

**Internal Revenue Service**

Appeals Office  
300 N. Los Angeles Street  
Los Angeles, CA 990012

Release Number: 201814010

Release Date: 4/6/2018

Date: January 12, 2018

**Department of the Treasury**

**Employer Identification Number:**

**Person to Contact:**

Employee ID Number:

Tel:

Fax:

**UIL: 501.03-00  
501.03-05  
501.36-01**

**Certified Mail**

Dear :

This is a final adverse determination that you do not qualify for exemption from federal income tax under Internal Revenue Code (the "Code") section 501(a) as an organization described in Section 501(c)(3).

We made the adverse determination for the following reason(s):

You are not operated exclusively for charitable purposes. Your activity of developing, promoting, and supporting the XXXXX software for physicians primarily benefits those physicians and their medical practices and operations and serves private rather than public purposes.

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

You're required to file Federal income tax returns on Forms 1120, U.S. Corporation Income Tax Return. Mail your form to the appropriate Internal Revenue Service Center per the form's instructions. You can get forms and instructions by visiting our website at [www.irs.gov/forms-pubs](http://www.irs.gov/forms-pubs) or by calling 800-TAX-FORM (800-829-3676).

We'll 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 either:

- United States Tax Court,
- The United States Court of Federal Claims,
- The United States District Court for the District of Columbia.

You must file a petition or complaint in one of these three courts within 90 days from the date we mailed this determination letter to you. Contact the clerk of the appropriate court for rules and the appropriate forms for filing petitions for declaratory judgment. You can write to the courts at the following addresses:

United States Tax Court  
400 Second Street, NW  
Washington, DC 20217

US Court of Federal Claims  
717 Madison Place, NW  
Washington, DC 20005

U. S. District Court for the District of Columbia  
333 Constitution Ave., N.W.  
Washington, DC 20001

Note: We will not delay processing income tax returns and assessing any taxes due even if you file petition for declaratory judgment under section 7428 of the Code.

Please refer to the enclosed Publication 892, How to Appeals an IRS Determination on Tax -Exempt Status, for more information about the Appeals process.

You also have the right to contact the Taxpayer Advocate Service (TAS). TAS is an independent organization within the IRS that can help protect your taxpayer rights. TAS can offer you help if your tax problem is causing a hardship, or you've tried but haven't been able to resolve your problem with the IRS. Advocate assistance, please contact the Taxpayer Advocate for the IRS office that issued this letter. You If you qualify for TAS assistance, which is always free. TAX will do everything possible to help you. Visit [www.taxpayeradvocate.irs.gov](http://www.taxpayeradvocate.irs.gov) or call 877-777-4778.

TAS assistance is not a substitute for established IRS procedures, such as the formal appeals process. TAS 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.

If you have any questions, contact the person at the top of this letter.

Sincerely,

Appeals Team Manager

Enclosure: Publication 892



Department of the Treasury  
 Internal Revenue Service  
 P.O. Box 2508  
 Cincinnati, OH 45201

Date: JAN 18 2017

Employer ID number:

Contact person/ID number:

Contact telephone number:

Contact fax number:

**Legend:**

- B= Date of formation
- C= State
- D= Software
- E= Source code repository

UIL: 501.03-00  
 501.03-05  
 501.36-01

Dear \_\_\_\_\_ :

We considered your application for recognition of exemption from federal income tax under Section 501(a) of the Internal Revenue Code (the Code). Based on the information provided, we determined that you don't qualify for exemption under Section 501(c)(3) of the Code. This letter explains the basis for our conclusion. Please keep it for your records.

**Issues**

Do you qualify for exemption under Section 501(c)(3) of the Internal Revenue code? No, for the reasons given below.

**Facts**

You incorporated on B in the state of C as a non-profit corporation. You were previously exempt under Section 501(c)(3) of the Code but you were automatically revoked for failure to file Form 990 series annual returns for three consecutive years. You submitted Form 1023 seeking retroactive reinstatement of your exempt status under Section 501(c)(3).

Your bylaws state you were “

You explained that you were formed as an official organization to support the D software project. The D software project is an open source software project which was created and can be found on E. E is a \_\_\_\_\_ for free and open source software projects. The D software project was described as a \_\_\_\_\_ that provide the service for the certification testing and to sponsor development work to improve the D software. You said that:

D is an \_\_\_\_\_ which permits a physician to schedule patient appointments, remind patients of their appointments, record the history and physical examination of each patient visit, record and transmit orders for pharmaceutical drugs and diagnostic studies, bill responsible parties for services rendered, record

the remittances and comply with the Meaningful Use Criteria. These criteria are guidelines set by the Department of Health and Human Services for electronic medical record software. D essentially allows physicians to run their medical office or medical clinic and to be in compliance with federal guidelines.

The D software is free as a download . No fees are charged for the download and it can be used with any operating system. Any organization has the ability to download the D software. There is neither a selection process nor monitoring process for intended use. The D open source software can also be configured to setup a patient portal, e-prescribing, for the exchange of clinical information, and immunization registries.

You provide support to the D software project primarily through your website. Your website describes the D software and solicits donations to help fund the project's meaningful use certifications and improvements to D. The website also explains that the advantage of open source software is the ability to choose who will provide support. Support can be self-provided for free, professional support can be purchased or somewhere in between. You provide links to mechanisms of free support that include online forums and a do-it-yourself guide. You also provide a list and links to vendors and certified professional developers that have demonstrated ongoing competence and experience with D. Your website explains that if the user is planning to customize the software, you “ .” Several board members are affiliated with some of the companies listed.

The service provided by a certified D vendor or professional generally includes D installation, maintenance, and customization. These services are provided for a fee agreed upon by the customer and the certified D vendor or professional. Some of these professionals offer customized versions of D, which are property of the vendor.

## **Law**

Section 501(c)(3) of the Code describes corporations organized and operated exclusively for charitable purposes no part of the net earnings of which inures to the benefit of any private shareholder or individual.

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

Treas. Reg. Section 1.501(c)(3)-1(c)(1) provides that an organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in Section 501(c)(3) of the Code. An organization will not be so regarded if more than an insubstantial part of its activities in not in furtherance of an exempt purpose.

Treas. Reg. Section 1.501(c)(3)-1(d)(1)(ii) provides that an exempt organization must serve a public rather than a private interest. The organization must establish that it is not organized or operated to benefit 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.”

Treas. Reg. Section 1.501(c)(3)-1(d)(2) provides that the term “charitable” is used in Section 501(c)(3) of the Code in its generally accepted legal sense and includes the relief of the poor and distressed or of the under

privileged as well as the advancement of education. The promotion of health has long been recognized as a charitable purpose. To meet the operational test, an organization must be engaged in activities furthering “public” purposes, rather than private interests. It must not be operated for the benefit of designated individuals or the persons who created it.

Rev. Rul. 65-1, 1965-1 C.B. 226 describes an organization which promotes and fosters the development and design of machinery in connection with commercial operation, and in connection therewith has the power to sell, assign, and grant licenses with respect to its copyrights, trademarks, trade names, or patent rights, does not qualify for exemption from Federal income tax under Section 501(c)(3) of the Code. Specifically, the IRS found that any benefit to the public was indirect because the development and licensing of the new machine benefited those particular manufacturers.

Rev. Rul. 69-632, 1969-2 C.B. 120 describes a nonprofit organization composed of members of a particular industry to develop new and improved uses for existing products of the industry is not exempt under Section 501(c)(3) of the Code. The association itself conducts no scientific research. It contracts with various research organizations, institutes, and universities for specific research projects selected by a committee of technical experts chosen from the association's membership. The results of these projects are published and made available to the interested public. Specifically, the ruling found that the association's research projects may result in new products and processes that benefit the public, but such benefit was secondary to that derived by the association's members.

Rev. Rul. 74-116, 1974-1 C.B. 127 describes an organization whose membership is limited to organizations that own, rent, or use a specific type of computer and whose activities are designed to keep members informed of current scientific and technical data of special interest to them as users of the computer is not exempt under Section 501(c)(3) of the Code. The organization is a membership association devoted to developing and exchanging research data among users of a specific type of computer. The organization also serves as liaison between users and the manufacturer of the computer. The organization conducts meetings and seminars at which operational and technical problems relating to the use of this computer are discussed.

In Better Business Bureau of Washington, D.C., Inc. v. United States, 326 U.S. 179 (1945), the Supreme Court held that a better business bureau was not exclusively educational or charitable, its activities were in part aimed at promoting the prosperity and standing of the business community, even though there was also benefit to the public. The presence of a single non-exempt purpose, if substantial in nature, will destroy a claim for exemption regardless of the number or importance of truly exempt purposes.

In Federation Pharmacy Services, Inc. v. Commissioner, 72 T.C. 687 (1979) aff'd 625 F.2d 804 (8th Cir. 1980), the Tax Court stated that the sale of prescription drugs to senior citizens and handicapped persons is a trade or business normally carried on for-profit. The court ruled that sales of prescription drugs to the elderly and the handicapped even at a discount is not, without more, in furtherance of a charitable purpose. The court said it is clear that petitioner's exclusive purpose for being is to sell drugs, an activity that is normally carried on by commercial profit making enterprises. The Tax Court said that they failed to see how the fact that it happened to deal in drugs could convert it to a Section 501(c)(3) organization. If it could be so converted, then so could a store selling orthopedic shoes, crutches, health foods, or any other product beneficial to health. Virtually everything we buy has an effect, directly or indirectly, on our health. They concluded that they did not believe that the law requires that any organization whose purpose is to benefit health, however, remotely, is automatically entitled, without more, to the desired exemption.

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

### **Application of law**

You are not described in Section 501(c)(3) of the Code because you are not operating exclusively for exempt purposes as described under Treas. Reg. Sections 1.501(c)(3)-1(a)(1) and 1.501(c)(3)-1(c)(1). You operate to promote and support D software, which essentially allows physicians to more effectively run their medical office or medical clinic and to be in compliance with federal regulations.

An organization is not organized or operated exclusively for one or more exempt purposes unless it serves a public rather than private interest. Treas. Reg. Section 1.501(c)(3)-1(d)(1)(ii). In Retired Teachers Legal Defense Fund the tax court defined private benefit to include any “advantage; profit; fruit; privilege; gain or interest.” Your activities benefit the private interests of both the physicians using the software to increase the efficiency of their private practices as well the vendors to whom you refer your software users for technical support.

You are not described in Treas. Reg. Section 1.501(c)(3)-1(d)(2) because you do not serve exclusively charitable purposes. Maintaining a website to promote the development, distribution and adoption of open source software is not an exempt purpose. See Rev. Rul. 65-1, Rev. Rul. 69-632 and Rev. Rul. 74-116.

The D software is available to the general public. However, both programs target a specific audience – physicians operating a medical office or clinic. The physicians and their medical practices derive a commercial advantage from your open source program because, in its absence, they would either need to develop their own software or would have to purchase commercial software. Thus, by providing open source software, you reduce or eliminate costs and provide the physicians or health care companies with a distinct commercial advantage, which is a substantial non-exempt purpose. The presence of a single non-exempt purpose, if substantial in nature, will destroy exemption under Section 501(c)(3) regardless of the number or importance of any other exempt purposes. Better Business Bureau of Washington D.C.

Your website provides a link to vendors/professionals that are certified to provide technical support for D software for a fee. These companies/individuals that provide technical support also profit from being able to redistribute your open source programs, with or without modification, for a fee. Additionally, some of these companies have business connections with your board members. This demonstrates that you are operating for the substantial benefit of private individuals which is prohibited under Treas. Reg. Section 1.501(c)(3)-1(d)(1)(ii).

The promotion of health is recognized as a charitable purpose; however, not every activity that generally promotes health furthers charitable purposes under Section 501(c)(3) of the Code. For example, selling prescription pharmaceuticals promotes health, but pharmacies cannot qualify for recognition of exemption under Section 501(c)(3). See Federation Pharmacy Services. In the same way, although D software could help in the promotion of health, it fails to exclusively further an exempt purpose and, at the same time, provides a private benefit to doctors, medical offices and the vendors that provide technical support for the software.

### **Your position**

Electronic medical records improve patient care and the public health benefits by the use of electronic medical records. In fact, the "Meaningful Use" program by the US government, set out to increase the use of electronic

medical records in order to satisfy certain objectives, which included "improve quality, safety, efficiency, and reduce health care disparities."

D is an electronic medical record software package that is translated in languages and is free to download, use, and customize anywhere in the world that has the internet available to them. D has been downloaded over times from more than countries/colonies. It is also important to note that since D is open source software (OSS), the underlying code can be freely modified making it very flexible to support markedly different workflows and cultures.

A recent memorandum from the White House, states that "Making source code available as OSS can enable continual improvement of Federal custom-developed code projects as a result of a broader user community implementing the code for its own purposes and publishing improvements. This collaborative atmosphere can make it easier to conduct software peer review and security testing, to reuse existing solutions, and to share technical knowledge."

This follows a memorandum from the Department of Defense, Clarifying Guidance Regarding Open Source Software (OSS). "The continuous and broad peer-review enabled by publicly available source code supports software reliability and security efforts through the identification and elimination of defects that might otherwise go unrecognized by a more limited core development team."

These advantages allow the use of a free, fully-featured and flexible electronic medical records system by individuals, clinics, non-profit organizations, and governments throughout the world that are not able to afford or find useful proprietary options. By no means is it required to hire one of the certified vendors or professional technical providers listed on the website. There are a multitude of options to support a D installation which range from Do It Yourself to hiring any professional or vendor.

One notable example of benefiting the public is the use of D by a large charitable health care provider that attests to the affordability and flexibility of D. The use of D enabled the electronic medical system to improve overall care with limited financial resources, which would not have been possible via traditional commercial electronic medical systems.

You reiterate that your purpose is to ensure that

#### **Our response to your position**

Although you demonstrated that the D software can benefit charitable medical facilities, the benefits are also enjoyed by for-profit companies since any organization can use the D software. Some of the for-profit entities that benefit are those with business connections to your board that are certified in D software technical support. These vendors and professionals who are listed and linked to your website can also provide customized versions of D which are the property of the vendor. You are not described in Treas. Reg. Section 1.501(c)(3)-1(c)(1) because more than an insubstantial part of your activities are devoted to non-exempt purposes. Because a substantial amount of your activities and receipts are for promotion and support of D you are not operating exclusively for one or more exempt purposes.

### **Conclusion**

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

### **If you don't agree**

You have a right to file a protest if you don't agree with our proposed adverse determination. To do so, you must send a statement to us within 30 days of the date of this letter. The statement must include:

- Your name, address, employer identification number (EIN), and a daytime phone number
- A copy of this letter highlighting the findings you disagree with
- An explanation of why you disagree, including any supporting documents
- The law or authority, if any, you are relying on
- The signature of an officer, director, trustee, or other official who is authorized to sign for the organization, or your authorized representative
- One of the following declarations:

**For an officer, director, trustee, or other official who is authorized to sign for the organization:**

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

**For authorized representatives:**

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

Your representative (attorney, certified public accountant, or other individual enrolled to practice before the IRS) must file a Form 2848, *Power of Attorney and Declaration of Representative*, with us if he or she hasn't already done so. You can find more information about representation in Publication 947, *Practice Before the IRS and Power of Attorney*.

We'll review your protest statement and decide if you provided a basis for us to reconsider our determination. If so, we'll continue to process your case considering the information you provided. If you haven't provided a basis for reconsideration, we'll forward your case to the Office of Appeals and notify you. You can find more information about the role of the Appeals Office in Publication 892, *How to Appeal an IRS Decision on Tax-Exempt Status*.

If you don't file a protest within 30 days, you can't seek a declaratory judgment in court at a later date because the law requires that you use the IRS administrative process first (Section 7428(b)(2) of the Code).



**Where to send your protest**

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

U.S. mail:

Internal Revenue Service  
EO Determinations Quality Assurance  
Room 7-008  
P.O. Box 2508  
Cincinnati, OH 45201

Street address for delivery service:

Internal Revenue Service  
EO Determinations Quality Assurance  
550 Main Street, Room 7-008  
Cincinnati, OH 45202

You can also fax your statement and supporting documents to the fax number listed at the top of this letter. If you fax your statement, please contact the person listed at the top of this letter to confirm that he or she received it.

**If you agree**

If you agree with our proposed adverse determination, you don't need to do anything. If we don't hear from you within 30 days, we'll issue a final adverse determination letter. That letter will provide information on your income tax filing requirements.

You can find all forms and publications mentioned in this letter on our website at [www.irs.gov/formspubs](http://www.irs.gov/formspubs). If you have questions, you can contact the person listed at the top of this letter.

Sincerely,

Jeffrey I. Cooper  
Director, Exempt Organizations  
Rulings and Agreements

Enclosure:  
Publication 892