



# ***CR 2002/53 - Income tax: Johnson & Johnson Pty Ltd - Deferred 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 - Deferred 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 *Income Tax Assessment Act 1936* (ITAA 1936)
- 139CA (ITAA 1936);
- 139CC (ITAA 1936);
- 139CD (ITAA 1936);
- 139E (ITAA 1936);
- 139FA (ITAA 1936);
- 139FB (ITAA 1936);
- 104-75 *Income Tax Assessment Act 1997* (ITAA 1997);
- 109-5 (ITAA 1997);
- 130-80 (ITAA 1997); and
- 130-83 (ITAA 1997).

## Class of persons

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

4. The Johnson & Johnson Group of Companies involved in this DSP 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 and 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;
- Plan Trust Deed of the Johnson & Johnson Pty Limited Employee DSP and Plan Rules included therein; and
- Plan Trust Deed of the Johnson & Johnson Pty Limited Employee Exempt Share Plan, 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 DSP works:

- (a) A special purpose company - the Trustee Plan Company (TPC) has been established to act as trustee in the implementation and administration of the Plan;
- (b) Selected Australian staff of the Johnson & Johnson Group companies will be invited to participate in the DSP;
- (c) Employer Incentive Contributions arising under any bonus/incentive plans of a Johnson & Johnson Group company may be provided under the DSP in the form

of Johnson & Johnson Inc. ordinary shares. Special discretionary offers may also be made to key employees. These shares will be acquired by the TPC and held for the benefit of the participating employees. It is likely that vesting periods and performance criteria will apply;

- (d) TPC will use funds it receives from the employer companies to purchase 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 purchased and held by the TPC for the benefit of an employee and will be registered in the name of the TPC;
- (e) The employee's beneficial interests in the shares will be subject to restrictions on disposal and subject to forfeiture in certain circumstances;
- (f) Employees wishing to withdraw share benefits from the DSP must seek permission from the TPC before a distribution may be made. If permission is refused, the TPC may identify what criteria still need to be satisfied before such withdrawal may be reconsidered;
- (g) The conditions applicable to the acquisition of listed shares by TPC on behalf of an employee will be set out in the Plan Rules. The Plan Rules govern the respective relationships between companies in the Johnson & Johnson Group, the employee and the TPC;
- (h) 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 DSP 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 the following paragraphs.

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

13. 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.

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

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

16. 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.

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

18. Where a participating employee acquires shares under the Plan and does not make an election under section 139E in respect thereof and the shares are subsequently forfeited under the Plan's Rules, the amount of discount on the shares to be included in assessable income under subsection 139B(3) will be nil, and there will be no CGT consequences.

**Where the employee does make an election**

19. 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). The discount will be calculated in accordance with subsection 139CC(2).

20. Where a participating employee acquires shares under the Plan and makes an election under section 139E and the shares are subsequently forfeited under the Plan Rules, the amount of discount on the shares will be included in assessable income under subsection 139B(2) as outlined above in paragraph 19.

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## Explanations

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21. The shares acquired under the DSP meet each of the six conditions in section 139CD and all shares acquired under the Plan are qualifying shares. Specifically, this Plan through its connection with the Johnson & Johnson Pty Limited Employee Exempt Share Plan (ESP) satisfies subsection 139CD(5)(b). The ESP is the subject of a separate Class Ruling, CR 2002/52.

22. At the time the 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 employees assessable income. When the employee acquires the shares (when the TPC purchases the shares for the benefit of the employee) an amount may be included in assessable income as outlined below

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

23. Where a participating employee has not made an election under section 139E, the discount in relation to the 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, subsection 139CA(2) will determine when cessation time occurs.

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

- (a) the time when the taxpayer disposes of the share;
- (b) 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;
- (c) the time when the employment in respect of which the share was acquired ceases; and
- (d) 10 years after the taxpayer acquired the share.

25. Subsection 139CC(3) enables calculation of 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 cessation time. Where the employee does not give consideration for the shares, the entire proceeds on the disposal will represent the discount to be included in assessable income.

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

27. An employee who does not dispose of shares in an arm's length transaction within 30 days of cessation time will include the discount in their assessable income. The discount is calculated in accordance with subsection 139CC(4). The discount is the market value of the shares at cessation time less any consideration paid by the taxpayer to acquire the shares.

28. 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 (a) of subsection 139CC(4) will be determined in accordance with section 139FA. 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.

29. The cost base of the shares for the purposes of the CGT provisions in Part 3-3 of the ITAA 1997 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.

30. Where a participating employee acquires shares under the Plan and the shares are subsequently forfeited under the Plan Rules, the discount to be included in assessable income pursuant to subsection 139B(3) will be nil. As the Plan Rules apply equally to all participating employees, the forfeiture by the employee will be considered to be at arm's length for the purposes of subsection 139CC(3). As the employee has not received any consideration upon forfeiture of the shares, nor paid anything for them, the discount calculated in accordance with subsection 139CC(3) will be nil.

31. Where a participating employee acquires shares under the Plan and the shares are subsequently forfeited under the Plan's Rules, there will be no capital gains tax consequences because there will be no acquisition of the shares by the employee as required for section

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130-80 to apply. The employee has not acquired the shares by becoming absolutely entitled to them pursuant to section 109-5 event E5, and section 104-75.

**Where the employee does make an election**

32. 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) includes the discount in assessable income in the year of acquisition of the share.

33. The discount is calculated in accordance with subsection 139CC(2). The discount is the market value of the share, as determined by section 139FA (see paragraph 28), when it was acquired by the employee as the employee does not provide any consideration for the acquisition of the share.

34. The discount on the share will be included in assessable income under subsection 139B(2) in the year the share was acquired even in circumstances where the share is subsequently forfeited in a later year of income.

**Detailed contents list**

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

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**Commissioner of Taxation**21 August 2002

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*Previous draft:*

Not previously released in draft form.

- ITAA 1936 139CA(2)

- ITAA 1936 139CC

- ITAA 1936 139CC(2)

- ITAA 1936 139CC(3)

- ITAA 1936 139CC(4)

*Related Rulings/Determinations:*

TR 92/1; TR 92/20; TR97/6;

- ITAA 1936 139CD

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- ITAA 1936 139CD(5)(b)

- ITAA 1936 139E

*Subject references:*

- ITAA 1936 139E(3)

- Employee Share Scheme

- ITAA 1936 139FA

- ITAA 1936 139FB

*Legislative references:*

- ITAA 1997 104-75

- ITAA 1997 109-5

- TAA 1953 Pt IVA

- ITAA 1997 130-80

- ITAA 1936 Pt 3-3

- ITAA 1997 130-83

- ITAA 1936 6-5

- ITAA 1997 130-83(2)

- ITAA 1936 139B

- ITAA 1997 130-83(3)

- ITAA 1936 139B(2)

- Copyright Act 1968

- ITAA 1936 139B(3)

- ITAA 1936 139CA

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ATO References

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