Mr. T. Michael Smith, Administrator  
Inheritance Tax Division  
106 State Office Building  
Indianapolis 4, Indiana

Dear Mr. Smith:

This is in response to your request for an Official Opinion in answer to the following question:

"Would you please advise me by way of an Official Opinion as to whether bequests to (1) a municipality-owned cemetery, (2) a church-owned cemetery and (3) a non-profit cemetery corporation are subject to the Indiana inheritance tax."

The Indiana Inheritance Tax Law is the Acts of 1931, Ch. 75, as amended, as found in Burns' (1953 Repl.), Section 7-2401 et seq. Section 1 of that act imposes the tax and defines the transfers upon which the tax is imposed. However, certain transfers, which would otherwise be includible within Section 1 of the act, are exempt from the tax imposed thereby by reason of the Acts of 1931, Ch. 75, Sec. 3, as amended, as found in Burns' (1963 Supp.), Section 7-2403, which provides, in part, as follows:

"There shall be exempt from the tax imposed by this act (a) all transfers to or for the use of any municipal corporations within this state; (b) all transfers to any public institutions for exclusive public purposes; (c) all transfers to any trustee or trustees in trust for the sole benefit of any charitable, educational, or religious organization, fund, or foundation; and (d) all transfers to any corporation, institution, society, association, or trust, wherever incorporated or organized, formed for charitable, educational, or religious purposes: Provided, That in all cases under subdivisions (a), (b), and (c) and in the case of transfers under subdivision (d) to corporations, institutions, societies, associations or trusts not incorporated or
organized under the laws of the state of Indiana, the exemption shall be granted only if the entire property transferred or the entire income therefrom is to be used exclusively, either according to the provisions of the will or other instrument of transfer or according to the past practices of the donee or donees, for one or more of such purposes within the state of Indiana, and in the case of transfers under subdivision (d) to corporations, institutions, societies, associations or trusts incorporated or organized under the laws of the state of Indiana the exemption shall be granted only if more than a merely nominal part of the property transferred or of the income therefrom is to be used, either according to the provisions of the will or other instrument of transfer or according to the past practices of the donee or donees, for one or more of such purposes within the state of Indiana, and only if, as respects that part of the property transferred or the income therefrom which is not to be used for one or more of such purposes within the state of Indiana, the use or uses which are to be made of a material share of such property or such income, either according to said provisions or according to said past practices, are for the benefit of mankind generally and not for the exclusive benefit of a particular locality outside the state of Indiana; but in all cases under subdivisions (a), (b), (c) and (d) no such transfer shall be so exempt if any officer, member, shareholder or employee of such corporation, institution, society, association or trust shall receive or may be lawfully entitled to receive any pecuniary profit from the operation thereof, except reasonable compensation for services in effecting one or more of such purposes, or as proper beneficiaries of a strictly charitable purpose, or if the organization of any such corporation, institution, society, association, or trust for any of the foregoing avowed purposes be a guise or a pretense for directly or indirectly making it, or for any of its officers, members, shareholders or employees any other pecuniary profit, or if it be not in good faith organized or conducted for one or more of such purposes; and Provided further, That the
exemptions in all cases under subdivisions (b), (c) and (d) shall extend to persons, organizations, associations and corporations organized under the law of other states, and resident therein, provided the law of such other state grants to persons, organizations, associations and corporations organized under the law of the state of Indiana, and resident therein, a like and equal exemption.” (Our emphasis)

At the outset, it should be noted that Regulation No. 2-2 of the Indiana Revenue Board for many years past has provided and now provides as follows:

“Bequests to or for the use of a cemetery or lots in a cemetery are subject to inheritance tax.”

However, the above-quoted regulation concerns cemeteries generally and does not purport to be specifically directed to transfers to any particular classification of cemeteries. Moreover, the action of taxing officials, when not in accord with the applicable statutory provisions, cannot waive the right and duty of the state to assess and collect taxes or waive the right of exemption to which taxpayers would otherwise be entitled under the statute.

Walgreen Company v. Gross Income Tax Division (1947), 225 Ind. 418, 75 N. E. (2d) 784.

Furthermore, the rule of statutory construction according great weight to the administrative rules of agencies administering statutes which have remained in effect over a long period of time, should not control, when, as in this case, the Inheritance Tax Division has not consistently followed Regulation No. 2-2.

(1) The first division of your question relates to the taxable or exempt status of transfers to “a municipality owned cemetery.” For answer to this phase of your question, it seems obvious that subdivision (a) of Burns' 7-2403, supra, exempts “all transfers to * * * municipal corporations within this state; * * *” (Our emphasis) Therefore, all bequests to a cemetery owned by a municipality within this state are ex-
empt from the Indiana inheritance tax, subject to compliance with requisites hereafter noted.

(2) The second division of your question relates to transfers to a church-owned cemetery. Both subdivisions (c) and (d) of Burns' 7-2403, supra, would include such transfers, since they would obviously be transfers either to trustees for the sole benefit of a religious organization or transfers to a corporation, institution, society, association or trust formed for religious purposes. Therefore, bequests to a cemetery owned by a church would be exempt from the Indiana inheritance tax, subject to compliance with requisites hereafter noted.

(3) The third division of your question relates to transfers to a nonprofit cemetery corporation. Referring to Burns' 7-2403, supra, it should be observed that all transfers under subdivisions (a), (b), (c) and (d), in order to be eligible for exemption, must conform to the requirement underlined above that an officer, member, shareholder or employee of any corporation, institution, society, association or trust cannot receive nor be lawfully entitled to receive any pecuniary profit from the operation thereof, except reasonable compensation for services actually rendered, or except as proper beneficiaries of a strictly charitable purpose, and all of such transfers must further conform with the requirement that the transferee corporation, institution, society, association or trust cannot be a guise or pretense for directly or indirectly making it, or for any of its officers, members, shareholders or employees any other pecuniary profit, and that it be in good faith organized and conducted for one or more of the eligibility purposes specified in Burns' 7-2403, supra.

Thus, while the nonprofit element is a requisite for all transferees to be eligible for exemption as provided by Burns' 7-2403, supra, this is but one of the eligibility requirements, and it is also necessary, in order for the particular transfer to be eligible for exemption, that it be of the kind classified in subdivisions (a), (b), (c) or (d) of that section.

From the wording of your question, when you refer to "a nonprofit cemetery corporation," it is presumed that you mean a corporation organized and operating under the not-for-profit
corporation statutes of this state. From a reading of Burns' 7-2403, supra, it is clear that the section imposes many more conditions which are prerequisites to the eligibility for exemption than the mere condition that the transferee be a not-for-profit corporation. Therefore, the mere organization and operation as a not-for-profit cemetery corporation would not, alone, entitle such a transferee to exemption with respect to transfers made to all such corporations.

The further conditions must exist with respect to corporate transferees, as provided in subdivision (d), that the transfer must be to a corporation incorporated, organized or formed "for charitable, educational or religious purposes."

Reference is made to "The Indiana General Cemetery Act," being the Acts of 1939, Ch. 142, as found in Burns' (1950 Repl.), Section 21-1001 et seq., Section 13 of which, as found in Burns' (1950 Repl.), Section 21-1013, provides that the accumulation and holding of funds as authorized by Sections 12 and 18 of that act, or contributions thereto, are to be expressly permitted "and shall be and be deemed to be for a charitable and eleemosynary purpose." Section 12 of that act (Burns' [1950 Repl.], Section 21-1012) requires the creation of a "perpetual care fund" of cemeteries organized and operating under said act, and Section 18 (Burns' [1950 Repl.], Section 21-1018) specifically authorizes the owner of every cemetery to take and hold any property devised, bequeathed, granted or given to it in trust to apply the same, or the proceeds or income therefrom according to the terms of the devise, bequest, grant or gift. Thus, with respect to transfers by death to such perpetual care fund, in accordance with Burns' 21-1012, supra, and to the owner of every cemetery by devise, bequest, grant or gift, in accordance with Burns' 21-1018, supra, the Legislature itself has categorized such as being "for a charitable and eleemosynary purpose." See also:

1959 O. A. G., page 8, No. 3, at pp. 13 et seq.

Thus, for answer to the third phase of your question, a transfer to a cemetery owned by a nonprofit corporation may be eligible for exemption under Burns' 7-2403, supra, if there is compliance with all other requisites.