



# ***CR 2002/52 - Income tax: Johnson & Johnson Pty Ltd - Exempt Share Plan***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *1 July 2001*



## **Class Ruling**

### **Income Tax: Johnson & Johnson Pty Ltd - Exempt Share Plan**

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#### ***Preamble***

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains **Class Rulings** and **Taxation Rulings** TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

## **What this Class Ruling is about**

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1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

#### **Tax law(s)**

2. The tax law(s) dealt with in this Ruling are sections:

- 139B of the *Income Tax Assessment Act 1936* ('ITAA 1936');
- 139BA (ITAA 1936);
- 139CA (ITAA 1936);
- 139CC (ITAA 1936);
- 139CD (ITAA 1936);
- 139CE (ITAA 1936);
- 139E (ITAA 1936);
- 139FA (ITAA 1936);
- 139FB (ITAA 1936);
- 6-5 of the *Income Tax Assessment Act 1997* ('ITAA 1997'); and
- 130-83 (ITAA 1997).

## Class of persons

3. The class of persons to which this Ruling applies is the employees of Johnson & Johnson Group Companies, listed in paragraph 4, who receive shares in Johnson & Johnson Inc. under the Johnson & Johnson Pty Limited Employee Exempt Share Plan (the ESP).

4. The employees of the Johnson & Johnson Group Companies involved in the ESP are:

- Johnson & Johnson Pty Ltd;
- Johnson & Johnson Pacific Pty Ltd;
- Johnson & Johnson Medical Pty Ltd;
- Johnson & Johnson Research Pty Ltd;
- Tasmanian Alkaloids Pty Ltd;
- Depuy Australia Pty Ltd; and
- Janssen-Cilag Pty Ltd.

## Qualifications

5. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.

6. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement described below at paragraphs 10 to 11 in this Ruling.

7. If the arrangement actually carried out is materially different from the arrangement that is described in this Ruling:

- (a) this Ruling has no binding effect on the Commissioner because the arrangement entered into is not the arrangement on which the Commissioner has ruled; and
- (b) this Ruling may be withdrawn or modified.

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## **Date of effect**

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9. This Ruling applies from the 2001/2002 year of income. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 to 22 of Taxation Ruling TR 92/20). Furthermore, the Ruling only applies to the extent that:

- it is not later withdrawn by notice in the Gazette; or
- it is not taken to be withdrawn by an inconsistent later public ruling; or
- the relevant tax laws are not amended.

## **Arrangement**

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10. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents.

- Class Ruling application dated 12 July 2001; and
- Plan Trust Deed of the Johnson & Johnson Pty Limited's Employee ESP, and Plan Rules included therein.

These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description.

11. The following is a brief description of how the plan works:

- (a) A special purpose trustee company - the Trustee Plan Company (TPC) has been established to act as trustee in the implementation and administration of the Plan;
- (b) Non-discriminatory offers will be made to the employees of Johnson & Johnson Group Companies inviting them to participate in the ESP;
- (c) Employees will be able to salary sacrifice amounts approved by the relevant employer and limited to \$A1,000 in any one tax year;

- (d) Employees may be eligible for bonus and incentive plans under which a proportion of the incentive may be provided in the form of shares, limited to a value of \$A1,000 in any one tax year;
- (e) The relevant Johnson & Johnson Group Company as the employer, will provide funds to TPC to purchase ordinary shares;
- (f) TPC will use the funds it receives to acquire Johnson & Johnson Inc. ordinary shares from fresh issues or from on market acquisitions on the New York Stock Exchange (NYSE). The shares purchased by TPC will be registered in the name of TPC and held for the benefit of the employee participants;
- (g) The employee's interest in the shares held by TPC will be subject to a prohibition on disposal for a period ending on the earlier of three (3) years after acquisition or termination of employment. The interest in the shares will not be subject to conditions that could result in forfeiture of the shares;
- (h) Employees wishing to withdraw share benefits from the ESP will first need to seek permission from the TPC before a distribution will be made. The share benefits identified for withdrawal will be available if they have been held by the TPC for three (3) years or the employee has ceased employment, whichever is first to occur;
- (i) The conditions for the acquisition of shares by TPC for an employee will be set out in the Plan Rules. The Plan Rules govern the respective relationships between the Johnson & Johnson Group Company, the employee and the TPC;
- (j) No employee may accept an offer, or continue to participate in the Plan if he or she owns, has an interest in or controls five percent or more of the issued capital of Johnson and Johnson.

## Ruling

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12. Amounts paid by an employer to the TPC under the Plan, pursuant to an effective salary sacrifice arrangement, will not be included in the assessable income of the employee, pursuant to section 6-5, when those amounts are paid. The employee will include the

amount of the discount on the shares in assessable income in accordance with paragraphs 13 to 19 of this Ruling.

**Where the employee does make an election**

13. Where a participating employee acquires shares under the Plan and makes an election under section 139E, the discount on the shares will be included in assessable income in the year of income in which the shares are acquired pursuant to subsection 139B(2).

14. The discount will be calculated in accordance with subsection 139CC(2). The discount is the market value of the share at the time it is acquired less any consideration paid by the employee. Provided that the Plan rules are not varied to lift the disposal restrictions referred to in paragraphs 11(g) and (h) above, it would be concluded that the exemption conditions in section 139CE have been satisfied in relation to the shares acquired by the employees. Pursuant to section 139BA only the amount of discount greater than \$1,000 will be included in assessable income.

**Where the employee does not make an election**

15. Where a participating employee acquires shares under the Plan and does not make an election under section 139E, the amount of discount on the shares will be included in assessable income pursuant to subsection 139B(3) in the year of income in which subsection 139CA(2) determines the cessation time occurs.

16. Where the participating employee disposes of the shares in an arm's length transaction within 30 days of cessation time, the discount assessable at cessation time under subsection 139B(3) will be calculated in accordance with subsection 139CC(3).

17. A capital gain or capital loss made as a consequence of such a disposal will be disregarded pursuant to subsection 130-83(2).

18. Shares that are not subsequently disposed of by the employee in an arm's length transaction within 30 days of the cessation time, will have the discount calculated in accordance with subsection 139CC(4). The market value of the share will be worked out under section 139FA.

19. The cost base of the shares upon a capital gains tax (CGT) event occurring will be their market value at the cessation time pursuant to subsection 130-83(3).

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## Explanations

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20. A salary sacrifice arrangement is an arrangement under which an employee agrees to forego part of their total remuneration, which they would expect to receive as salary or wages, in return for the employer providing benefits of a similar value. An effective salary sacrifice arrangement requires the employee to agree to receive part of their total remuneration as an employee share scheme benefit before the employee has earned the entitlement to receive the amount as salary or wages.

21. At the time contributions are made by an employer to the TPC no income has been derived by the employee and no amount would be included in the employee's assessable income. When the employee acquires the shares (when TPC purchases the shares for the benefit of the employee) an amount may be included in assessable income as outlined below.

22. The shares acquired under the employee share plan meet the conditions in section 139CD, and therefore all shares acquired under the Plan are qualifying shares.

### **Where the employee does make an election**

23. An employee can elect under section 139E that subsection 139B(2) applies for a year of income. The election will apply to each qualifying share acquired by the employee in the year of income. Subsection 139B(2) provides that the discount is included in the taxpayer's assessable income in the year of acquisition of the share, that is, in the year when TPC purchases the share for the benefit of the employee.

24. The discount is calculated in accordance with subsection 139CC(2). As the employee does not provide any consideration for the acquisition of the share the discount is the market value of the share, determined by section 139FA, when it was acquired by the employee. The market value of an ordinary share under section 139FA is:

- if there was at least one transaction on the NYSE in those shares in the week up to and including the date of acquisition – the weighted average of the prices at which those shares were traded on the NYSE during that week; or
- if there were no such transactions in the week up to and including the date of acquisition – the last price at which an offer was made on the NYSE in that period to buy such a share, or if no such offer was made, the

value of the share determined as if section 139FB applied to the share.

25. Section 139CE contains three exemption conditions:

- The first exemption condition is that the scheme did not contain any conditions which could result in employees forfeiting ownership of the shares that were acquired under the Plan, subsection 139CE(2);
- The second exemption condition is that the scheme is operated so that no employee would be permitted to dispose of shares acquired under the Plan until three years after the acquisition or until after the employee ceases to be an employee of the employer - whichever event occurs first, subsection 139CE(3);
- The third exemption condition is that the employee share scheme and any financial assistance scheme in respect of the acquisition of shares under the employee share scheme is operated on a non discriminatory basis, subsection 139CE(4).

The scheme as outlined satisfies the exemption conditions in section 139CE. Therefore subsection 139BA(2) will apply so that only the discount greater than \$1,000 will be included in the employees assessable income.

26. However should the shares, acquired by TPC for the benefit of the employee under the Plan, be disposed of within three years of acquisition by the employee as a result of an alteration to the Plan rules, the exemption condition in subsection 139CE(3) will not be satisfied and section 139BA will not apply to the employees for the relevant years of income. Thus employees are required under subsection 139BA(2) to include in their assessable income for each year of income the total value of any discounts given. Existing assessments may be required to be amended where a employee has excluded an amount of discounts given from their assessable income in a year of income.

### **Where the employee does not make an election**

27. Where a participating employee has not made an election under section 139E, as the shares are qualifying shares, the discount in relation to these shares will be included in assessable income pursuant to subsection 139B(3) in the year in which cessation time occurs. As the shares acquired under the plan will have restrictions on their disposal, ie. an employee will be prohibited from disposing of the shares for the first 3 years after acquisition, subsection 139CA(2) will determine when cessation time occurs.



28. Subsection 139CA(2) provides that the cessation time will be the earliest of:

- the time when the taxpayer disposes of the share;
- the later of the time when:
  - (i) any restriction preventing the taxpayer from disposing of the share; and
  - (ii) any condition that could result in the taxpayer forfeiting the shareceases to have effect;
- the time when the employment in respect of which the share was acquired ceases; and
- 10 years after the taxpayer acquired the share.

29. Subsection 139CC(3) calculates the discount to be included in assessable income where the shares are disposed of by the employee in an arm's length transaction within 30 days of the cessation time. Where no consideration has been given by the employee for the shares, the entire proceeds received by the employee on disposal will represent the discount to be included in assessable income.

30. As the share is a qualifying share and no election was made under section 139E in the year of income in which the share was acquired, a capital gain or loss made on the disposal will be disregarded in accordance with subsection 130-83(2).

31. Shares that are not disposed of by the employee in an arm's length transaction within 30 days of cessation time will have the discount to be included in assessable income calculated in accordance with subsection 139CC(4). This is the market value of the shares at cessation time less any consideration paid by the taxpayer to acquire the shares.

32. As the shares in Johnson and Johnson Inc. are listed on an approved stock exchange the market value of the shares for the purposes of paragraph 139CC(4)(a) will be determined in accordance with section 139FA, see paragraph 24.

33. The cost base of the shares for the purposes of the capital gains tax provisions will be determined in accordance with subsection 130-83(3), the first element being the market value of the shares worked out under section 139FA at cessation time.

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## Detailed contents list

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34. Below is a detailed contents list for this Class Ruling:

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## **Commissioner of Taxation**

21 August 2002

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<i>Previous draft:</i>	- ITAA 1936 139CA(2)
Not previously released in draft form	- ITAA 1936 139CC
	- ITAA 1936 139CC(2)
	- ITAA 1936 139CC(3)
<i>Related Rulings/Determinations:</i>	- ITAA 1936 139CC(4)
CR 2001/1; TR 92/1; TR 97/16;	- ITAA 1936 139CC(4)(a)
TR 92/20	- ITAA 1936 139CD
	- ITAA 1936 139CE
<i>Subject references:</i>	- ITAA 1936 139E
- Employee Share Scheme	- ITAA 1936 139FA
	- ITAA 1936 139FB
<i>Legislative references:</i>	- ITAA 1997 6-5
- TAA 1953 Pt IVAAA	- ITAA 1997 130-83
- ITAA 1936 139BA	- ITAA 1997 130-83(2)
- ITAA 1936 139BA(2)	- ITAA 1997 130-839(3)
- ITAA 1936 139B(3)	- Copyright Act 1968
- ITAA 1936 139B	
- ITAA 1936 139CA	

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### ATO References

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