital account

results, then the other partners, or the General Partner does not have to replenish or pay back the negative balance(s). In other words, the other partners or the General Partner received more than they were entitled to [of the] partnership's net income [i.e., ORG's net income inured to the benefit of private interests].

D. TAXPAYER'S POSITION

Please see the attached Exhibit A for ORG's response dated January 9, 20XX, to the examining revenue agents' report issued October 18, 20XX.

E. GOVERNMENT'S REBUTTAL TO TAXPAYER'S POSITION

The agents continue to take the position that ORG's tax exemption under Section 501(c)(3) of the Code should be revoked [Issue I].

ORG takes exception to Issue I.[24] ORG believes their participation in the PARTNERSHIP [Partnership] is for investment purposes only and not to "join forces with the Partnership as part of a business venture to expand its own charitable purposes and activities."[25] Additionally, ORG states: "these incorrect assumptions of the IRS have resulted in the proposed Form 5701, Notice of Proposed Adjustments, being focused on an audit of the Partnership rather than the Foundation [ORG]."[26]

Additionally, ORG believes some of the IRS's additional facts are incorrect and should be corrected:

1. The management and administration of the Foundation have been graciously donated by CO-4 in order to avoid costly and unnecessary overhead.[27]
2. The Foundation is in the process of obtaining audited financial statements for its fiscal years following its startup period.
3. There are no "business" relationships mentioned in the IDR Responses #6, 9, 10, 13, 16 and 19. The only relationships shared by the three members of the Board of Directors of the Foundation are with respect to their activities on behalf of the Foundation, CO-4 and other public charitable activities and organizations.[28]
4. The General Partner of the Partnership is not CO-1, but the General Partner Interest of that Partnership is held by CO-7 and CO-8. As described above, the General Partner only controls the Partnership and is not involved in the charitable operations of the Foundation.

Naturally, "tax exemption is a matter of legislative grace and taxpayers have the burden

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[24] *From ORG's January 9, 20XX protest attached as Exhibit A [hereinafter referred to as ORG's Protest or simply Protest], "we submit to you that the conclusions and proposed adjustments of the IRS are incorrect..."*

[25] *See ORG's protest in Exhibit A.*

[26] *Id.*

[27] *In ORG's response to Information Document Request [IDR] #6, Item 4, they stated, "There are no volunteers for the ORG Foundation."*

[28] *In ORG's response to IDR #9, they answered yes to the governance check sheet question #16A, "Did any of the organization's voting board members have a family relationship and/or outside business relationship with any other voting or non-voting board member, officer, director, trustee or key employee?" Also, to question 16C, concerning the type of relationship, ORG stated there were two business relationships.*

of establishing their entitlements to exemptions."[29] Additionally, courts are not required to accept taxpayer's uncorroborated, unverified, undocumented and self-serving testimony;[30] petitioner's testimony, standing alone, is not to be taken as gospel, and it does not carry the petitioner's burden of proof;[31] indeed, it has even been stated that a "well founded doubt is fatal to the claim;"[32] and if there should be a gap in the record, it may not be presumed that any missing facts are favorable to him [taxpayer];[33] if a taxpayer has information/evidence which would be favorable, then failure to produce said information/evidence gives rise to the presumption that if produced, it would be unfavorable and becomes itself "evidence of the most convincing character."[34] We use common sense when assessing facts.[35] An organization is not operated exclusively for charitable purposes, and thus will not qualify for exemption under section 501(c)(3), if it has a single non-charitable purpose that is substantial in nature. This is true regardless of the number or importance of the organization's charitable purposes.[36] Operating for the benefit of private parties who are not members of a charitable class constitutes such a substantial nonexempt purpose,[37] with prohibited private benefits. In order for an organization to qualify under 501(c)(3) it must serve a public **not** a private benefit, including an "advantage; profit; fruit; privilege; gain; or interest." [38]

Discussion of Issue I

ORG criticizes the examining agents for concentrating on the Partnership rather than on ORG's tax exempt activities. ORG is involved in the Partnership as a passive investor with absolutely no control over the partnership's activities. ORG looks to the partnership to provide income, i.e., an investment return that will allow ORG to use said income to advance its tax exempt purpose of providing funds to other charitable organizations so those organizations can achieve their charitable purposes.

The examining agents are of the opinion that participating in, or lending money to a partnership, will not alone preclude an organization from qualifying for exemption. However, the presence of private parties with a controlling interest in the Partnership jeopardizes the organization's exempt status under Section 501(c)(3) since those private parties are receiving more than an incidental benefit.

In this case, the sole assets capable of generating income to be used for ORG's exempt

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[29] *Christian Echoes National Ministries, Inc. v. U.S., 28 A.F.T.R.2d, 71-5934, rev'd on other grounds, 470 F.2d 849; Nelson v. Commissioner, 30 T.C 1151.*

[30] *Niedringhaus v. Commissioner, 99 T.C. 202 (1991); Tokarski v. Commissioner, 87 T.C. 74 (1986); Shea v. Commissioner, 112 T.C. 183 (1999).*

[31] *Halle v. Commissioner, 7 T.C. 245 (1946), aff'd 175 F.2d 500 (C.A. 2nd, 1949).*

[32] *Estate of Bowers v. Commissioner, 94 T.C. 582 (1990); Butka v. Commissioner, 91 T.C. 110 (1998) aff'd without published opinion 886 F.2d 442 (D.C. Cir. 1989).*

[33] *In Shapiro v. Commissioner, 40 T.C. 34 (1963) the tax court stated: "The burden of proof is of course, upon the petitioner."*

[34] *Stoumen v. Commissioner, 208 F.2d 903 (C.A. 3, 1953); William G. Lias, 24 T.C. 280 (1955), aff'd 235 F.2d 879 (C.A. 4, 1956; Wichita Terminal Elevator Co., 6 T.C. 1158, aff'd 162 F.2d 513 (C.A. 10, 1947).*

[35] *Vallette v. Commissioner, T.C. Memo 1996-285; Nickerson v. Commissioner, 700 F.2d 402 (CA7 1983).*

[36] *Better Business Bureau v. United States, 326 U.S. 279 (1945); Stevens Bros. Foundation, Inc., v. Commissioner, 324 F.2d 633 (8th Cir. 1963), aff'd. 39 TC 93 (1962), cert. denied, 376 U.S. 969 (1964).*

[37] *Old Dominion Box Co., Inc. v. U.S., 477 F.2d 340, cert. denied 413 U.S. 910.*

[38] *Retired Teachers Legal Defense Fund v. Commissioner, 78 T.C. 280 (1982).*

purpose is the common stock in CO-3 [CO-3] received as a gift from another organization on November 1, 20XX. On that same day [November 1, 20XX], ORG (the new owner of 0 shares of common stock in CO-3) contributed all of their CO-3 stock to the newly formed Partnership, which resulted in ORG retaining an 0% limited partnership interest. In IDR #12, the examining agents requested copies of all minutes to meetings, including (but not limited to) the Board of Directors, Executive Committee, Finance Committee, Audit Committee, Grant Making Committee, etc., for the calendar years ending 12/31/20XX, 12/31/20XX and 12/31/20XX. ORG responded by providing a copy of their April 29, 20XX Board of Director's meeting [excerpts from that meeting have been reproduced in the Facts section of the examining agent's Proposed Notice of Adjustments [Form 5701]. This one meeting [which apparently is the only meeting held by ORG during a three year period] merely reported on prior events. Typically when you receive an asset worth $0 [per Form 1065, Schedule K-1], there would be discussions at a Board of Director's meeting in or around the receipt of such a large donation; especially when this asset is your sole asset to be used in achieving your tax exempt purpose. Also, there would usually be some Board discussion concerning the placement of this, their sole asset, into a limited partnership; wherein, ORG's Board of Directors ceded all control over the amount of funds it will receive from said Partnership, allowing the General Partner [a non-exempt entity] to make any and all distribution decisions.

In calendar year 20XX, as noted in the Notice of Proposed Adjustments [Form 5701], ORG was entitled to a distribution of $0; yet the General Partner only authorized a cash distribution of $0, leaving $0 remaining in the Partnership. The examining agents learned [after the issuance of the Form 5701] in calendar year 20XX, ORG was entitled to a distribution of $0, yet the General Partner only authorized a cash distribution of $0, leaving $0 remaining in the Partnership. However, the General Partner [in calendar year 20XX] was entitled to a distribution of $0, yet said General Partner authorized [to itself] a cash distribution of $0, or a $0 excess distribution from what said General Partner was entitled to during calendar year 20XX. Naturally, the lion's share of this excess distribution came from the ORG funds the General Partner decided would remain in the Partnership and not distributed to ORG. Therefore, for calendar years 20XX and 20XX, ORG was entitled to distributions of $0, yet only received [in cash] $0, leaving $0 remaining in the Partnership for the General Partner to decide how best to use those funds, and in calendar year 20XX, the General Partner decided the best use of a portion of those funds was to make an excess [cash] distribution to itself.

As the examining agents stated in their report dated October 18, 20XX (Form 5701), if a private party [the General Partner] is allowed to control or use a nonprofit organization's [ORG's] assets and/or the accompanying income for the benefit of the private party, and said benefit is not incidental to the accomplishment of exempt purposes, then the organization [ORG] will fail to be organized and operated exclusively for exempt purposes.

We can think of no better example to demonstrate this principle than our case. The General Partner of the Partnership [in which ORG invested its sole asset] has complete dominance over the income generated from ORG's sole asset, with ORG having absolutely no voice as to how the General Partner will exercise their dominance; and, as the facts have shown, they have exercised said dominance for their own private advantage, profit, fruit, privilege, gain, or interest resulting in ORG's failure to qualify as a tax exempt Section 501(c)(3) charitable organization. The General Partner viewed

the ORG funds as its own "incorporated pocket book" to do with as it saw fit, which clearly is not allowable for a Section 501(c)(3) organization, i.e., said organization is to serve a public not a private interest.

Finally, as ORG noted in its protest, they received the CO-3 stock under a deed of gift, which anticipated that ORG would use the net income from the CO-3 shares for charitable purposes. For Federal tax purposes, the amount of a partnership's net income, that the partner is entitled to, is considered to be the net income on which the partner is required to report and pay the appropriate taxes. The PARTNERSHIP acknowledged this fact in Article III, Section 3.1(b) of the Partnership Agreement. Therefore, as noted, ORG [during calendar years 20XX and 20XX] was entitled to $0 of the Partnership's net income and received only $0 in cash. ORG interpreted the term "net income" as meaning only the cash distributed from the Partnership. However, this "net income" term could easily be interpreted as the net income ORG is/was entitled to from the Partnership. ORG provided no support for how it arrived at their interpretation of the term "net income."

F. CONCLUSION TO ISSUE I

ORG's tax exempt status should be revoked because it cannot assure that participating in the Partnership will not further private interest more than incidentally, causing ORG not to be organized and operated exclusively for public rather than private interest(s). Accordingly, for all the reasons previously stated, the examining agents maintain that ORG's tax exempt status under Section 501(c)(3) should be revoked because ORG is being used to benefit more than an incidental private benefit rather than a public interest.[39]

Alternative ISSUE II

If ORG is found to qualify under Section 501(c)(3), then should ORG's Type II supporting organization foundation status, under Section 509(a)(3), be revoked?

A. FACTS

The facts remain as presented in Issue I above.

B. LAW

The Code provides that certain "supporting organizations" (in general, organizations that provide support to another section 501(c)(3) organization that is not a private foundation) are classified as public charities rather than private foundations.[40] To qualify as a supporting organization, an organization must meet all three of the following tests: (1) it must be organized and at all times operated exclusively for the benefit of, to

[39] *The Court, in American Campaign Academy, 92 T.C. 1053, observed that "conferral of benefits on disinterested persons may cause an organization [like ORG] to serve "a private interest" in violation of the Section 501(c)(3) mandate to service public rather than private interests.*

[40] *Section 509(a)(3).*

perform the functions of, or to carry out the purposes of one or more " "publicly supported organizations"[41] (the "organizational and operational tests");[42] (2) it must be operated, supervised, or controlled by or in connection with one or more publicly supported organizations (the "relationship test");[43] and (3) it must not be controlled directly or indirectly by one or more disqualified persons (as defined in section 4946) other than foundation managers and other than one or more publicly supported organizations (the "lack of outside control test").[44]

To satisfy the relationship test, a supporting organization must hold one of three statutorily described close relationships with the supported organization. The organization must be: (1) operated, supervised, or controlled by a publicly supported organization (commonly referred to as " "Type I" supporting organizations); (2) supervised or controlled in connection with a publicly supported organization ("Type II" supporting organizations); or (3) operated in connection with a publicly supported organization ("Type III" supporting organizations).[45]

Type I supporting organizations

In the case of supporting organizations that are operated, supervised, or controlled by one or more publicly supported organizations (Type I supporting organizations), one or more supported organizations must exercise a substantial degree of direction over the policies, programs, and activities of the supporting organization.[46] The relationship between the Type I supporting organization and the supported organization generally is comparable to that of a parent and subsidiary. The requisite relationship may be established by the fact that a majority of the officers, directors, or trustees of the supporting organization are appointed or elected by the governing body, members of the governing body, officers acting in their official capacity, or the membership of one or more publicly supported organizations.[47]

Type II supporting organizations

Type II supporting organizations are supervised or controlled in connection with one or more publicly supported organizations. Rather than the parent-subsidiary relationship characteristic of Type I organizations, the relationship between a Type II organization and its supported organizations is more analogous to a brother-sister relationship. In order to satisfy the Type II relationship requirement, generally there must be common supervision or control by the persons supervising or controlling both the supporting

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[41] *In general, supported organizations of a supporting organization must be publicly supported charities described in sections 509(a)(1) or (a)(2).*

[42] *Section 509(a)(3)(A).*

[43] *Section 509(a)(3)(B).*

[44] *Section 509(a)(3)(C).*

[45] *Treas. Reg. Section 1.509(a)-4(f)(2).*

[46] *Treas. Reg. Section 1.509(a)-4(g)(1)(i).*

[47] *Id.*

organization and the publicly supported organizations.[48] An organization generally is not considered to be "supervised or controlled in connection with" a publicly supported organization merely because the supporting organization makes payments to the publicly supported organization, even if the obligation to make payments is enforceable under state law.[49]

Type III supporting organizations

Type III supporting organizations are "operated in connection with" one or more publicly supported organizations. To satisfy the "operated in connection with" relationship, Treasury regulations require that the supporting organization be responsive to, and significantly involved in the operations of, the publicly supported organization. This relationship is deemed to exist where the supporting organization meets both a "responsiveness test" and an "integral part test."[50]

In general, the responsiveness test requires that the Type III supporting organization be responsive to the needs or demands of the publicly supported organizations. The responsiveness test may be satisfied in one of two ways.[51] First, the supporting organization may demonstrate that: (1)(a) one or more of its officers, directors, or trustees are elected or appointed by the officers, directors, trustees, or membership of the supported organization; (b) one or more members of the governing bodies of the publicly supported organizations are also officers, directors, or trustees of the supporting organization; or (c) the officers, directors, or trustees of the supporting organization maintain a close continuous working relationship with the officers, directors, or trustees of the publicly supported organizations; and (2) by reason of such arrangement, the officers, directors, or trustees of the supported organization have a significant voice in the investment policies of the supporting organization, the timing and manner of making grants, the selection of grant recipients by the supporting organization, and otherwise directing the use of the income or assets of the supporting organization.[52] Alternatively, the responsiveness test may be satisfied if the supporting organization is a charitable trust under state law, each specified supported organization is a named beneficiary under the trust's governing instrument, and the beneficiary organization has the power to enforce the trust and compel an accounting under state law.[53]

In general, the integral part test requires that the Type III supporting organization maintains significant involvement in the operations of one or more publicly supported organizations, and that such publicly supported organizations are in turn dependent upon the supporting organization for the type of support which it provides. There are two

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[48] *Treas. Reg. Section 1.509(a)-4(h)(1).*

[49] *Treas. Reg. Section 1.509(a)-4(h)(2).*

[50] *Treas. Reg. Section 1.509(a)-4(i)(1).*

[51] *For an organization that was supporting or benefiting one or more publicly supported organizations before November 20, 1970, additional facts and circumstances, such as an historic and continuing relationship between organizations, also may be taken into consideration to establish compliance with either of the responsiveness tests. Treas. Reg. Section 1.509(a)-4(i)(1)(ii).*

[52] *Treas. Reg. Section 1.509(a)-4(i)(2)(ii).*

[53] *Treas. Reg. Section 1.509(a)-4(i)(2)(iii).*

alternative methods for satisfying the integral part test. The first alternative is to establish that (1) the activities engaged in for or on behalf of the publicly supported organization are activities to perform the functions of, or carry out the purposes of, such organizations; and (2) these activities, but for the involvement of the supporting organization, normally would be engaged in by the publicly supported organizations themselves.[54] Organizations that satisfy this "but for" test sometimes are referred to as "functionally integrated" Type III supporting organizations. The second method for satisfying the integral part test is to establish that: (1) the supporting organization pays substantially all of its income to or for the use of one or more publicly supported organizations;[55] (2) the amount of support received by one or more of the publicly supported organizations is sufficient to insure the attentiveness of the organization or organizations to the operations of the supporting organization (this is known as the "attentiveness requirement");[56] and (3) a significant amount of the total support of the supporting organization goes to those publicly supported organizations that meet the "attentiveness requirement."[57]

In Polm Family Foundation,[58] the court rested its decision [as to Polm's] Type II supporting foundation status on whether Polms satisfied the "organizational and operational tests." The Court noted:

> To satisfy the organizational test, the Foundation had to demonstrate that it is "organized, and at all times thereafter is operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more specified [publicly supported] organizations . . .." *26 U.S.C § 509(a)(3)(A)*. Regulations implementing this provision require the articles of incorporation of a supporting organization to "designate each of the *specified* organizations by name . . .." *Treas. Reg. § 1.509(a)-4(d)(2)(i)*.
>
> There is an exception to this requirement: a Type II supporting organization need not specify by name each publicly supported organization if its articles of incorporation "require that it be operated to support or benefit one or more beneficiary organizations which are designated by class or purpose . . .." *Treas. Reg. § 1.509(a)-4(d)(2)(i)(b)*. The IRS tells us that the exception applies only if the class of beneficiary organizations is "readily identifiable." In support, it points to the examples in the regulations and a related revenue ruling. *See Treas. Reg. § 1.509(a)-4(d)(2)(iii)*; *Rev. Rul. 81-43, 1981-1 C.B. 350*. In each example, the description of the class allows easy identification of the

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[54] *Treas. Reg. Section 1.509(a)-4(i)(3)(ii).*

[55] For this purpose, the IRS has defined the term "substantially all" of an organization's income to mean 85 percent or more. Rev. Rul. 76-208, 1976-1 C.B. 161.

[56] Although the regulations do not specify the requisite level of support in numerical or percentage terms, the IRS has suggested that grants that represent less than 10 percent of the beneficiary's support likely would be viewed as insufficient to ensure attentiveness. Gen. Couns. Mem. 36379 (August 15, 1975). As an alternative to satisfying the attentiveness standard by the foregoing method, a supporting organization may demonstrate attentiveness by showing that, in order to avoid the interruption of the carrying on of a particular function or activity, the beneficiary organization will be sufficiently attentive to the operations of the supporting organization. Treas. Reg. Section 1.509(a)-4(i)(3)(iii)(b).

[57] *Treas. Reg. Section 1.509(a)-4(i)(3)(iii).*

[58] *644 F.3d 406, aff'd 655 F.Supp. 2d 125 (D.D.C).*

beneficiary organizations--e.g., "institutions of higher learning in the State of Y," *Treas. Reg. § 1.509(a)-4(d)(2)(iii)*; "[tax-exempt public charities] located in the [city of] Z area," *Rev. Rul. 81-43.*

An agency's interpretation of its regulation is controlling unless the interpretation is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997).* This is so even if the interpretation appears for the first time in a legal brief. *Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 880-81, 178 L. Ed. 2d 716 (* 2011*)*; *Bigelow v. Dep't of Def., 217 F.3d 875, 878, 342 U.S. App. D.C. 369 (D.C. Cir. 2000).* "Because the interpretation the [IRS] presents in its brief is consistent with the regulatory text," *Chase Bank, 131 S. Ct at 880*, we have no basis for rejecting it in favor of some other version. In the statute's terms, the organizations the Foundation supports must be "specified." This strongly suggests that either the Foundation must identify those organizations by name or the organizations must be identifiable from the Foundation's articles of incorporation. That essentially is what the Treasury regulation provides. The IRS so interprets it in its submissions to this court and to the district court. The Foundation has offered nothing to counter the IRS's interpretation. All the Foundation has to say is that the government is forbidden from making the argument. This is frivolous for the reasons we have already given--a winning party may support the judgment on appeal on any grounds argued below, even if the district court never reached them.

All that is left is the question whether the Foundation satisfied the organizational test, as the IRS interprets it. The Foundation has no defense. Its amended articles of incorporation designate as supported organizations "the class of organizations . . . which support, promote and/or perform public health and/or Christian objectives, including but not limited to Christian evangelism, edification and stewardship." Unlike the examples contained in the regulation and the revenue ruling, this designation does not make its beneficiary organizations readily identifiable. There is no geographic limit. There is no limit by type of publicly supported organization (such as churches or seminaries). In light of the broad purposes mentioned in Foundation's articles of incorporation, we agree with the government that it would be difficult, if not impossible, to determine whether the Foundation will receive oversight from a readily identifiable class of publicly supported organizations.

THE "LACK OF OUTSIDE CONTROL TEST"

Income Tax Regulations § 1.509(a)-4(i) regarding control by disqualified persons provides:

(1) In general. -- Under the provisions of § 509(a)(3)(C) a supporting organization may not be controlled directly or indirectly by one or more disqualified persons (as defined in § 4946 other than foundation managers and other than one or more publicly supported organizations. If a person who is a disqualified person with respect to a supporting organization, such as a substantial contributor to the supporting organization, is appointed or designated as a foundation manager of the supporting organization by a publicly supported beneficiary organization to serve as the representative of such publicly supported organization, then for purposes of this paragraph such person will be regarded as a disqualified person, rather than as a representative of the publicly supported organization. An organization will be considered "controlled", for purpose of § 509(a)(3)(C), if the disqualified persons, by aggregation their votes or positions of authority, may require such organization to perform any act which significantly affects its operations or may prevent such organization from performing such act. This includes, but is not limited to, the right of any substantial contributor or his spouse to designate

annually the recipients, from among the publicly supported organizations of the income attributable to his contribution to the supporting organization.

Disqualified Persons

Section 4946 of the Code provides, in pertinent part, that for purposes of this subchapter, the term "disqualified person" means, with respect to a private foundation, a person who is --

(A) a substantial contributor to the foundation,

(B) a foundation manager (within the meaning of *subsection (b)(1)*),

(C) an owner of more than 20 percent of --

(i) the total combined voting power of a corporation,

(ii) the profits interest of a partnership, or

(iii) the Beneficial interest of a trust or unincorporated enterprise, which is a substantial contributor to the foundation,

(D) a member of the family (as defined in *subsection (d)*) of any individual described in *subparagraph (A)*, *(B)*, or *(C)*, and

(E) a corporation of which persons described in *subparagraph (A)*, *(B)*, *(C)*, or *(D)* own more than 35 percent of the total combined voting power.

Section 1.509(a)-4(j)(1) of the regulations provides, in pertinent part, that under the provisions of *section 509(a)(3)(C)* a supporting organization may not be controlled directly or indirectly by one or more disqualified persons (as defined in *section 4946*) other than foundation managers and other than one or more publicly supported organizations. An organization will be considered "controlled," for purposes of *section 509(a)(3)*, if the disqualified persons, by aggregating their votes or positions of authority, may require such organization to perform any act which significantly affects its operations or may prevent such organization from performing such act. This includes, but is not limited to, the right of a substantial contributor or his spouse to designate annually the recipients, from among the publicly supported organizations of the income attributable to his contribution to the supporting organization.

Rev. Rul. 80-207, 1980-2 C.B. 193, held that an organization with a 4-person-board consisting of a substantial contributor and two employees of a corporation owned (over 35 percent) by the substantial contributor was indirectly controlled by disqualified persons and was not a supporting organization under *section 509(a)(3) of the Code*. The Service stated that because one of the organization's directors was a disqualified person and neither the disqualified person nor any other director had a veto power over the organization's actions, the organization was not directly controlled by a disqualified person under section 1.509(a)-4(j) of the regulations. However, in determining whether an organization is indirectly controlled by one or more disqualified persons, one circumstance to be considered is whether a disqualified person is in a position to influence the decisions of members of the organization's governing body who are not themselves disqualified persons.

Chapter 42 Excise Taxes

IRC § 509(a) of the Code provides that any foreign or domestic organization described

in section 501(c)(3) is a private foundation unless it is an organization described in section 509(a)(1), (2), (3) or (4). Private foundations are subject to the excise taxes imposed by Chapter 42 of the Code.

Section 4940 of the Code imposes an excise tax on the net investment income (including capital gain net income) of private foundations.

Section 4941(a) of the Code imposes a tax on each act of self-dealing between a disqualified person and a private foundation.

Section 4942 of the Code generally imposes a tax on private foundations for failure to distribute annually for exempt purposes a certain minimum percentage of the fair market value of certain property owned by it, and allows a carryover to future years of excess qualifying distributions.

Section 4943 of the Code imposes a tax annually on the value of a private foundation's excess holdings in a business enterprise.

Section 4944 of the Code generally imposes a tax on private foundations which invest any amount in a manner which jeopardizes the carrying out of their exempt purposes.

Section 4945 of the Code generally imposes a tax on taxable expenditures made by a private foundation.

C. GOVERNMENT'S POSITION

The ORG Articles of Incorporation make no mention of the class of organizations ORG will support, in violation of the organizational test.[59] Their By-Laws, [only] in broad terms, allow ORG to fund a limitless number of organizations with no easy identification of the beneficiary organizations, other than CO-4, i.e., similar Christian Evangelical churches, missions, organizations, programs and activities which carry on the same purposes, mission and philosophy of this corporation. Furthermore, ORG's dissolution provision suffers from the same broad terms, allowing ORG to dissolve into a limitless number of organizations with no easy identification of the beneficiary organizations. Therefore, ORG does not meet the qualifications for a Type II, Section 509(a)(3) public foundation status. The agents propose to revoke ORG's Type II, Section 509(a)(3) public foundation status.

D. TAXPAYER'S POSITION

Please see the attached Exhibit A for ORG's response dated January 9, 20XX to the examining revenue agents' report issued October 18, 20XX

E. GOVERNMENT'S REBUTTAL TO TAXPAYER'S POSITION

The agents propose to revoke ORG's Type II, Section 509(a)(3) public foundation status as their alternative position [Issue II].

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[59] *Treas. Reg. Section 1.509(a)-4(c)(1) requires ORG's Articles to specify the publicly supported organizations on whose behalf such organization is to be operated.*

ORG takes exception to proposed Issue II.[60] ORG believes they have defined their beneficiary organization sufficiently; they state their "second class of beneficiary organizations, i.e., similar evangelical Christian organizations, is also a sufficient definition of a class of beneficiary organizations under the IRS's own regulations. Treas. Reg. 1.509(a)-4(d)(2)(i). The Polm Family Foundation, Inc. case is clearly irrelevant..."[61]

Naturally, "tax exemption is a matter of legislative grace and taxpayers have the burden of establishing their entitlements to exemptions."[62] Also, taxpayers have the burden of proving the IRS's determination of private foundation status is incorrect.[63] Additionally, courts are not required to accept taxpayer's uncorroborated, unverified, undocumented and self-serving testimony;[64] petitioner's testimony, standing alone, is not to be taken as gospel, and it does not carry the petitioner's burden of proof;[65] indeed, it has even been stated that a "well founded doubt is fatal to the claim;"[66] and if there should be a gap in the record, it may not be presumed that any missing facts are favorable to him [taxpayer];[67] if a taxpayer has information/evidence which would be favorable, then failure to produce said information/evidence gives rise to the presumption that if produced, it would be unfavorable and becomes itself "evidence of the most convincing character."[68] We use common sense when assessing facts.[69]

ORG, as previously noted, claims their "second class of beneficiary organizations" i.e., evangelical Christian organizations, is a sufficient definition of a class of beneficiary organizations under Treas. Reg. 1.509(a)-4(d)(2)(i) and the Polm Family Foundation, Inc. case is clearly irrelevant. However, ORG failed to comment on its flawed Articles of Incorporation which fail to mention the class of organizations ORG will support in violation of the organizational test under Treas. Reg. 1.509(a)-4(c)(1). This alone would result in revocation of ORG's Type II Section 509(a)(3) foundation status.

Nevertheless, putting aside this fatal flaw, we find ORG acknowledging there are, aside from CO-4, other secondary beneficiaries. In fact, from an analysis of grants made in 20XX and 20XX less than 0% of all grant money expended was given to the purportedly supported organization CO-4. Also, ORG stated they can spend 0% of their annual grants and donations on these secondary beneficiaries. Given the breadth of other evangelical Christian organizations, it is clear why the Court in Polm agreed with the government that it would be difficult, if not impossible, to determine whether the

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[60] *From ORG's January 9, 2013 protest [hereinafter referred to as ORG's Protest or simply Protest], "we submit to you that the conclusions and proposed adjustments of the IRS are incorrect..."*

[61] *Id.*

[62] *Christian Echoes National Ministries, Inc. v. U.S., 28 A.F.T.R.2d, 71-5934, rev'd on other grounds, 470 F.2d 849; Nelson v. Commissioner, 30 T.C 1151.*

[63] *Roe Foundation v. Commissioner, T.C. Memo 1989-566.*

[64] *Niedringhaus v. Commissioner, 99 T.C. 202 (1991); Tokarski v. Commissioner, 87 T.C. 74 (1986); Shea v. Commissioner, 112 T.C. 183 (1999).*

[65] *Halle v. Commissioner, 7 T.C. 245 (1946), aff'd 175 F.2d 500 (C.A. 2nd, 1949).*

[66] *Estate of Bowers v. Commissioner, 94 T.C. 582 (1990); Butka v. Commissioner, 91 T.C. 110 (1998) aff'd without published opinion 886 F.2d 442 (D.C. Cir. 1989).*

[67] *In Shapiro v. Commissioner, 40 T.C. 34 (1963) the tax court stated: "The burden of proof is of course, upon the petitioner."*

[68] *Stoumen v. Commissioner, 208 F.2d 903 (C.A. 3, 1953); William G. Lias, 24 T.C. 280 (1955), aff'd 235 F.2d 879 (C.A. 4, 1956; Wichita Terminal Elevator Co., 6 T.C. 1158, aff'd 162 F.2d 513 (C.A. 10, 1947).*

[69] *Vallette v. Commissioner, T.C. Memo 1996-285; Nickerson v. Commissioner, 700 F.2d 402 (CA7 1983).*

foundation would receive any oversight from a readily identifiable class of publicly supported organizations.

Additionally, merely stating [as ORG did] that these secondary beneficiary organizations are a sufficiently defined class of beneficiary organizations, fails to carry ORG's burden of proving the examining agents' [IRS] foundation status determination (i.e., revoking ORG's Type II Section 509(a)(3) status, resulting in ORG being treated as a private foundation) is incorrect.

Additionally, the majority of ORG's 3 board members have business relationships with each other. The agents believe Director-1 is a disqualified person with respect to ORG through his relationship with the Family.

F. CONCLUSION TO ISSUE II

Accordingly, ORG's Type II foundation status should be revoked because ORG failed to satisfy the "organizational and operational tests" to qualify for said Type II foundation status. [70] Additionally, it is the IRS's position that ORG's Section 509(a)(3) Type II foundation status should be revoked, retroactive to date of formation, because ORG has failed to demonstrate that it:

- is organized and operated for the benefit of publicly supported organization(s) under Section 509(a)(1) or (2);
- has the required Type I, Type II or Type III relationship with said § 509(a)(1) or (2) organization(s); and
- is not controlled by a disqualified person.

Therefore, ORG should be treated as a private foundation from September 14, 20XX under Section 509(a) of the Internal Revenue Code.

Form 990-PF returns should be filed for the tax periods ending on and after December 31, 20XX. ORG will owe Chapter 42 excise taxes to be determined upon revocation of its 509(a)(3) Type II status.

[70] *Naturally, if ORG is not considered a tax exempt organization under Section 501(c)(3) or a public foundation under Section 509(a)(3), then by implication, it cannot be treated as an integrated auxiliary of a church under Treas. Reg. 1.6033-2(h).*

Taxpayer's Formal Protest

In response to the Service's 30 day letter report dated April 18, 20XX, ORG filed a protest letter, attached as Exhibit D. ORG does not agree with the report's conclusion that ORG's exemption under 501(c)(3) should be revoked retroactively to the date of formation, September 14, 20XX. ORG also does not agree that their foundation status is other than a supporting §509(a)(3) Type II organization; and that their supporting organization's status should be revoked retroactively to RI's date of formation on September 14, 20XX. They do not agree that they are a private foundation subject to the excise tax provisions in Chapter 42 of the Code. They also do not agree that Director-1 is a disqualified person to the ORG.

Government's Rebuttal to Taxpayer's Formal Protest

This section contains the Service's response to ORG's Protest of the Tax Exempt/Government Entities [TE/GE] Division of the Internal Revenue Service 30-Day Letter, proposing to revoke retroactively to September 14, 20XX, ORG's section 501(c)(3)[71] Tax Exempt Status, with an Alternative Issue[72] that ORG's Supporting Organization's Foundation Status be revoked retroactively to September 14, 20XX. The TE/GE agents contend that ORG has been used to advance a private rather than a public interest, causing revocation of ORG's Section 501(c)(3) tax exemption. Also, because ORG submitted misleading information to the TE/GE Division in order for that Division to grant ORG a Section 501(c)(3) tax exempt status, said status should be revoked retroactively to September 14, 20XX. The remainder of this rebuttal is divided into four sections A-D. Section A will cover rebuttals concerning the primary issue of revocation. Section B will cover disputed items on the alternative issue of the retroactive revocation of ORG's Type II Section 509(a)(3) supporting organization foundation status. Section C will set forth the reasons that Director-1 and CO-6 are considered to be disqualified persons. Section D will summarize the overall conclusions of the rebuttal section.

A. The Primary Issue – Revocation of Section 501(c)(3) status

(1) Private Benefit

In the protest to TE/GE's 30-day letter, ORG spelled out the transaction leading TE/GE to the conclusion that private benefit/interests were being served more than incidentally. ORG's protest stated:

1. *"The CO-6 ("CO-6") companies owned most of the real estate on which the CO-6 businesses operated. On November I, 20XX, that changed. In a series of integrated steps, CO-6 (i) transferred a material portion of its real estate to CO-3 in exchange for CO-3 shares and, (ii) in a taxable transaction, immediately distributed the CO-3 shares to its ultimate Beneficial owners, the partners of LLP-3.*

[71] *All Section references are to the Internal Revenue Code, unless otherwise indicated.*

[72] *If ORG's Section 501(c)(3) Status is Upheld*

2. *CO-6 is owned by LLP-3, a Delaware limited partnership with an 0% charitable limited partner. That charity received 0% of CO-3's shares and simultaneously granted those shares to ORG conditioned upon the shares being simultaneously contributed to Partnership L P in exchange for an 0% limited partnership interest. ORG never Beneficially owned CO-3 shares.*

3. *The CO-3 transaction was undertaken for a valid business reason. In 20XX, CO-6 determined that it should segregate a material portion of its real estate from its distribution business, similar to how it had reorganized its County real estate holdings, to shield the real estate from product liability exposure and to achieve other risk management objectives. CO-6 sold some 0 different perishable and nonperishable products, a number of which were susceptible to contamination and other food safety issues. After observing devastating claims against food industry providers for listeria and E. coli contamination fatalities, CO-6's Board of Directors was concerned that, unless CO-6 separated its real estate from its distribution business, product liability (or environmental) lawsuits could not only materially damage the distribution business but place its significant real estate holdings at risk. Thus, CO-6 developed a diversification plan to distribute much of its real estate to a separate company (CO-3) that would be owned and controlled by a partnership (Partnership) unrelated to CO-6.*

4. *Contrary to the IRS's statement, ORG was never in "a position of guaranteed yearly distributions." ORG never held a voting interest in CO-3, Partnership LP or any other entity. ORG acquired the CO-3 shares on the condition that it simultaneously contribute the shares to Partnership LP for a limited partnership interest in Partnership LP. All of the steps were "pre-wired"; that is, the parties agreed that the steps were dependent on each other and that each one would take place simultaneously. ORG agreed to that condition in order to receive an 0% limited partnership interest in Partnership LP – an asset with a value in excess of $0 million. If ORG had not agreed to that condition, it would not have received the interest."*

In summary, ORG never controlled an activity, no less gave up control of an activity to a for-profit entity. ORG received an 0% nonvoting interest in Partnership LP, an asset with a value in excess of $0 million. All of the steps culminating in Partnership receiving the CO-3 shares occurred on the same day (November l, 20XX)."

The following chart may help explain the narrative.

CHART DELETED

Immediately before the transfer, CO-1, Inc. owned all of the CO-3 stock. CO-1, Inc. is controlled by a Board of Advisors which consists of Advisor-1, Advisor-2, Advisor-3, Advisor-4, and Advisor-5. Immediately after the transfers, which all occurred on November 1, 20XX, the Partnership owned all of the CO-3 stock. The CO-1 is the only general partner of the Partnership. The CO-1 is controlled by the same Board of Advisors that controls CO-1, Inc. Since the Board of Advisors controls the only general partner (CO-1) of the Partnership, the Board of Advisors controls the Partnership. It is important to note that the same group of individuals (the Board of Advisors) controlled the CO-3 stock before and after the transfers.

In the protest, for the first time, ORG advised the TE/GE Division that they were merely a nominee of the CO-3 stock for a few brief seconds, as said stock made its way from the CO-6 [CO-6] to the Partnership with the CO-1. being the only general partner in the Partnership; giving the LLC complete control over all aspects of the Partnership with the same individuals in control of CO-1, Inc. and the CO-1.

In Commissioner v. Court Holding Co., 324 U.S. 331, the court held that income tax consequences arise from the substance of the transaction, taken as a whole. "[M]ere formalisms, which exist solely to alter tax liabilities" cannot, disguise the true nature of a transaction.

In J.E. and L.E. Mabee Foundation v. United States, 533 F.2d 521 (10th Cir. 1976), the Court considered the tax consequences of a royalty payment to a tax exempt parent, from companies which had purchased oil from the wholly-owned taxable subsidiary of the tax exempt parent. In finding the income taxable to the exempt organization, the court held that where a tax exempt organization attempts to circumvent the statute by structuring transactions so that payments are received from third parties rather than from its controlled subsidiary, such manipulations may be ignored.

Deciding "whether to accord the separate steps of a complex transaction independent significance, or to treat them as related steps in a unified transaction, is a recurring problem in the field of tax law." King Enters., Inc. v. United States, 418 F.2d 511. In search of an answer to this problem, courts utilize a variety of approaches, including a particular incarnation of the basic substance over form principle known as the step transaction doctrine. Simply stated, the step transaction doctrine provides that "interrelated yet formally distinct steps in an integrated transaction may not be considered independently of the overall transaction." Commissioner v. Clark, 489 U.S. 726; see also Security Indus. Ins. Co. v. United States, 702 F.2d 1234, ("The step transaction doctrine is a corollary of the general tax principle that ... taxation depends on the substance of a transaction rather than its form."). The doctrine requires us to link together "all interdependent steps with legal or business significance, rather than [take] them in isolation," so that "federal tax liability may be based on a realistic view of the entire transaction." Clark, supra.

Courts have developed (for our purposes) two tests for determining when the step transaction doctrine should operate to collapse the individual steps of a complex transaction into a single integrated transaction for tax purposes: (1) end result, and (2) interdependence. More than one test might be appropriate under any given set of

circumstances; however, the circumstances need only satisfy one of the tests in order for the step transaction doctrine to operate. Associated Wholesale Grocers, Inc. v. U.S., 927 F.2d 1517.

The end result test combines "into a single transaction separate events which appear to be component parts of something undertaken to reach a particular result." Kornfeld v. Commissioner, 137 F.3d 1231; Associated Wholesale Grocers, supra. Under this test, if we find the series of closely related steps in a transaction are merely the means to reach a particular result, we will not separate those steps, but instead treat them as a single transaction. Kanawha Gas & Utils. Co. v. Commissioner, 214 F.2d 685. The taxpayer's subjective intent is especially relevant under this test because it allows us to determine whether the taxpayer directed a series of transactions to an intended purpose. See Brown v. United States, 782 F.2d 559, ("end result test" for determining when to apply "step transaction doctrine" makes intent a necessary element for application of doctrine). The intent we focus on under the end result test is not whether the taxpayer intended to avoid taxes. Prior case law clearly instructs that tax reduction and avoidance motives are permissible and do not alone invalidate a transaction. Gregory v. Helvering, 293 U.S. 465. Instead, the end result test focuses on whether the taxpayer intended to reach a particular result by structuring a series of transactions in a certain way.[73] Also, see King Enters., supra.

The interdependence test takes a slightly different approach. Under this test, we disregard the tax effects of individual transactional steps if "it is unlikely that any one step would have been undertaken except in contemplation of the other integrating acts." Kuper v. Commissioner, 533 F.2d 152. The interdependence test relies to a lesser degree on the taxpayer's subjective intent than the end result test. It focuses not on a particular result, but on the relationship between the individual steps and "whether under a reasonably objective view the steps were so interdependent that the legal relations created by one of the transactions seem fruitless without completion of the series." Kornfeld, supra. In order to maintain this objectivity and ensure the steps have independent significance, we find it useful to compare the transactions in question with those we might usually expect to occur in otherwise bona fide business settings. See Merryman v. Commissioner, 873 F.2d 879 (5th Cir. 1989).

To ratify a step transaction that exalts form over substance merely because the taxpayer can either (1) articulate some business purpose allegedly motivating the indirect nature of the transaction or (2) point to an economic effect resulting from the series of steps, would frequently defeat the purpose of the substance over form principle. Events such as the actual payment of money, legal transfer of property, adjustment of company books, and execution of a contract all produce economic effects and accompany almost any business dealing. Thus, we do not rely on the occurrence of these events alone to determine whether the step transaction doctrine applies. Likewise, a taxpayer may proffer some non-tax business purpose for engaging in a

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[73] *We emphasize that under the end result test, our focus is not on the legitimacy of the intended result, but instead on whether the taxpayer undertook multiple steps to achieve a particular result. Thus, if a taxpayer engages in a series of steps that achieve a particular result, he cannot request independent tax recognition of the individual steps unless he shows that at the time he engaged in the individual step, its result was the intended end result in and of itself. If this is not what the taxpayer intended, then we collapse the series of steps and only give tax consideration to the intended end result. See Crenshaw v. United States, 450 F.2d 472 (5th Cir. 1971), cert. denied, 408 U.S. 923.*

series of transactional steps to accomplish a result he could have achieved by more direct means, but that business purpose by itself does not preclude application of the step transaction doctrine. Associated Wholesale Grocers, supra. Although the absence of economic effects or business purposes may be fatal to a taxpayer's step transaction refund suit, the presence of those factors is not dispositive. See Associated Wholesale Grocers, supra. We must still examine the objective realities of the multi-step transactions to determine their tax status, and proceed to do so under the end result and interdependence tests.[74]

There appears to be nothing more to say [ORG freely admits the application of the step transaction doctrine] other than to apply the doctrine to our case. As the Court noted in Crenshaw, supra, "We collapse the series of steps and only give tax consideration to the intended end result."

It is clear from ORG's protest that CO-1, Inc. and the members of its Advisor Board were concerned with the financial risk [to its real estate holding] from potential lawsuits. They devised a plan to shield the real estate holdings from any potential lawsuits by spinning off the holdings into the Partnership. Therefore, for our purposes, we have CO-1, Inc. transferring % of the CO-3 stock to the Partnership with the partnership transferring back to ORG an 0% limited partner interest. As evident from ORG's protest, they were merely a place holder for CO-1, Inc. ["ORG never beneficially owned CO-3 shares"], i.e., if ORG never owned the stock, they never could transfer the stock to the Partnership.

There are two cases[75] and one revenue ruling[76] similar to our case, i.e., where an exempt organization was used to advance private rather than public interest. In Best Lock, supra, we had a private interest [Mr. Best] having a foundation purchase stocks and make loans to assist a corporation owned by a friend. In Beeghly Fund, supra, a foundation was used to purchase stock in a corporation for the benefit of the selling stockholders. In Rev. Rul. 67-5, supra, again a foundation was used to purchase stock in a corporation for the benefit of the corporate stockholders.

In this instance, we have a closely held corporation [CO-1, Inc.] using the ORG to shield/protect its considerable real estate assets from any potential lawsuits relative to the corporation's wholesale and retail operations. The Directors of ORG were not exercising their fiduciary duties when they allowed ORG to be used for CO-1, Inc.'s private benefit.[77] Clearly the public/beneficiaries' interests were running a distant

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[74] See Crenshaw, supra (a taxpayer may not secure, by a series of contrived steps, different tax treatment than if he had carried out the transaction directly). Fundamental principles of taxation dictate that "[a] given result at the end of a straight path is not made a different result because reached by following a devious path." Minnesota Tea Co. v. Helvering, 302 U.S. 609.

[75] *Leon Beeghly Fund v. Commissioner, 35 T.C. 490; Best Lock Corporation v. Commissioner, 31 T.C. 1217.*

[76] *Rev. Rul. 67-5, 1967-1 C.B. 123.*

[77] *The most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty . . . . It is the duty of a trustee to administer the trust solely in the interest of the beneficiaries." 2A A. Scott & W. Fratcher, Trusts § 170, 311 (4th ed. 1987); see also G. Bogert & G. Bogert, Law of Trusts and Trustees § 543 (rev. 2d ed. 1980) ("Perhaps the most fundamental duty of a trustee is that he must display throughout the administration of the trust complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the interests of third persons"); Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559 (1985); Meinhard v. Salmon, 249 N.Y. 458 (1928) ("Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to*

second to the private interest of shielding/protecting CO-1, Inc.'s real estate assets from lawsuits; thereby causing said use to destroy the tax exempt charitable status of ORG, regardless of the number or importance of its exempt purpose.[78]

(2) PARTNERSHIP

ORG wrote extensively on the Partnership:

i. The general partner [CO-1] did not receive a disproportionate distribution from the partnership.

ii. The general partner has a fiduciary duty to the limited partners.

iii. The partnership's sole asset is stock in CO-3, which is operating a real estate business, i.e., the retail facilities used in CO-1, Inc.'s wholesale and retail operations.; CO-3 needed capital to grow so the general partner decided to reinvest a large amount of the CO-3 distributions [to the partnership] back into CO-3's real estate business.

iv. ORG was in its start-up years and it did not have all charitable giving programs in place.

v. The partnership has given ORG considerable funds in order for ORG to achieve its tax exempt purpose.

i. No disproportionate distribution to the general partner.

ORG states the general partner [during year 20XX] liquidated their interest in the Partnership, i.e., they sold their interests back to the partnership and received their capital account balance in cash, i.e., they converted to cash their 0% ownership interest in the partnership. Now we have a partnership with no general partner; and holding an interest (0% general partner interest) that cost $0.

What ORG failed to explain or provide any information for: who took over the CO-1. general partner duties and obligations, and how did the partnership recoup their $0 investment?

Reviewing the partnership's Form 1065, filed for the 20XX year, we find that two LLC's presumably took over the CO-1 general partner duties. The CO-7 took a 0% general partner interest while the CO-8 took a 0% general partner interest. CO-7 and CO-8 reside at the same address [Address, City, State] and have family members as the

something stricter than the morals of the market place.

[78] *Better Business Bureau of Washington, D.C., supra.*

partnerships' general managers. The new general partners' capital accounts [Schedules K-1] show no capital contributions made to the partnership.

CO-7 is managed by Advisor-1, one of the members of the Board of Advisors of CO-1, Inc. and the CO-1. CO-7 is the general partner of LLP-1 [which resides at the same address as CO-7 and CO-8], a 0% limited partner in the Partnership.

CO-8 is managed by Advisor-5., also a member of the Board of Advisors of CO-1, Inc. and the CO-1. CO-8 is the general partner of LLP-2 [which resides at the same address as CO-7, LLP-1, and CO-8], a 0% limited partner in the Partnership.

Therefore, members of the family have sole control over all aspects of the Partnership, which is the sole owner of all the stock of 'CO-3' Real Estate Investment Trust [REIT], which in turn owns most of the real estate facilities used in the family's wholesale and retail operations.

As the TE/GE examining agents noted in their 30-day letter, it is ORG's burden to fill in factual gaps and any unfilled gaps are presumed unfavorable and becomes itself "evidence of the most convincing character."[79]

ORG has failed to supply any information on:

- Why the CO-1. decided to liquidate their 0% general partner's interest in the Partnership;
- Why two related LLCs [CO-7 and CO-8] took over the Partnership general partner duties; and
- How much, if anything, the two related LLCs paid for their 0% general partner interest in the Partnership.

ii. The general partner has a fiduciary duty to the limited partners.

ORG states a general partner has a fiduciary duty to deal fairly with its limited partners and a breach of said duties exposes the general partner to special damages plus attorney fees.

In Cantor Fitzgerald,[80] the Delaware court noted:

> *A court should assume that parties involved in commerce who elect to join together in a business organization to pursue an enterprise have substantial knowledge of a wide range of business operational frameworks. One can further assume these parties make a thoughtful*

[79] *Stoumen, supra; William G. Lias, supra; Witchita Terminal Elevator, supra.*

[80] *2001 WL 1456494.*

election with full knowledge of the significance of the operational framework they chose.[81]

In the present case, the parties are all sophisticated individuals and entities and possess a demonstrable measure of business acumen. This, combined with advice from their qualified legal counsel, allowed these parties to evaluate fully, both from a business and legal standpoint, the limited partnership form as a commercial vehicle. A limited partnership is a creature of both statute and contract. The operative document is the limited partnership agreement and the statute merely provides the "fall-back" or default provisions where the partnership agreement is silent. Thus, the provisions of the partnership agreement define the rights and responsibilities of those who are parties to the agreement and are afforded significant deference by the Courts.[82] *In fact, "where the parties have a more or less elaborated statement of their respective rights and duties, absent fraud, those rights and duties, where they apply by their terms, and not the vague language of a default fiduciary duty, will form the metric for determining breach of duty."*[83]

Therefore, it would appear, contrary to ORG's assertion, that a court would take into account the various provisions in a partnership agreement.

iii. The partnership's sole asset is stock in CO-3, which is operating a real estate business, i.e., the retail facilities used in CO-1, Inc.'s wholesale and retail operations.; CO-3 needed capital to grow so the general partner decided to reinvest a large amount of the CO-3 distributions [to the partnership] back into CO-3's real estate business.

In the TE/GE examining agents' 30-day letter, it is noted, for the 20XX and 20XX years, ORG was entitled to a distribution of $0 and received $0. Therefore, CO-3 had the use of $0 of ORG's funds for growth purposes. Also, the partnership needed funds [approximately $0] to liquidate its general partner's interest. Furthermore, because ORG was considered to be tax exempt, CO-3 had the full use of these funds undiminished by any Federal taxes or a savings of $0 [$0 x %], i.e., put another way, CO-3 was able to spend $0 more than its competition for growth purposes.

ORG states all types of charities can invest or reinvest in businesses from which they derive profits. What ORG fails to recognize is they [ORG] are not doing any investing or reinvesting. ORG, per their attorney, had no ability to evaluate the investment

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[81] *In re Marriott Hotel Properties II L.P. Unitholders Litig., Del. Ch., C.A. No. 14961, Allen, C. (June 12, 1996) Mem. Op. at 11-11 (quoting In re Cencom Cable Income partners, L.P. Litig., Del. Ch., C.A. No. 14634, Steele, V.C. (Feb. 15, 1996).*

[82] *See id.*

[83] *In re Marriott Hotel Properties II, L.P. Unitholders Litig., supra. at 11. See also Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., Del. Ch., C.A. No. 15754, Strine, V.C. (Sept. 27, 2000) Mem. Op. at 24 ("[W]here the Partnership Agreement provides the standard that will govern the duty owed by a General Partner to is partners in self-dealing transactions, it is the contractual standard and not the default fiduciary duty of loyalty's faimess standard the exclusively controls."); Wilmington Leasing, Inc. v. Parrish Leasing Co., L.P., Del. Ch., C.A. No. 15202, Jacobs, V.C. (Dec. 23, 1996) Mem. Op. at 30 ("Where, as here, a Partnership Agreement specifically addresses the rights and duties of the partners, any fiduciary duty that might be owed by the Limited Partners is satisfied by compliance with the applicable provisions of the partnership agreement.").*

opportunity of CO-3 or the Partnership.[84] As a limited partner in the Partnership, ORG has absolutely no voice on how the partnership will use CO-3's net income.

This is another example how ORG is being used to advance CO-1, Inc.'s private interest over a public interest.

iv. ORG was in its start-up years and it did not have all charitable giving programs in place.

ORG was formed on September 14, 20XX and granted tax exempt status on August 10, 20XX with an effective date of September 14, 20XX. In ORG's application [Form 1023] for tax exempt status [received on December 18, 20XX], ORG explained their grant making procedures and that a grant making form was in development.

In the TE/GE examining agents' view, ORG had ample time [prior to receiving their tax exempt status or shortly thereafter] to complete the development and implementation of their charitable gift giving program. Even if ORG needed all of the 20XX year to develop and implement their charitable giving program, there appears to be no reason [and none provided by ORG] why the 20XX year did not have a meaningful charitable program.[85]

v. The partnership has given ORG considerable funds in order for ORG to achieve its tax exempt purposes.

The only years the TE/GE agents have reviewed are 20XX and 20XX. In those years, ORG received $0 of the $0 owed to it from the Partnership.

In ORG's reply to the TE/GE examining agents' 30-day letter, they made some confusing statements. First, ORG stated as of May 29, 20XX, they received more than $0 million of the Partnership profit distributions. Then, ORG states during the 20XX year, they made $0 in grants for a total of almost $0 in grants for 20XX through 20XX, i.e., the $0 in grants during 20XX, $0 in 20XX and $0 in 20XX. Therefore, we have an unexplained $0 [$0 less $0]. Also, no information was provided as to how much of the Partnership's year 20XX net income ORG was owed.

As previously noted, factual gaps which go unfilled take on a presumption of unfavorability. Also, as previously noted, the presence of a single non-exempt purpose, such as serving private rather than public interests, will destroy the exemption regardless of the number or importance of exempt purposes.[86]

Therefore, while making grants is important, serving a private interest [as the TE/GE examining agents contend ORG is doing] will destroy a tax exempt status.

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[84] *"ORG acquired the CO-3 shares on the condition that it simultaneously contribute the shares to Partnership for a limited partnership interest in Partnership." ORG's reply to the TE/GE examining agents' 30-day letter.*

[85] *More on this topic later.*

[86] *Better Business Bureau of Washington, DC, supra.*

(3) Retroactive Revocation of ORG's Section 501(c)(3) Tax Exempt Status

ORG expressed [in the response to the TE/GE examining agents' 30-day letter] their entitlement to rely on the IRS determination letters.

The Regulation section 601.201(n)(6)(ii) states a "ruling or determination letter recognizing exemption may not be relied upon if there is a material change inconsistent with exemption in the character, the purpose, or the method of operation of the organization."

The Regulation section 601.201(n)(6)(i) states "[a]n exemption ruling or determination letter may be revoked or modified by a ruling or determination letter addressed to the organization . . . The revocation or modification may be retroactive if the organization omitted or misstated a material fact, operated in a manner materially different from that originally represented . . ."

Therefore, if ORG did not omit or misstate material facts, operate materially different from their original representation, then ORG may rely on the IRS determination letters.

ORG, in their filed [received on December 18, 20XX] application [Form 1023] requesting Section 501(c)(3) status gave the following narrative description of its activities.

ORG
City, State

Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code

"Part IV: NarrativeDescription of Activities

ORG (the "Organization") was organized as a nonprofit corporation in the State of State on September 14, 20XX for the purposes of holding certain investment assets and utilizing the income from those assets to further the Kingdom of God through Evangelical missions around the world and, more specifically, in support of the Evangelical work of CO-4, as a supported organization, and other Christian organizations affiliated with or carrying out the same Evangelical work as CO-4. The Organization will hold the investment assets in accordance with its governance documents and distribute the income for religious and charitable purposes as described in its governance documents.

The Organization has been formed in anticipation of receiving a partial ownership interest in a closely held company, CO-3, which owns and

holds certain real estate assets. This partial ownership interest is being granted to the Organization from the Foundation ("Foundation"), a religious and charitable foundation which is qualified as a tax exempt, public charity under Section 501(c)(3) of the Internal Revenue Code. A copy of the IRS Determination Letter, dated April 25, 19XX, issued to Foundation is attached. Foundation is qualified under Code Section 501(c)(3) as a supporting organization to CO-4 and other public charities which are churches and/or associations of churches. Upon receipt of this ownership interest, the Organization has an agreement with the other owners of this real estate company to convey their various ownership interests to a Delaware limited partnership under the name of the Partnership and the Organization will hold as its primary asset a Limited Partnership Interest in the Partnership.

CO-4 is part of a worldwide foreign mission organization known as CO-4. CO-4 is the missionary arm of interdenominational churches in the United States. CO-4 has multiple affiliates, churches, missions, programs and activities that carry out its purpose of spreading the Gospel of Jesus Christ throughout the world, by sponsoring missionaries, planting churches and providing health and other services to the needy. CO-4 was originally incorporated as CO-5 in the State of State, on April 26, 19XX. It was later transferred to the State of State as CO-5, on February 26, 19XX. CO-4 was granted exemption for federal income tax under Section 501(c)(3) as an association of churches, effective September 30, 19XX. A copy of the Determination Letter issued by the IRS to CO-4 is attached to this Application. As an association of churches, CO-4 is exempt from any requirement to file Form 990 for income tax purposes.

The primary activity of the Organization will be to make distributions, contributions and grants out of the net income of the investment assets held by the Organization to support the purposes, mission, programs, activities of CO-4 and its related churches, affiliates, missions and programs, and for the purpose of supporting similar Christian Evangelical organizations, churches, missions, activities and programs. All of these distributions, contributions and grants will be made only upon approval of the Board of Directors of the Organization. The assets of the Organization will be held as an investment fund and integral part for the benefit of CO-4.
Part VI. Item Kb):

The Organization will provide funds, by way of contributions, donations and grants, to the beneficiary Organizations under the guidelines set forth in the governance documents of the Organization and as described in detail in Part IV, Narrative Description of Activities, as above.

Part VIII. Item 11:

As explained above in Part IV, Narrative Description of Activities, the Organization is being commenced based upon the grant to it of a closely held, real estate business interest from the Foundation, a public charity under IRC Section 501(c)(3). In the Deed of Gift for this interest, the Organization is required to provide support from the net income (not less than 30% of the net income) to CO-4, which is the reason for CO-4 being the primary beneficiary Organization of the Organization. The Organization may in the future receive donations of other closely held interests or securities, but there are none contemplated at this time.

Part VIII. Item 13:

As described in Parts IV and VI of this Application, the Organization will be making distributions, contributions, donations and grants to the beneficiary Organizations in accordance with the terms and conditions set forth in its governance documents. There are no contracts with the beneficiary Organizations other than the provisions in the Articles and Bylaws of the Organization. The Organization will require a description of the activity, program or mission to be funded, a budget for each activity, program or mission, an explanation of how the project will be funded and the portion of the cost being requested from the Organization and an explanation of how the project will meet the exempt purposes of the Organization. The proposed form(s) to be used by the Organization is being developed by the Organization. Each project will be examined by CO-5 Advisors and any necessary due diligence will be carried out by CO-5 Advisors. CO-5 Advisors will make recommendations to the Board of Directors of the Organization for distributions, contributions, donations and grants to be made to, or on behalf of, the beneficiary Organizations, with the Board of Directors making all final decisions on the grants to be made. The Board of Directors of the Organization may also, from time to time, request that CO-5 Advisors do periodic checks or audits and oversight of the grants in order to confirm that the funds are being used in accordance with the grants made by the Board of Directors and consistent with the exempt purposes of the Organization. Final reports on each project and grant will be required from the beneficiary Organizations to the Board of Directors.

Part V: Compensation and Other Financial Arrangements with Directors

The Directors of the Organization are not receiving any compensation or financial benefits and it is not anticipated that any compensation would be paid to any of the Directors in the future. Because of this, most of the questions in this Part V are answered "No" or "Not Applicable".

The duties of the three Directors of the Organization will be to meet several times a year and approve grants, contributions and donations by the Organization to the beneficiary Organizations. These duties should require less than one hundred (100) hours per year by each of the Directors."

Accordingly, the IRS was lead to believe in December 20XX that a newly formed organization, ORG, was planning to receive, for another Section 501(c)(3) organization, a partial ownership interest [stock] in a real estate company and once the stock was received, ORG, along with the other owners of the real estate company, planned on conveying their ownership interests to the Partnership with ORG holding this investment asset [their share of the Partnership] and utilizing the income to make grants to other organizations that satisfy/comply with ORG's grant making program, as determined by ORG's Board at their periodical Board meetings.

However, as ORG advised in their May 29, 20XX response to the TE/GE examining agents' 30-day letter, the true facts were materially different from those presented to the IRS in their application for tax exempt status. Here is a list of material differences:

- ORG never truly received the real estate company stock [as stated in their response "ORG never beneficially owned CO-3 [the real estate company] shares."
- The various transfers of the real estate company stock took place on November 1, 20XX; 45 or so day before ORG filed its tax exempt application.
- The convoluted path taken by the real estate company's stock was never disclosed to the IRS in ORG's application for tax exemption.
- ORG has only used the cash distributions from the Partnership to make grants, but not the income owed to ORG from the Partnership.
- There is no evidence of any grant making program as described in ORG's application. The TE/GE examining agents requested all meeting minutes, including Board of Directors, Executive, Finance, Audit or Grant Making Committees for 20XX, 20XX and 20XX. ORG supplied minutes from an April 29, 20XX Board meeting and a December 15, 20XX written consent to actions of the Board of Directors. No mention was made in the single Board meeting or the one consent to the Board's actions regarding any grantees complying with ORG's grant making program.
- ORG's Board has not, as stated in its application for tax exemption, met several times a year to approve grants. ORG's board has met only once during the three years examined by the TE/GE agents.

Clearly ORG omitted or misstated material facts and is operating in a manner materially different from that originally represented, justifying a retroactive revocation of ORG's Section 501(c)(3) tax exempt status as of September 14, 20XX.

(4) Conclusion on Proposed Retroactive Revocation of ORG's Section 501(c)(3) Tax Exemption.

Simply put, ORG has not turned square corners in dealing with the Federal government. CO-1, Inc. and/or the Family have utilized ORG [with their Board's concurrence] to achieve a private interest purpose of protecting CO-1, Inc. and/or the Family's considerable real estate assets from any lawsuits coming from CO-1, Inc. and/or the Family's wholesale/retail distribution business.

Furthermore, ORG masked their involvement in the CO-1, Inc.; and/or the Family's protective scheme when applying for tax exempt status, causing the IRS to erroneously grant, to ORG, a Section 501(c)(3) tax exemption.

Therefore, the TE/GE examining agents continue to maintain their position that ORG's Section 501(c)(3) tax exempt status should be revoked retroactively to September 14, 20XX.

B. Alternative Issue – The Retroactive Revocation of ORG's Type II Section 509(a)(3) Supporting Organization Foundation Status.

(1) Articles

ORG feels their By-Laws, along with their Articles of Incorporation, constitute the Articles of Organization for purposes of the Section 509(a)(3) organizational test. Therefore, per ORG, if the class of organizations they support are mentioned in their By-Laws, then said organizational test is met, i.e., no need to mention the class of organizations ORG is supporting in their Articles of Incorporation. ORG cites a few cases wherein the court noted, in passing, that an organization's Articles, By-Laws and Charter constituted the entity's Articles of Organization. Furthermore, if the TE/GE examining agents believe the class of organizations ORG intends to support needs to be in ORG's Articles of Incorporation, then the agents could simply request ORG to amend their Articles.

As will be evident later, ORG and the TE/GE examining agents disagree on whether ORG has specifically identified the class of supported organizations. So, at present, no request was made [by the TE/GE examining agents] for ORG to amend their Articles. Additionally, if the primary issue [revocation] is upheld, then amending Articles becomes moot.

Finally, while the TE/GE examining agents believe ORG's Articles of Incorporation should specifically identify the supported organizations [by class or purpose] this, in the agent's, is a minor transgression which can be cured by an amendment.

(2) Class of Supported Organizations

ORG believes the Polm Family Foundation case, supra, is not applicable to their situation. In Polm, according to ORG, the organization's documents named no beneficiaries and thus provided no benchmarks for identifying any beneficiaries.[87]

However, contrary to ORG's view, the court [in Polm] noted Polm's Articles of Incorporation designate as supported organizations "the class of organizations...which support, promote and/or perform public health and/or Christian objectives, including but not limited to Christian evangelism, edification and stewardship. Unlike the examples contained in the regulation and revenue ruling, this designation does not make its beneficiary organizations readily identifiable."

In the TE/GE examining agents' 30-day letter, they took exception to ORG including, as supported organizations, similar evangelical churches, missions, organizations, programs and activities which carry on the same purposes, missions and philosophy as CO-4, Inc., or a CO-4 related church, mission, organization, affiliate, program and activity. In the TE/GE examining agent's view, the breadth of other evangelical Christian organizations makes it impossible to readily identify ORG's supported beneficiary organizations.

ORG again states the term 'other evangelical Christian organizations' is a sufficient definition of a class of supported beneficiary organizations. Additionally, "the designation of CO-4, is a definitive benchmark for identifying 'related' and 'similar' organizations."[88]

Furthermore, "the actual evangelical Christian community that participates with such organizations as CO-4 is a well-known, well-defined and interrelated group of organizations."[89]

Therefore, in the TE/GE examining agents' view, ORG admits the term "similar evangelical Christian organizations" is not readily identifiable outside the evangelical community. And in ORG's view, readily identifiable does not mean readily identifiable by everyone [as maintained by the agents] or the general public. This term [per ORG] can also mean readily identifiable by the evangelical community as opposed to the general public and therein lies the disagreement.

(3) The Lack of Outside Control Test

In ORG's protest, they attempt to distance their three Board members from CO-1, Inc., CO-3, and the Family and emphasize their three Board members connection to CO-4. However, ORG never truly explains why these three [since inception] Board members allowed ORG to be used as a placeholder/nominee for CO-1, Inc./The Family's commercial real estate diversification plan.

[87] *ORG's protest, p. 12.*

[88] *ORG's protest, p. 12.*

[89] *ORG's protest, p. 12.*

Apparently any funds the Family [through the Partnership] were willing to transfer to ORG was sufficient justification for ORG's Board of Directors to allow private interests [the Family and their asset diversification plan] to be served more than incidentally.[90]

The TE/GE examining agents believe the following events, in all likelihood, took place:

> CO-1, Inc./The Family had concerns about potential lawsuits against their wholesale/retail distribution business, which placed their considerable real estate assets at risk. Therefore, the noted diversification plan was conceived. However, for some unexplained reason, the initial charitable recipient [the Foundation (Foundation), a foreign organization] needed to dispose of their 0% interest in the CO-3 stock. They [Foundation] could have transferred their interest to an unrelated charity or outright sold their CO-3 stock. Again, for some unexplained reason, neither of these options was acceptable to CO-1/the Family. So the decision was made to form a new domestic charity [ORG] and have that charity receive and transfer the Foundation CO-3 stock to the Partnership. Naturally, the Board members of the new charity [ORG] needed to be onboard, so all the moving parts would work as intended, i.e., the various transfers of the CO-3 stock needed to take place on November 1, 20XX. Although ORG's Board members may have had ties to CO-4, the ties they had with CO-1, Inc./the Family were stronger.

So, yes, contrary to ORG's contention, they are not controlled by a Section 509(a)(1) [CO-4] organization, but rather are merely a source of some support to CO-4 with ORG's Board of Directors having some connection to CO-4. However, said connections [with CO-4] were not sufficient to overcome their connections with the Family, as evidenced by their actions.

(4) Overall Comments on ORG's Foundation Status

As previously noted, ORG needs to satisfy three tests in order to be considered a Section 509(a)(3) supporting organization. The TE/GE examining agents' believe ORG has failed all three tests with ORG holding the opposite view. However, ORG is the party required to provide substantiation to support their views/position. As previously stated, substantiation does not include a taxpayer's uncorroborated, unverified, undocumented and self-serving testimony[91] with missing facts viewed as unfavorable to the taxpayer.[92]

ORG operates more like a traditional private foundation than a supporting organization.

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[90] *The presence of a single non-exempt purpose [such as serving private interests], if substantial, will destroy the exemption regardless of the number or importance of exempt purposes. Better Business Bureau, supra.*

[91] *Niedringhouse, supra; Tokarski, supra; Shea, supra.*

[92] *Stoumen, supra; Lias, supra; Wichita Terminal Elevator Company, supra.*

Most private foundations specialize in a given field, i.e., education, healthcare, environment, etc. In ORG's case, they specialize in evangelical Christian organizations. While the parties may disagree over the amount of the contributions; there, is no disagreement that most of the funds contributed by ORG went to non-CO-4 or their affiliated organizations. If CO-4 was in fact, in control of ORG, then common sense tells us that CO-4 would want the lion's share of ORG's funds [another reason for doubting CO-4 is in control of ORG].

(5) Retroactive Revocation

As noted under the retroactive revocation of ORG's Section 501(c)(3) status, they [ORG] presented a compelling case for granting a Section 501(c)(3) exemption, along with a Type II, Section 509(a)(3) supporting organization foundation status. However, all the facts were not presented, as seen by those discovered during the current TE/GE examination. Needless to say, a determination based on partial facts can never be relied upon by the party who failed to supply all the pertinent facts, causing the Service [IRS] to arrive at an erroneous conclusion.

Therefore, in this case, retroactive revocation of ORG's Type II, Section 509(a)(3) supporting organization foundation status, is justified and results in ORG being treated as a private foundation [as of September14, 20XX] and all Chapter 42 Excise taxes applicable as of that date, with said taxes to be determined upon the final outcome of ORG's appeal.[93]

C. Disqualified Persons

Although ORG adamantly denies that Director-1 is a disqualified person in its protest, the fact remains that he is a disqualified person. The agents are required to go through many twists and turns as will be seen in this section, in order to follow the structure the Family and the CO-6 companies have set up. Below under the History section is a summary of facts found on CO-6 website. Additionally, facts about the organization's structure and relationships have been provided to the Service in a variety of returns filed as well as through Information Document Requests answered during examination. We have determined that Director-1 is a disqualified person as described by Internal Revenue Code 4946.

Director-1 is a director to the ORG as listed on Part V to the Form 1023 filed with the IRS on December 18, 20XX. Additionally, it is noted that he is listed as the primary contact for the ORG on the Form 1023. It is also noted that Director-1 is reported to be the initial Resident Agent of ORG in its Articles of Incorporation field with the State of State on September 14, 20XX. Director-1 is a disqualified person as described by Internal Revenue Code *Section 4946(B)* a foundation manager (within the meaning of *subsection (b)(1)*). Additionally, Director-3 and Director-2 are disqualified persons as they too are directors of ORG under Internal Revenue Code *Section 4946(B)* and were listed on Part V of Form 1023.

[93] *Naturally, if ORG is not considered a tax exempt organization under Section 501(c)(3) or a public foundation under Section 509(a)(3), then by implication, it cannot be treated as an integrated auxiliary of a church under Treas. Reg. 1.6033-2(h).*

Also, Director-1 is a disqualified person due to his relationship to the Family (owners of CO-1). He is currently married to Individual-1. Individual-1 is the daughter to Individual-3 ( ) and Individual-2 ( ). A history of the CO-6, presented below, will provide support for the fact that Director-1 is a disqualified person to the ORG as ORG's sole source of funding came directly and indirectly from CO-6 a self-described privately held company[94]. Director-1 is a disqualified person as described by Internal Revenue Code *Section 4946(D) a member of the family.*

CO-6 ("CO-6") company is a disqualified person to the ORG as it is a substantial contributor to ORG as described by Internal Revenue Code *Section 4946(A).* In ORG's protest to our 30 day letter dated May 30, 20XX, ORG has indicated that the steps taken to deliver the 0% non-voting limited partnership interests in the Partnership were "pre-wired." They also stated the following:

1. *"The CO-6 ("CO-6") companies owned most of the real estate on which the CO-6 businesses operated. On November I, 20XX, that changed. In a series of integrated steps, CO-6 (i) transferred a material portion of its real estate to CO-3 in exchange for CO-3 shares and, (ii) in a taxable transaction, immediately distributed the CO-3 shares to its ultimate beneficial owners, the partners of LLP-3.*

2. *CO-6 is owned by LLP-3, a Delaware limited partnership with an 0% charitable limited partner. That charity received 0% of CO-3's shares and simultaneously granted those shares to ORG conditioned upon the shares being simultaneously contributed to Partnership in exchange for an 0% limited partnership interest. ORG never beneficially owned CO-3 shares.*

3. *The CO-3 transaction was undertaken for a valid business reason. In 20XX, CO-6 determined that it should segregate a material portion of its real estate from its distribution business, similar to how it had reorganized its Country real estate holdings, to shield the real estate from product liability exposure and to achieve other risk management objectives. CO-6 sold some 0 different perishable and nonperishable products, a number of which were susceptible to contamination and other food safety issues. After observing devastating claims against food industry providers for listeria and E. coli contamination fatalities, CO-6's Board of Directors was concerned that, unless CO-6 separated its real estate from its distribution business, product liability (or environmental) lawsuits could not only materially damage the distribution business but place its significant real estate holdings at risk. Thus, CO-6 developed a diversification plan to distribute much of its real estate to a separate company (CO-3) that would be owned and controlled by a*

[94] *See CO-6 webpage at: http://www.CO-6.com.*

partnership (Partnership) unrelated to CO-6.

4. *Contrary to the IRS's statement, ORG was never in "a position of guaranteed yearly distributions." ORG never held a voting interest in CO-3, Partnership or any other entity. ORG acquired the CO-3 shares on the condition that it simultaneously contribute the shares to Partnership for a limited partnership interest in Partnership. All of the steps were "pre-wired"; that is, the parties agreed that the steps were dependent on each other and that each one would take place simultaneously. ORG agreed to that condition in order to receive an 88% limited partnership interest in Partnership – an asset with a value in excess of $0 million. If ORG had not agreed to that condition, it would not have received the interest.*

   In summary, ORG never controlled an activity, no less gave up control of an activity to a for-profit entity. ORG received an 0% nonvoting interest in Partnership, an asset with a value in excess of $0 million. All of the steps culminating in Partnership receiving the CO-3 shares occurred on the same day (November l, 20XX)."

In the years 20XX, 20XX and 20XX the CO-1, Inc. Board of Advisors consisted of: Advisor-1, Advisor-2, Advisor-3, Advisor-4 and Advisor-5.

History of the CO-6 (CO-6):

Under the history tab on the CO-6 (CO-6) webpage (http://www.CO-6.com/en/about-us/history.page?) they proclaim that they are the largest family-owned broadline foodservice distributor in North America—and one of the largest privately held companies in the United States. Important to the history of this company is one ancestor to the current day family members of the Family, Individual-4.

Individual-4 joined the company at age 16. He married Individual-5 in 19XX. [They had two children that also became partners at CO-6: Individual-1 and Advisor-5.]

Individual-4 became a partner in 19XX. At this time the name of the company became CO-9.

In 19XX Individual-4's brother Individual-6 joined the company.

In 19XX the company is reorganized by Individual-4 and Individual-6 and renamed CO-6.

In 19XX Individual-3, son of Individual-4, joined the company. He became president in 19XX.

In 19XX Individual-5, son of Individual-4, joined the company. He became secretary/treasurer in 19XX.

Individual-1 ( ), son to Individual-4 and Individual-5, was married to Individual-2 ( ) and they had 4 children: Advisor-1, Advisor-4, Individual-7 and Individual-8. Children of this union that are currently on the board of advisors include Advisior-1 and Advisor-4. Individual-7 is now known as Individual-7. Individual-8 is now known as Individual-1 and she is married to

Director-1. All of these descendants to Individual-4 have various ownership interests in CO-6 companies.

Individual-9, son to Individual-4 and Individual-5 was married to Individual-10. Their child, Advisor-5 is currently on the Board of Advisors to CO-1, Inc.

In 19XX Advisor-1, son of Individual-3, joined the company.

In 19XX Advisor-9, son of Individual-9, joined the company.

In 19XX Individual-11 and Individual-12 join the CO-6 Board of Directors.

In 19XX Advisor-1 replaced his father Individual-3 as president.

In 19XX Advisor-4, brother to Advisor-1 and son of Individual-3, is named operations manager.

During 19XX the ownership of CO-6 was reorganized according to Individual-13 Memorandum dated June 10, 20XX. Quoted from this memorandum: "The purpose for the reorganization was for the purpose of consolidating the management and control of this privately held company and to assure the ownership would continue for the benefit of its family..." Also, according to this memorandum the stock ownership of CO-1, Inc. has not changed since July 1, 19XX. See the attached copy of the June 11, 20XX memorandum at Exhibit E.

In the years 20XX, 20XX and 20XX the CO-1 Board of Advisors consisted of: Advisor-1, Advisor-2, Advisor-3, Advisor-4 and Advisor-5.

Further Delineation of CO-6 ownership:

CO-1 Inc. Board of Advisors in 20XX, 20XX and 20XX were: Advisor-1, Advisor-2, Advisor-3, Advisor-4 and Advisor-5.

CO-1, Inc. is the parent to CO-6s, Inc.

CO-1 Inc. is owned by the LLP-3

The LLP-3 has two classes of partnership interests: General Partnership interests and Limited partnership interests. The CO-1 owns 0% of the General Partnership interests which have voting rights. Therefore the CO-1 has 0% of the voting interests in 19XX. However, overall CO-1 owns 0% of the total partnership interests in the LLP-3.

CO-1 at the time ORG applied for exemption was the general partner of the Partnership. The individual with signatory authority over the partnership on November 1, 20XX was Advisor-1.

CO-1 is owned 0% by the Trust. The Family Irrevocable Trust is a complex trust. The beneficiaries to the Trust are: Individual-1 a member of the Family (married to Director-1) at 0%, Advisor-1 at 0%, Advisor-4 at 0% and Individual-7 at 0%. The Family siblings own 0% of the 0% of the CO-1 which in turn is the general partner to the Partnership of which approximately 0% non-voting interest is owned by ORG. Additionally, CO-1 owns 0% of the stock in CO-1, Inc. the parent to CO-6s, Inc.

LLP-1 owns a percentage of Partnership see the chart provided on page 13 above (in part 7.) Signing for CO-7 as General Partner and Manager was Advisor-1.[95]

LLP-2, owns a percentage of Partnership see the chart provided on page 13 above (in part 7.) Signing for LLP-2 as General Partner and Manager was Advisor-5. CO-8 is the general partner of LLP-2 [which resides at the same address as CO-7, LLP-1, and CO-8]

Section C, Conclusions regarding Disqualified Persons:

Director-1 is a disqualified person to the ORG as he is related to the Family as well as being a director on the Board of the ORG.

Seemingly, the Family, particularly the following siblings: Advisor-1, Advisor-4, Individual-7 (Individual-7) and Individual-8 [married to Director-1] via their 0% combined interest in Trust which in turn owns 0% of the CO-1 that is the general partner to the Partnership by aggregating their votes and/or positions of authority have the ability to significantly affect the operations of the ORG and may prevent the ORG from performing its charitable acts. Additionally, 3 out of 5 members on the Board of Advisors to CO-6 are from the Family: Advisor-1, Advisor-4 and Advisor-5. This is prohibited by Section 1.509(a)-4(j)(1) of the regulations. This regulation section provides, in pertinent part, *"that under the provisions of section 509(a)(3)(C) a supporting organization may not be controlled directly or indirectly by one or more disqualified persons (as defined in section 4946) other than foundation managers and other than one or more publicly supported organizations. An organization will be considered "controlled," for purposes of section 509(a)(3, if the disqualified persons, by aggregating their votes or positions of authority, may require such organization to perform any act which significantly affects its operations or may prevent such organization from performing such act. This includes, but is not limited to, the right of a substantial contributor or his spouse to designate annually the recipients, from among the publicly supported organizations of the income attributable to his contribution to the supporting organization."*

D. Overall Conclusion

It seems ORG believes, even if they are being used for the private benefit of the Family, they still gave away funds for a Section 501(c)(3) purpose, which should negate any adverse private benefit determination. However, this report, along with all the other writings of the TE/GE examining agents, demonstrates a Section 501(c)(3) organization cannot be used to advance, support, or aid [in a substantial way] any private interest [like the benefit Family and their related entities] no matter the size or importance of any exempt purpose.

Additionally, a Type II, Section 509(a)(3) supporting organization must truly [in substance] be controlled by a Section 509(a)(1) supported organization, not merely [in form] pretend to be and said supported organization(s) must be readily identifiable.

[95] *IDR 1897 IDR #2010-01 and attachment to Form 1023 Application for Exemption.*

EXPLANATION OF ITEMS		
NAME OF TAXPAYER **ORG**	TAX IDENTIFICATION NUMBER	YEAR/PERIOD ENDED **12-31-20XX, 12-31-20XX & 12-31-20XX**

ORG has failed to support its contention that its Section 501(c)(3) exemption should not be revoked. However, should the Appeals Division rule otherwise, then ORG's Type II, Section 509(a)(3) supporting organization public foundation status should be revoked, retroactively, causing ORG to be treated as a private foundation.