

# ***CR 2004/34 - Income tax: DCA Group Limited - Selective Employee Share Plan***

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## Class Ruling

### Income tax: DCA Group Limited - Selective Employee 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

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:
- Section 139B of the *Income Tax Assessment Act 1936* (ITAA 1936);
  - Section 139BA (ITAA 1936);
  - Section 139C (ITAA 1936);
  - Section 139CA (ITAA 1936);
  - Section 139CC (ITAA 1936);
  - Section 139CD (ITAA 1936);
  - Section 139E (ITAA 1936);
  - Section 139FA (ITAA 1936);
  - Section 139FB (ITAA 1936);
  - Section 139G (ITAA 1936);
  - Section 130-80 of the *Income Tax Assessment Act 1997* (ITAA 1997); and

- Section 130-83 (ITAA 1997).

**Class of persons**

3. The class of persons to which this Ruling applies are the Australian resident employees of the DCA Group listed in paragraph 4 who participate in the DCA Group Limited Selective Employee Share Plan (SESP) as described in the arrangement part of this Ruling. In this Ruling, a person belonging to this class of persons is referred to as a 'participating employee'.

4. The Group companies involved in the SESP include:

- DCA Group Limited (DCA);
- Amity Corporation Pty Limited;
- Braidcrest Pty Limited;
- Coastrad Management Pty Limited;
- I-Med Limited;
- Jones Holding Co Limited;
- Perthradclinic Limited;
- Regional Imaging Limited;
- Regional Imaging Management Pty Limited; and
- Southernex Management Services Pty Limited.

**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 in paragraphs 10 to 22.

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

- 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
- this Ruling may be withdrawn or modified.

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## Date of effect

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9. This Ruling applies from the 2002/2003 income year. 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 and 22 of Taxation Ruling TR 92/20). Furthermore, this 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 taxation 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 8<sup>th</sup> May, 2003
- SESP:
  - Trust Deed;
  - Plan Rules;
  - Plan Rules – Annexure A – Application Form for SESP; and Application Form for SESP including Contribution Plan; and
  - Plan Rules – Annexure B – Request for Withdrawal.

- Greenwoods & Freehill's:
  - e-mail dated 25th June 2003;
  - letter dated 20th August 2003;
  - e-mail dated 31st October 2003; and
  - letter dated 5th February 2004.

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

**Note:** certain information received has been provided on a commercial-in-confidence basis and will not be disclosed or released under the Freedom of Information Legislation.

11. The DCA Group Limited Selective Employee Share Trust (the Trust) and SESP Rules (the Rules) were established as part of the employee share plan strategy of DCA.

12. A number of the companies within the Group were incorporated for less than 36 months as at 30 June 2003.

13. Each employee eligible to participate in the SESP is given an application form specifying amongst other details:

- the number of shares the employee is invited to apply for;
- the acquisition price for each share;
- the vesting date for the shares; and
- the vesting conditions (if any).

14. DCA shares issued under the SESP will be fully paid ordinary shares ranking equally and having the same rights as other fully paid ordinary shares in the capital of the company. DCA shares are listed on the Australian Stock Exchange (ASX).

15. The Rules together with the SESP Trust Deed provide for ordinary shares in DCA to be issued to CPU Share Plans Pty Limited (the Trustee), or to be purchased by the Trustee out of contributed funds. The contributed funds comprise amounts paid by:

- a) Group companies; or
- b) Participating employees:
  - under salary sacrifice arrangements; or
  - from after-tax income.

16. The Trust will be administered in a manner that ensures the sole activities of the Trust are to acquire DCA ordinary shares and to provide such ordinary shares to participating employees.

17. The Trust will purchase DCA ordinary shares either on market or from new issues of shares by DCA. The shares will be registered in the name of the Trustee and held for the benefit of participating employees.

18. Shares will be beneficially allocated to participating employees and the Trustee will notify each participating employee upon such allocation.

19. A participating employee's beneficial interest in shares acquired under the SESP may be forfeited to the Trustee if:

- the participating employee ceases to be an employee other than in excepted circumstances; or
- at any time, before the end of the 10 year period starting when the participating employee acquired the shares, the Board directs the shares be forfeited.

20. Before participating employees can dispose of their shares they must complete a request for withdrawal. The Trustee may then transfer shares to them or dispose of the shares on their behalf.

21. The request for withdrawal can be lodged if:

- the vesting date for the relevant shares has occurred and all vesting conditions (if any) have been satisfied or waived;
- the Board so determines; or
- the participating employee ceases employment (except where shares are liable to forfeiture)

22. At no time will a participating employee hold a legal or beneficial interest in more than 5% of the shares of DCA. Also at no time will a participating employee be in a position to cast or control the casting of more than 5% of the maximum number of votes at a general meeting of DCA.

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## **Ruling**

*All legislative references made hereinafter are to the Income Tax Assessment Act 1936 (ITAA 1936) unless stated otherwise*

23. Under the SESP a participating employee will acquire qualifying shares (for the purposes of section 139CD) when the Trustee allocates a share to them.

**Where an employee makes an election**

24. Where a participating employee makes an election under section 139E, the discount given in relation to a share acquired under the SESP will be included in their assessable income in the year of income in which the share is acquired, pursuant to subsection 139B(2).

25. The discount to be included in the employee's assessable income is equivalent to the market value of the shares at the time they are acquired less any consideration the employee paid to acquire the shares. The market value of a share at this time is determined under section 139FA.

26. Under subsection 130-80(2) of the ITAA 1997, the first element of the cost base of each share that is acquired under the SESP is the market value of the share at the time it is acquired.

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

27. Where a participating employee does not make an election under section 139E, the discount given in relation to the shares will be included in their assessable income in the year of income in which the cessation time occurs, pursuant to subsection 139B(3).

28. The cessation time will be the earliest of:

- the time when the participating employee disposes of the shares;
- the time when the participating employee ceases employment with their employer or any company in the Group; or
- ten years after the share is acquired by the participating employee.

***Disposal within 30 days***

29. 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 will be the amount of consideration received on the disposal of the shares less any consideration the participating employee paid to acquire the shares, in accordance with subsection 139CC(3).

30. Any capital gain or capital loss made as a consequence of such a disposal will be disregarded, pursuant to subsection 130-83(2) of the ITAA 1997.

***Disposal after 30 Days***

31. Where the shares are not disposed of by the participating employee in an arm's length transaction within 30 days of the cessation time, the discount will be the market value of the shares at the cessation time less any consideration the participating employee paid to acquire the shares, in accordance with subsection 139CC(4).

32. The first element of the cost base of the shares upon a disposal will be their market value at the cessation time, pursuant to subsection 130-83(3) of the ITAA 1997.

**Explanation**

33. A share will be acquired under an employee share scheme, pursuant to Division 13A of Part III (Div 13A), if it is:

- acquired within the meaning of section 139G;
- acquired in respect of the employment of an employee pursuant to subsection 139C(1); and
- acquired for less than 'market value', pursuant to subsection 139C(3).

34. Section 139G provides that an employee will acquire a share in several circumstances, including by acquiring a beneficial interest in the share. Under the Trust participating employees acquire a beneficial interest in the shares allocated to them, thus they acquire shares within the meaning of section 139G.

35. The SESP has been established to provide performance incentives for employees, thus shares acquired under the SESP are considered to be acquired in respect of the employment of participating employees, pursuant to subsection 139C(1).

36. The Trustee will be issued shares or purchase shares from funds contributed by companies in the Group, including amounts contributed under effective salary sacrifice arrangements (refer to paragraphs 19 to 23 of Taxation Ruling TR 2001/10). Consideration paid or given by an employee to acquire shares does not include amounts sacrificed under an effective salary sacrifice arrangement. Thus as participating employees will not have provided any consideration, they will acquire shares for less than market value, pursuant to subsection 139C(3).

37. Where the Trustee purchases shares with funds contributed by a participating employee from after tax income, to the extent that the employee's contributions do not equal or exceed the market value (under section 139FA) of the shares acquired, the shares will be acquired for less than market value.



38. The Commissioner accepts that the conditions in section 139CD are satisfied, thus shares acquired under the SESP will be qualifying shares for the purposes of Div 13A.
39. Where an employee acquires shares under an employee share scheme, pursuant to section 139B(1), the assessable income of the employee, subject to section 139BA, includes the discount given in relation to the shares.
40. Where the shares are qualifying shares the year of income in which the discount is included and the amount of the discount depend on whether the employee has made a section 139E election in relation to the acquisition of shares.

**Where an employee makes an election**

41. An employee can elect under section 139E that subsection 139B(2) apply in respect of all shares acquired by the employee in a year of income. Subsection 139B(2) provides that the discount in relation to a share is included in the employee's assessable income in the year of income in which the share is acquired. Where the share is subsequently forfeited, there is no provision to excise this amount from the employee's assessable income.
42. The amount of the discount to be included is calculated in accordance with subsection 139CC(2). The discount being the market value of the shares at the time they were acquired by the employee less any consideration paid or given by the employee for the acquisition of the shares.
43. Subdivision F of Div 13A contains special provisions to determine the market value of shares on a particular day. As the ordinary shares in DCA are listed on the ASX, section 139FA provides that their market value is:
- if there was at least one transaction on the ASX 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 ASX 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 ASX in that period to buy such a share, or if no offer was made, the value as determined under section 139FB.
44. As the SESP contains forfeiture provisions, participating employees are unable to access the \$1000 tax free concession available under section 139BA.

***Cost base of the shares***

45. Where an employee acquires a qualifying share and makes a section 139E election, the first element of the cost base of the share, for the purposes of the CGT provisions is determined in accordance with subsection 130-80(2) of the ITAA 1997. In this case it is the market value of the shares, determined under section 139FA, at the time the participating employee acquires a beneficial interest in the share, i.e. when the Trustee first allocates the shares to the participating employee.

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

46. Where an employee acquires qualifying shares and does not make an election under section 139E, the discount given in relation to the shares is included in the employee's assessable income in the year of income in which the cessation time occurs, pursuant to subsection 139B(3).

47. As shares acquired under the SESP may be forfeited, the cessation time will be determined pursuant to subsection 139CA(2) and will be the earliest of:

- the time when the participating employee disposes of the shares;
- the time when pursuant to subsection 139CA(3) the employee ceases employment with their employer or a Group company; or
- the end of the 10 year period starting when the participating employee acquired the share.

48. The amount of the discount to be included in an employee's assessable income is determined under section 139CC and will depend on whether the shares are disposed of in an arm's length transaction within 30 days of the cessation time.

***Disposal within 30 days***

49. Where an employee disposes of the shares in an arm's length transaction within 30 days of the cessation time the discount to be included in assessable income, is the amount or value of any consideration received by the employee for the disposal less the amount or value of any consideration paid or given by the employee for the acquisition of the shares, pursuant to subsection 139CC(3).

50. Any capital gain or loss made as a consequence of such a disposal is disregarded, pursuant to subsection 130-83(2) of the ITAA 1997.

### ***Disposal after 30 days***

51. Where the employee does not dispose of the shares in an arm's length transaction within 30 days of the cessation time, the discount will be the market value of the shares at the cessation time less the amount or value of any consideration paid or given by the employee for the acquisition of the shares, pursuant to subsection 139CC(4).

52. Where the shares are qualifying shares and no election is made under section 139E, upon disposal the first element of the cost base of such shares will be their market value at the cessation time, pursuant to subsection 130-83(3) of the ITAA 1997.

53. Under the SESP, for the purposes of subsection 139CC(4) and subsection 130-83(3) the market value will be determined under section 139FA.

## **Detailed contents list**

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

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**Commissioner of Taxation**

7 April 2004

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*Previous draft:*

Not previously released in draft form.

- ITAA 1936 139C(3)
- ITAA 1936 139CA
- ITAA 1936 139CA(2)
- ITAA 1936 139CA(3)
- ITAA 1936 139CC
- ITAA 1936 139CC(2)
- ITAA 1936 139CC(3)
- ITAA 1936 139CC(4)

*Related Rulings/Determinations:*

TR 92/1; TR 92/20; TR 97/16;  
TR 2001/10; CR 2001/1

*Subject references:*

- employee share schemes

- ITAA 1936 139CD
- ITAA 1936 139E
- ITAA 1936 139FA
- ITAA 1936 139FB
- ITAA 1936 139G
- ITAA 1997 130-80
- ITAA 1997 130-80(2)
- ITAA 1997 130-83
- ITAA 1997 130-83(2)
- ITAA 1997 130-83(3)
- TAA 1953 Pt IVAAA
- Copyright Act 1968

*Legislative references:*

- ITAA 1936 Div 13A of Pt III
- ITAA 1936 Subdiv F Div 13A of Pt III
- ITAA 1936 139B
- ITAA 1936 139B(1)
- ITAA 1936 139B(2)
- ITAA 1936 139B(3)
- ITAA 1936 139BA
- ITAA 1936 139C
- ITAA 1936 139C(1)

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ATO references

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