

J. CEMETERIES

1. Introduction

IRC 501(a) exempts cemeteries described in IRC 501(c)(13) from federal income tax.

The provision exempting cemeteries is one of the oldest. Cemeteries were exempted from the first federal income tax in 1913. The statute has changed little over the years, but the ways cemeteries operate and fund their operations have changed significantly. The statute has had to accommodate these new conditions.

This topic discusses IRC 501(c)(13), its history, recent developments, and the Service's evolving position on these developments.

2. IRC 501(c)(13)

a. Statutory Language

IRC 501(c)(13) describes the types of cemeteries that qualify for exemption from federal income tax under IRC 501(a). IRC 501(c)(13) presently reads:

Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for the purpose of the disposal of bodies by burial or cremation which is not permitted by its charter to engage in any business not necessarily incident to that purpose and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

b. Statutory History

Before the enactment of the present federal income tax in 1913, most states exempted cemeteries from local property and excise taxes, because cemeteries were viewed as quasi-public organizations performing a recognized civic service.

The Tariff Act of 1913 exempted certain cemeteries from the brand new federal income tax (authorized by the Sixteenth Amendment to the Constitution in February 1913). The provision, IRC 501(c)(13)'s predecessor, exempted only those

"mutual" cemetery companies organized and operated exclusively "for the benefit of their members." Clearly, only those mutual companies not operating in a commercial manner for profit were contemplated.

In 1916, Congress modified the provision slightly. It changed the word "organized" to "owned" and dropped the superfluous word "mutual."

In 1921, the statute was expanded to cover non-mutual cemeteries. The following language was added:

or which are not operated for profit; and any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

The phrase "or which are not operated for profit;" follows the original language exempting mutual cemeteries. The phrase clearly relates to the mutual cemetery category because it is set off from the rest of the changed provision with a semi-colon. The phrase was apparently designed to extend exemption to mutual cemeteries that were operated primarily, but not "exclusively," for the benefit of their members, because they also engaged in the charitable (but not necessarily mutual) activity of burying non-member paupers. (Congressional Record, Vol. 61, p. 7489.)

The remaining language added in 1921 was directed at corporations. It exempted incorporated cemetery companies (not mutual companies), so long as their shareholders or any other individuals did not share in the cemetery companies' net earnings. In effect, this language extended the same exemption enjoyed by mutual cemetery companies to incorporated cemetery companies not operated in an ordinary commercial manner.

By 1921, IRC 501(c)(13)'s predecessor had taken its present form. Two types of cemeteries were exempt from federal income tax. The first type was the mutual cemetery company operated for the benefit of its members. This type of cemetery could not operate in a commercial manner. It was "nonprofit" in the sense that any net earnings were retained by the organization for mutual burial purposes and were not distributed to individuals for their private benefit in the manner of "for profit" businesses.

The second type of exempt cemetery was the incorporated, nonprofit cemetery company. This type of cemetery was distinguishable from commercial cemeteries because it had to limit its operations to burial activities and could not allow its net earnings to inure to the benefit of any private shareholders or individuals. These cemetery companies had to apply any excess net earnings to exempt cemetery operations.

In 1970, IRC 501(c)(13) was amended by P.L. 91-618 (84 Stat. 1955). This amendment added crematoria to the class of exempt organizations described in IRC 501(c)(13). In effect, the amendment simply defined cemeteries as including crematoria. The amendment reversed a Service ruling (Rev. Rul. 69-637, 1969-2 C.B. 127, subsequently revoked by Rev. Rul. 71-300, 1971-2 C.B. 238) that the operation of a crematorium did not constitute exempt IRC 501(c)(13) cemetery activity.

c. Regulations

The IRC 501(c)(13) regulations in effect at the time of this writing were promulgated nearly twenty years ago, T.D. 6500, 11/25/60. Their substance has been unchanged since 1934, Treas. Reg. 86, Art. 101(5)-1. They currently read:

Section 1.501(c)(13)-1 Cemetery companies.

(a) A cemetery company may be entitled to exemption --

(1) If it is owned by and operated exclusively for the benefit of its lot owners who hold such lots for bona fide burial purposes and not for purposes of resale, or

(2) If it is not operated for profit.

(b) Any cemetery corporation chartered solely for burial purposes and not permitted by its charter to engage in any business not necessarily incident to that purpose is exempt from income tax, provided that no part of its net earnings inures to the benefit of any private shareholder or individual. A cemetery company which fulfills the other requirements of section 501(c)(13) may be exempt, even though it issues preferred stock entitling the holders to dividends at a fixed rate, not exceeding the legal rate of interest in the State of incorporation or 8 percent per annum whichever is greater, on

the value of the consideration for which the stock was issued, provided that its articles of incorporation require:

(1) That the preferred stock shall be retired at par as soon as sufficient funds available therefor are realized from sales, and

(2) That all funds not required for the payment of dividends upon or for the retirement of preferred stock shall be used by the company for the care and improvement of the cemetery property.

The current regulations simply do not address many current developments in the cemetery area. Consequently, the Service is updating them. Proposed regulations under IRC 501(c)(13) were published on July 8, 1975 (40 FR 28613). A revised version of the proposed regulations was published on November 29, 1978 (43 FR 55797), and a public hearing was held on the proposal on March 29, 1979. The proposed regulations address most of the problems the Service has encountered in administering IRC 501(c)(13). The proposed regulations currently read:

Section 1.501(c)(13)-1 Cemetery companies and crematoria.

(a) *Nonprofit mutual cemetery companies.* A nonprofit cemetery company may be entitled to exemption if it is owned by and operated exclusively for the benefit of its lot owners who hold such lots for bona fide burial purposes and not for the purpose of resale. A mutual cemetery company which also engages in charitable activities, such as the burial of paupers, will be regarded as operating in conformity with this standard. Further, the fact that a mutual cemetery company limits its membership to a particular class of individuals, such as members of a family, will not affect its status as mutual so long as all the other requirements of section 501(c)(13) are met.

(b) *Nonprofit cemetery companies and crematoria.* Any nonprofit corporation, chartered solely for the purpose of the burial, or (for taxable years beginning after December 31, 1970) the cremation of bodies, and not permitted by its charter to engage in any business not necessarily incident to that purpose, is exempt from income tax, provided that no part of its net earnings inures to the benefit of any private shareholder or individual.

(c) *Preferred stock--(1) In general.* A cemetery company or crematorium is not exempt from income tax under section 501(c)(13) if it issues preferred stock on or after November 28, 1978.

(2) *Transitional rule.* In the case of preferred stock issued prior to November 28, 1978, a cemetery company or crematorium which issued such stock shall not fail to be exempt under section 501(c)(13) solely because it issued preferred stock which entitled the holders to dividends at a fixed rate, not exceeding the legal rate of interest in the State of incorporation or 8 percent per annum, whichever is greater, on the value of the consideration for which the stock was issued, if its articles of incorporation require:

(1) That the preferred stock be retired at par as soon as sufficient funds available therefor are realized from sales, and

(2) That all funds not required for the payment of dividends upon or for the retirement of preferred stock be used by the company for the care and improvement of the cemetery property.

For purposes of this subparagraph, the term "legal rate of interest" shall mean the rate of interest prescribed by law in the State of incorporation which prevails in the absence of an agreement between contracting parties fixing a rate.

(d) *Sales to exempt cemetery companies and crematoria.* Except as provided in paragraph (c)(2) of this section (relating to transitional rule for preferred stock), a cemetery company or crematorium is not exempt from income tax if property is transferred to such organization in exchange for an equity interest so long as such equity interest remains outstanding and retains its character as an equity interest. * * * In determining whether property is transferred to a cemetery company or crematorium in exchange for an equity interest, as opposed to being transferred for a bona fide debt obligation, consideration will be given to all the facts and circumstances surrounding the transfer including the following factors:

(1) Whether there is a written unconditional promise to pay on demand or on a specified date a sum certain in money in return for an adequate consideration in money or money's worth, and to pay a fixed rate of interest; and

(2) Whether there is subordination to, or preference over, any indebtedness of the company.

(e) *Convertible debt obligations.* A cemetery company or crematorium is not exempt from income tax under section 501(c)(13) if it issues debt obligations after July 7, 1975, which are convertible into the preferred stock of the company.

3. Requirements for IRC 501(c)(13) Exemption

a. "Nonprofit" Operation

As our earlier discussion of the history of IRC 501(c)(13) and the regulations indicates, exemption was not contemplated for cemeteries operated in the ordinary commercial manner to make profits for individuals. IRC 501(c)(13) exemption was intended only for mutual cemetery companies operated for the benefit of members (or occasional charity cases) or for incorporated cemetery companies that engage solely in burial activities without allowing net earnings to inure to the benefit of private shareholders or individuals. Both types operate for the general benefit of society, and neither type of cemetery is operated "for profit" in the commercial sense. Of course, both types of cemeteries may have an excess of receipts over expenditures ("net earnings" or "profits") which are devoted to exempt IRC 501(c)(13) purposes rather than to the benefit of private individuals. It is in this sense that we characterize an IRC 501(c)(13) cemetery as "nonprofit."

"Nonprofit" operation has traditionally been a presumed requirement for IRC 501(a) tax exemption. The Supreme Court has stated that "exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain." Trinidad v. Sagrada Orden de Predicadores, 263 U.S. 578, 581 (1924). See also, West Side Tennis Club v. Commissioner, 111 F. 2d 6 (2d Cir. 1940), cert. den. 311 U.S. 674 (1940).

Unfortunately, IRC 501(c)(13) and the current regulations could be read differently. They seem to describe three separate categories of exempt cemeteries:

- (1) Cemetery companies owned and operated exclusively for the benefit of lot owners who hold the lots for burial purposes only,
- (2) cemetery companies not operated for profit, or

- (3) cemetery corporations chartered solely for burial and not permitted by charter to engage in any other non-IRC 501(c)(13) purpose, and having no part of net earnings inure to the benefit of any private shareholder or individual.

This overly literal reading would lead to anomalous results. For example, a mutual cemetery company that operated for profit and shared the profit among the members, rather than applying it exclusively to exempt burial purposes, could fall into the first category above. Naturally, the Service has never accepted this interpretation of IRC 501(c)(13) or the regulations.

The history of the regulations supports the Service position. The first regulation clearly stated that the mutual cemetery companies exempted by the Tariff Act of 1913 had to be "nonprofit":

Article 90. Cemetery companies organized and operated exclusively for the mutual benefit of their members are exempt. The provisions of the law clearly indicate that companies which operate cemeteries for profit are liable to the tax. The status of cemetery associations under the law will, therefore, depend upon the character and purpose of the organization and what disposition is made of the income. (Treas. Reg. 33, Art. 90, T.D. 1944.)

The 1921 version was also clear. Cemetery companies could not operate for profit in the ordinary commercial manner:

Article 516. Cemetery companies. -- A cemetery company which is operated for profit or for the benefit of others than its members, does not come within the exempted class... (Treas. Reg. 45, Art. 516, T.D. 3146.)

In 1922, however, the wording of the regulations changed:

Article 516. Cemetery companies. -- A cemetery company in order to be exempt must be owned and operated exclusively for the benefit of its lot owners or must not be operated for profit... (Treas. Reg. 62, Art. 516, T.D. 3295.)

The use and placement of the disjunctive phrase "or must not be operated for profit" is confusing. It could be read to imply (as discussed above) that exempt

mutual cemetery companies might operate for profit. There is no evidence that the regulation was meant to reverse the not-for-profit intent of the statute. Indeed, as we pointed out earlier, the clear legislative intent behind the statutory addition of the phrase "or which are not operated for profit;" was to extend exemption to those mutual cemeteries that (besides engaging in mutual burial activities) also buried paupers not-for-profit. The regs. language merely followed the disjunctive phrasing of the statute.

The ambiguous disjunctive form persists into the current regulations. The proposed IRC 501(c)(13) regulations would resolve the ambiguity by stating that the "nonprofit" requirement applies to all cemeteries seeking exemption under IRC 501(c)(13).

It seemed so obvious that an exempt IRC 501(c)(13) cemetery company must be "nonprofit" that the Service has never felt it necessary to publish the point directly. Rev. Rul. 64-217, 1964-2 C.B. 153, however, indirectly states the point. The Rev. Rul. is based on the assumption that for-profit cemetery companies do not perform exempt IRC 501(c)(13) activities. The Rev. Rul. holds that a perpetual care fund, the income of which is turned over to a profit-making cemetery company for use in connection with the maintenance of the cemetery properties and the burial lots, is not entitled to exemption from federal income taxation as an organization described in IRC 501(c)(13). In explaining the conclusion, the Rev. Rul. states:

Perpetual care funds operated in connection with nonprofit cemeteries have been held to be exempt from taxation as organizations described in section 501(c)(13) of the Code. See Revenue Ruling 58-190, C.B. 1958-1, 15. Implicit in this conclusion is a recognition that the perpetual care funds are providing an essential part of the functions of the cemetery companies themselves. They are thus so closely connected with the actual cemetery companies that they partake of the character of the cemetery companies for exemption purposes. Therefore, when the company actually operating the cemetery is itself a profit-making enterprise, the perpetual care fund operated in connection with it would also partake of this character and would not be entitled to exemption from federal income tax. Furthermore, as the services and facilities furnished by a perpetual care fund to a cemetery operated for profit constitute substantial assistance in its business by affecting the salability and selling price of lots, and relieving the company itself of a legal or contractual

obligation, net earnings of such funds inure to the benefit of the profit company or its shareholders.

In some recent decisions, courts have stated that IRC 501(c)(13) and the current regulations set out three separate categories of exemption for cemeteries. For example, The John D. Rockefeller Family Cemetery Corporation, 63 T.C. 355 (1974) (Acq. 1977-2 C.B. 2); DuPont de Nemours Cemetery Company, T.C.M. 1974-314. The courts' recitations of the three separate category language seem perfunctory restatements of the Code's language. The holdings do not depend on the recitation, because the organizations met all the requirements of IRC 501(c)(13) anyway. Thus, the Service does not read the decisions to permit exempt cemeteries to be "for profit" in the ordinary commercial sense. To do so would be inconsistent with the history of the statute and regulations discussed above, as well as the prohibitions against inurement and private benefit discussed later in this topic.

IRC 170(c)(5) also implies that Congress presumed "nonprofit" operation for exempt cemetery companies. In view of the traditional "quasi-charitable" nature of cemeteries, Congress chose to allow charitable deductions for contributions to cemeteries operating for the benefit of the public. This meant that the cemetery companies must be "nonprofit." IRC 170(c)(5) allows deductions for contributions to:

A cemetery company owned and operated exclusively for the benefit of its members, or any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, if such company or corporation is not operated for profit and no part of the net earnings of such company or corporation inures to the benefit of any private shareholder or individual.

The placement of the nonprofit requirement in IRC 170(c)(5) is unambiguous. The nonprofit requirement applies to all cemeteries.

b. No Inurement of Earnings for Private Benefit

As our previous discussion indicates, exemption under IRC 501(c)(13) was meant for only cemeteries that do not operate for private gain in the ordinary commercial sense. The regulations have always made that clear, and the Service has not accepted the reading (discussed above) that "for profit" operation is consistent with exemption. Therefore, no part of an exempt IRC 501(c)(13)

cemetery's earnings (profit or any other form) may inure to the benefit of any private shareholder or individual.

The requirement of no inurement does not mean that an exempt IRC 501(c)(13) cemetery may not have a "profit" or net earnings (an excess of receipts over expenditures) during a taxable period. It does mean, however, that those net earnings must be devoted to exempt cemetery functions. Traditional exempt cemetery functions are:

1. operating, maintaining, and improving a cemetery,
2. acquiring cemetery property, and
3. investing surplus to provide income to fund the above functions.

Obviously, exempt cemetery companies may not declare and distribute "profits" to individuals, but there are other arrangements that result in inurement to the benefit of private shareholders or individuals. The most common arrangement is called the "open-ended land sale agreement" or the "percentage-of-sales land sale agreement." In these arrangements, a cemetery agrees to purchase land for exempt burial purposes from an individual or group of individuals (who may even be incorporated). Instead of setting a fixed price for the land, the parties agree that the individual(s) selling the land will receive a percentage of the price subsequent lot purchasers pay the cemetery for their burial plots. Thus, the price the individual(s) selling the land receives is open-ended and will inevitably increase as land and burial plots appreciate in value.

The Service has always viewed this type of arrangement as resulting in inurement to the individual(s) selling the land to the cemetery. If the individual(s) had received the usual fixed sum payment, the cemetery would have received the full value of the appreciation in the subsequent plot sales. In the open-ended arrangement, the individual's retained interest entitles him to a share of the cemetery's earnings on the land. (The individuals(s) selling the land and receiving percentages on subsequent sales also seek to treat the proceeds as capital gain rather than ordinary income.)

The early cases on "open-ended land sale agreements" went both ways. Forest Lawn Memorial Park Association v. Commissioner, 45 B.T.A. 1091 (1941) held that such an arrangement did not result in inurement of "net earnings," because the payments to the land shareholders came from gross receipts rather than

net earnings. The Service did not acquiesce in the Forest Lawn case (1960-2 C.B. 8) and won several cases on the issue, Knollwood Memorial Gardens v. Commissioner, 46 T.C. 764 (1966), Rose Hills Memorial Park Association v. United States, 463 F.2d 425 (Ct. Cl. 1972), cert. denied, 414 U.S. 822 (1973), Restland Memorial Park v. United States, 371 F.Supp. 164 (N.D. Tex. 1974), affirmed, 509 F.2d 187 (5th Cir. 1975).

The Service position on "open-ended land sale agreements" was first published in Rev. Rul. 61-137, 1961-2 C.B. 118. That Rev. Rul. describes a cemetery company that, in order to acquire property to operate, purchased land for an indeterminable total price which was to be calculated on the basis of a percentage of gross proceeds realized from the sale of individual lots. The Rev. Rul. held that the cemetery was not exempt as an organization described in IRC 501(c)(13). Rev. Rul. 77-70, 1977-1 C.B. 150, reached the same result in a situation where the seller of the land was a for-profit cemetery. The Rev. Rul. held that a nonprofit cemetery company that acquires land from a for-profit cemetery company, under an agreement providing payment to the former owners on the basis of a percentage of the sales price of each cemetery lot sold, is not exempt from tax as a cemetery described in IRC 501(c)(13).

As the above Rev. Ruls. and cases indicate, the nature of the private party selling land to the cemetery is irrelevant. Whether the seller is an individual(s), association, trust, or corporation, it may not share in the IRC 501(c)(13) cemetery company's net earnings. Such inurement is inconsistent with IRC 501(a) exemption.

c. Issuing Stock

The inurement prohibition just discussed would seem to preclude IRC 501(c)(13) cemetery companies from issuing any stock and paying dividends on the stock (to private parties). There has never been any question that issuing common stock with the right to dividends is inconsistent with the inurement prohibition of IRC 501(c)(13). The dividends from common stock would be clearly payments of the cemetery's "net earnings" to private shareholders or individuals.

However, there has been disagreement over whether issuing certain preferred stock and paying a fixed "dividend" on the preferred stock results in inurement of "net earnings" to private shareholders or individuals. The current regulations permit this under certain specific conditions. Reg. 1.501(c)(13)-1(b) states:

(b) Any cemetery corporation chartered solely for burial purposes and not permitted by its charter to engage in any business not necessarily incident to that purpose is exempt from income tax, provided that no part of its net earnings inures to the benefit of any private shareholder or individual. A cemetery company which fulfills the other requirements of section 501 (c) (13) may be exempt, even though it issues preferred stock entitling the holders to dividends at a fixed rate, not exceeding the legal rate of interest in the State of incorporation or 8 percent per annum, whichever is greater, on the value of the consideration for which the stock was issued, provided that its articles of incorporation require:

(1) That the preferred stock shall be retired at par as soon as sufficient funds available therefor are realized from sales, and

(2) That all funds not required for the payment of dividends upon or for the retirement of preferred stock shall be used by the company for the care and improvement of the cemetery property.

Apparently, the fixed-return preferred stock issue was a popular cemetery financing method. It was thought to resemble a bond or a debt repayment more than a stock returning dividends on the "net earnings" of the cemetery. The regs. have permitted preferred stock dividends since 1919 (Treas. Reg. 45, Art. 516, T.D. 2831).

The Service, however, has been reconsidering its position on preferred stock for some time, because even the fixed-rate dividend seems to be a form of distribution to private shareholders as individuals. In proposing the new regulations, the Service announced that the new regulations would treat preferred stock dividends as inurement of cemetery net earnings to private shareholders and individuals, 40 FR 28613 (7/8/75) and 43 FR 55797 (11/29/78). There was a public hearing on the proposed regs. on March 29, 1979. The proposed regs. clearly state that issuing preferred stock is inconsistent with IRC 501(c)(3) exemption and provides a transitional rule:

(c) *Preferred stock--(1) In general.* A cemetery company or crematorium is not exempt from income tax under section 501(c)(13) if it issues preferred stock on or after November 28, 1978.

(2) *Transitional rule.* In the case of preferred stock issued prior to November 28, 1978, a cemetery company or crematorium

which issued such stock shall not fail to be exempt under section 501(c)(13) solely because it issued preferred stock which entitled the holders to dividends at a fixed rate, not exceeding the legal rate of interest in the State of incorporation or 8 percent per annum, whichever is greater, on the value of the consideration for which the stock was issued, if its articles of incorporation require:

(1) That the preferred stock be retired at par as soon as sufficient funds available therefor are realized from sales, and

(2) That all funds not required for the payment of dividends upon or for the retirement of preferred stock be used by the company for the care and improvement of the cemetery property.

For purposes of this subparagraph, the term "legal rate of interest" shall mean the rate of interest prescribed by law in the State of incorporation which prevails in the absence of an agreement between contracting parties fixing a rate.

d. Limitations on Class Served

Sheer physical limitations dictate that cemeteries (or any other exempt organizations for that matter) can serve only limited numbers of people. The question then arises, "How limited a class may the IRC 501(c)(13) cemetery serve?" If a cemetery limits the class served too much, the cemetery may be operating for purely private purposes.

Many cemeteries ("potters' fields") serve a charitable class, the poor. There are also many religious cemeteries that usually are part of a church. These cemeteries obviously serve a broad class and operate for public purposes. These cemeteries are often exempt under IRC 501(c)(3).

There are also many military and government cemeteries. As components of the government, these public institutions usually do not pay federal income tax. Some may even qualify for exemption under IRC 501(c)(1).

Many fraternal and other associations have cemeteries for their members. These mutual cemetery companies were the type specifically contemplated in IRC 501(c)(13). It is possible that some of these mutual cemetery companies are operated as part of a fraternal association (an IRC 501(c)(8) or (10)) and never bothered to apply for IRC 501(c)(13) exempt status.

Often members of a community may form an association to maintain a cemetery. Rev. Rul. 78-143, 1978-1 C. B. 161.

The troublesome cemeteries were private or family cemeteries. Historically, many families set aside private family cemeteries. Usually, such cemeteries would serve only a named family, for example, the lineal descendants of a person and all those who intermarry with those descendants. These cemeteries were often funded by a trust and run not-for-profit, and all trust income and proceeds were devoted to the cemetery operation. Formerly, the Service considered these private family cemeteries non-exempt under IRC 501(c)(13), because they served private interests more than public interests. Rev. Rul. 65-6, 1965-1 C.B. 229. Several court cases have decided that private family cemeteries are entitled to exemption under IRC 501(c)(13). DuPont de Nemours Cemetery Company, T.C.M. 1974-314, and The John D. Rockefeller Family Cemetery Corporation, 63 T.C. 355 (1974) (Acq. 1977-2 C.B. 2). The Service acquiesced in Rockefeller and reversed Rev. Rul. 65-6. In addition, the new regulations will make it clear that nonprofit family cemeteries, meeting all other IRC 501(c)(13) requirements, may qualify for exemption:

Section 1.501(c)(13)-1 Cemetery companies and crematoria.

(a) *Nonprofit mutual cemetery companies.* A nonprofit cemetery company may be entitled to exemption if it is owned by and operated exclusively for the benefit of its lot owners who hold such lots for bona fide burial purposes and not for the purpose of resale. A mutual cemetery company which also engages in charitable activities, such as the burial of paupers, will be regarded as operating in conformity with this standard. Further, the fact that a mutual cemetery company limits its membership to a particular class of individuals, such as members of a family, will not affect its status as mutual so long as all the other requirements of section 501(c)(13) are met.

(b) *Nonprofit cemetery companies and crematoria.* Any nonprofit corporation, chartered solely for the purpose of the burial, or (for taxable years beginning after December 31, 1970) the cremation of bodies, and not permitted by its charter to engage in any business not necessarily incident to that purpose, is exempt from income tax, provided that no part of its net earnings inures to the benefit of any private shareholder or individual.

It remains a question of fact whether the class served by a cemetery is so limited that the cemetery operates for narrow private benefit. And certainly,

cemetery operations resulting in inurement of net earnings to private shareholders and individuals of the limited class served would be inconsistent with IRC 501(c)(13) exemption.

4. Definitions

Congress probably meant to exempt only traditional cemeteries, burying grounds for human remains, under IRC 501(c)(13) and its predecessors.

Cemeteries for pets were not within the intendment of the statute. The Service published Rev. Rul. 73-454, 1973-2 C.B. 185, which held that an organization that owns, operates, and maintains a cemetery for pets does not qualify for exemption under IRC 501(c)(13).

For a while it was unclear whether crematoria (not traditional burying grounds) were within the intendment of the statute. Cremation had not always been legal. Rev. Rul. 69-637, 1969-2 C.B. 127, held that the exemption of a cemetery is adversely affected by engaging in the operation of a crematorium. Congress interceded by passing P.L. 91-618, 1971-1 C.B. 539, which amended IRC 501(c)(13) to include crematoria in the definition of cemetery. Rev. Rul. 71-300, 1971-2 C.B. 238, was published to revoke Rev. Rul. 69-637.

The status of perpetual care funds was also in question for a time. It was decided that such funds operate as an adjunct to the cemeteries they support. These funds are so closely related to the cemeteries they serve that they partake the characteristics of the supported cemetery. Thus, a perpetual care fund operating to maintain a nonprofit cemetery company, none of the earnings of which inures to the benefit of any private shareholder or individual, may qualify for exemption under IRC 501(c)(13), Rev. Rul. 58-190, 1958-1 C.B. 15. However, a perpetual care fund, the income of which is turned over to a profit-making cemetery for use in connection with the maintenance of cemetery properties and the burial lots, is not entitled to exemption from federal income tax under IRC 501(c)(13). Rev. Rul. 64-217, 1964-2 C.B. 153.

A mortuary does not qualify as a cemetery. Rev. Rul. 64-109, 1964-1, (Part 1) C.B. 190, holds that a cemetery company exempt from federal income tax under IRC 501(c)(13) will be subject to the loss of its exempt status by the establishment and operation of a mortuary on the cemetery grounds or elsewhere. Apparently, a mortuary is not a necessary adjunct to cemetery operations, as a perpetual care fund is. See, however, Rev. Rul. 79-359, 1979-45 I.R.B. 10, which holds that an

otherwise qualifying organization whose purpose is to provide traditional burial services that directly support and maintain basic tenets and beliefs of a religion regarding burial of its members is operated exclusively for charitable (religious) purposes and is exempt under IRC 501(c)(3). This organization might resemble a mortuary, but it is clearly operated for religious rather than business purposes.

5. Contributions to Cemetery Companies

IRC 170(c)(5) provides for the deduction for federal income tax purposes of contributions to cemetery companies of the type described in IRC 501(c)(13). To be deductible the contributions must be voluntary and must be made to or for the use of a nonprofit cemetery or crematorium, whose funds are irrevocably dedicated to the care of the cemetery as a whole. A donor may not deduct a contribution made for the perpetual care of a particular lot or crypt. Furthermore, payments made to a cemetery company as part of the purchase price of a burial lot or crypt, even though irrevocably dedicated to the perpetual care of the cemetery as a whole, are not deductible. Rev. Rul. 58-190, 1958-1 C.B. 15.

IRC 2055 and 2522 contain no provisions similar to those of IRC 170(c)(5). Accordingly, bequests or gifts to nonprofit cemeteries described in IRC 501(c)(13) are not deductible for federal estate and gift tax purposes. Rev. Rul. 67-170, 1967-1 C.B. 272.