



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

Release Number **201231012**
Release Date: 8/3/2012
Date: May 8, 2012
UIL: 501.03-00

Contact Person:
Identification Number:
Contact Number:
Employer Identification Number:
Form Required To Be Filed:
Tax Years:

Dear

This is our final determination that you do not qualify for exemption from Federal income tax as an organization described in Internal Revenue Code section 501(c)(3). Recently, we sent you a letter in response to your application that proposed an adverse determination. The letter explained the facts, law and rationale, and gave you 30 days to file a protest. Since we did not receive a protest within the requisite 30 days, the proposed adverse determination is now final.

Because you do not qualify for exemption as an organization described in Code section 501(c)(3), donors may not deduct contributions to you under Code section 170. You must file Federal income tax returns on the form and for the years listed above within 30 days of this letter, unless you request an extension of time to file. File the returns in accordance with their instructions, and do not send them to this office. Failure to file the returns timely may result in a penalty.

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

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

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

Sincerely,

Director, Exempt Organizations

Enclosure
Notice 437
Redacted Proposed Adverse Determination Letter
Redacted Final Adverse Determination Letter



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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

Date: February 8, 2012

UIL: 501.03-00

Contact Person:

Identification Number:

Contact Number:

FAX Number:

Employer Identification Number:

Legend:

M =
State =
X =
Y =
Z =
City =
Date =

Dear

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

Facts:

You are organized as a non-profit corporation under State law. Your stated purpose is the provision and promotion of free community Internet access throughout State, primarily through wireless mesh networking, and the education of others regarding the benefits of Internet and wireless mesh networking technology.

To further your stated purpose, you state that you will develop, deploy and support a public wireless mesh network that allows members of the general public to connect to the Internet for free. You state that a public wireless mesh network is established and developed by strategically deploying at no cost, wireless signal repeaters to businesses as well as various other private and public locations throughout the community. Once these signal repeaters are plugged in and connected to the Internet, any member of the general public that is within reach

of the signal of one of the wireless signal repeaters can connect to the Internet with a computer, mobile phone or other wireless Internet-enabled device. Each person or entity that hosts a wireless signal repeater will need to provide a minimal amount of electricity to power the wireless signal repeater. Each wireless signal repeater host will be required to pay you a \$50 security deposit upon receipt of the wireless signal repeater, which would be returned to the hosting individual when the wireless signal repeater was returned intact to you.

You state that "by promoting and providing free Internet access, the underprivileged and elderly will be better able to access support services online, connect with their fellow community members via email and have a greater access to employment." You plan to do this by distributing flyers describing how this public wireless network operates and how and where it can be accessed as well as stickers for individual businesses to place in their windows so members of the public know that a free wireless signal is available in that area. In addition, you plan to use your website, personal letters and in-person meetings to educate community members on how to access the network. You do not restrict who may access the network nor do you focus your service to any particular class of persons.

The mayor of City, in a letter dated Date, praised and expressed approval of the work being accomplished through you and encouraged the community to support such work. However, other than this letter, you did not provide any additional information on local government involvement or oversight.

You intend to enter into a written agreement with M, the for-profit entity that caused you to be formed, to provide you with financial and in-kind support over a multi-year period. M will provide you with assets and intangibles described in the agreement valued in excess of \$x. M will also provide \$y to be paid in two installments during the period in which the agreement is effective as well as z 'man hours' of staff time to provide you with administrative and technical support. In exchange, you will provide to M promotional consideration in which you will "prominently list M" as your primary sponsor on your website and in your collateral and marketing materials.

You are governed by a board of directors who are elected by a vote of your sole member, M, a for-profit entity. The number of directors shall not be less than five members. The board may be enlarged by a vote of your sole member. At least three of your directors shall have no ownership interest in M. In addition, M may remove any officer or director with or without cause.

You have formed a disinterested members committee. The disinterested members committee is a committee, appointed by the chair of the board of directors, consisting of directors who do not possess an ownership interest in M. The committee shall be charged with, as may be necessary, investigating and resolving, as appropriate, issues and questions relating to the existence of pecuniary benefit transactions and conflicts of interest and shall meet on an as needed basis, but not less than once each year. In contrast, the board of directors shall meet, at a minimum, on a quarterly basis. The board shall exercise all powers not otherwise delegated by law, the articles of agreement or by-laws.

Law:

Section 501(c)(3) of the Code provides exemption from federal income tax for organizations organized and operated exclusively for charitable, educational or other exempt purposes.

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

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

Section 1.501(c)(3)-1(d)(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 this requirement, it is necessary for an organization to establish that it is not organized or operated for the benefit of private interests.

In Better Business Bureau of Washington, D.C. v. U. S., 326 U.S. 279 (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 nonexempt purpose, if substantial in nature, would destroy the exemption regardless of the number or importance of truly exempt purposes.

In KJ's Fund Raisers, Inc. v. Commissioner, 74 T.C.M. 669 (1997), the court held that a nonprofit organization, which sold lottery tickets on the premises of a for-profit business had a substantial non-exempt purpose to enhance the profits of the for-profit business. The owners of the for-profit business to purportedly raise funds for distribution to charitable causes formed the nonprofit organization. The nonprofit's lottery tickets were sold during the regular business hours by the owners and employees of the for-profit business. The owners of the for-profit initially controlled the board and later indicated that it would vest control in unrelated parties. The nonprofit opined that the organization "would fold without the original founders of the organization as officers." In finding that the nonprofit had a substantial nonexempt purpose, which was promoting the for-profit, the court reasoned that the identity of the for-profit owners and the officer of the nonprofit placed the owners of the for-profit in a position to control the nonprofit. Additionally, the court found that the publicity received by the for-profit was a significant benefit.

Analysis:

Based on the information and supporting documentation you provided in your application, you have failed to establish that your activities will further a charitable purpose, and that you will not be operated for a substantial nonexempt private purpose. An organization cannot be

recognized as exempt under § 501(c)(3) unless it shows that it is both organized and operated exclusively for one or more exempt purposes.

You have failed to establish that your activities will not serve the private interests of M or its owners, directors, and officers. As stated in Better Business Bureau of Washington, D.C., 326 U.S. 279, the presence of a single nonexempt purpose, if substantial in nature, will destroy the exemption, regardless of the number or importance of truly exempt purposes. Section 1.501(c)(3)-1(d)(1)(ii) of the regulations provides that an organization does not operate exclusively for exempt purposes if it operates for the benefit of private interests.

You state that you have a close connection with M. You operate in substantially the same field, providing Internet access, with M providing the networking capabilities and support services. You were formed by M and while you exist as a separate legal entity, you are clearly controlled by the officers and directors of M. Your officers and directors may be elected or removed by M with or without cause. In addition, your employees are the employees of M. Moreover, in KJ's Fund Raisers, Inc., 74 T.C.M. 669 (1997), the court held that a nonprofit's activities served the commercial purposes of the for-profit organizations that formed it, even where individuals unrelated to the for-profit organizations formally controlled the nonprofit.

Your primary purpose is to benefit private interests. While you provided a letter from the mayor of the local area that you will operate in, you have not shown that the government has any other interest or oversight in you or your activities. You advertise on behalf of your sole member, M, a for-profit entity. You plan to enter into an agreement whereby M's sponsorship will be prominently displayed on all information materials. M, as your sole member, has discretion and control of your operations through its appointment and removal power over the board of directors and officers. Although you have a "disinterested members" committee, this committee does not possess actual authority over day to day operations and is only convened on an as needed basis or at least once a year.

In addition to the advertising for M, you state that you will promote public access to the Internet, by providing free equipment to businesses for use at no charge by their customers. Such customer access enhances the ability of businesses to attract customers. Therefore, you are organized and operated for the benefit of private interests.

Your primary activity, developing, deploying and supporting a public wireless mesh network, serves the interests of the general public and not a specific charitable class. While you may engage in some educational activity through distribution of information on how this wireless network operates and how and where it can be accessed, this activity is minor compared to your service provider activity which is more than an insubstantial part of your total activities. Such activity furthers a commercial purpose not an exempt purpose. Therefore, you are not operated exclusively for one or more exempt purposes specified in § 501(c)(3) of the Code.

Based on the foregoing, you do not qualify for exemption under § 501(c)(3). You have not demonstrated that you operate primarily for charitable purposes pursuant to § 1.501(c)(3)-1(c)(1) or 1.501(c)(3)-(1)(d)(1)(ii). Instead, you operate for a substantial nonexempt purpose.

Conclusion:

Accordingly, you do not qualify for exemption as an organization described in § 501(c)(3) of the Code. You must file federal income tax returns. Contributions to you are not deductible under section 170 of the Code.

You have the right to file a protest if you believe this determination is incorrect. To protest, you must submit a statement of your views and fully explain your reasoning. You must submit the statement, signed by one of your officers, within 30 days from the date of this letter. We will consider your statement and decide if the information affects our determination.

Your protest statement should be accompanied by the following declaration:

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

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

If you do not file a protest within 30 days, you will not be able to file a suit for declaratory judgment in court because the Internal Revenue Service (IRS) will consider the failure to protest as a failure to exhaust available administrative remedies. Code section 7428(b)(2) provides, in part, that a declaratory judgment or decree shall not be issued in any proceeding unless the Tax Court, the United States Court of Federal Claims, or the District Court of the United States for the District of Columbia determines that the organization involved has exhausted all of the administrative remedies available to it within the IRS.

If you do not intend to protest this determination, you do not need to take any further action. If we do not hear from you within 30 days, we will issue a final adverse determination letter. That letter will provide information about filing tax returns and other matters.

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

Internal Revenue Service
SE:T:EO:RA:T:3,
Attn:
1111 Constitution Ave, N.W.
Washington, DC 20224-0002

You may also fax your statement using the fax number shown in the heading of this letter. If you fax your statement, please call the person identified in the heading of this letter to confirm that he or she received your fax.

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

Sincerely,

Director, Exempt Organizations