

CR 2004/5 - Income tax: Aventis SA 'Aventis Shares' Group Savings Plan for employees

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Class Ruling

Income tax: Aventis SA ‘Aventis Shares’ Group Savings Plan for employees

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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 laws dealt with in this Ruling are
- Section 23L of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - Division 13A of the ITAA 1936;
 - Subsection 6-5(4) of the *Income Tax Assessment Act 1997* (ITAA 1997);
 - Subsection 6-10(3) of the ITAA 1997;
 - Section 104-10 of the ITAA 1997;
 - Section 104-25 of the ITAA 1997;
 - Section 110-25 of the ITAA 1997;
 - Subsection 112-20(1) of the ITAA 1997;
 - Division 115 of the ITAA 1997;
 - Subsection 116-20(1) of the ITAA 1997;

- Section 43 of the *Fringe Benefit Tax Assessment Act 1986* (FBTAA 1986); and
- Subsection 136(1) of the FBTAA 1986.

Class of persons

3. The class of persons to which this Ruling applies consists of the Australian residents employed by Aventis SA's Australian employer companies, Aventis Pasteur Pty Ltd and Aventis Pharma Pty Ltd and its Australian subsidiaries, who will participate in the offer under the arrangement described below in paragraphs 9 to 18.

Qualifications

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

5. 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 9 to 18 in this Ruling.

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

- 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

8. This Ruling applies to arrangements entered into during the income years ending 30 June 2002, 30 June 2003 and 30 June 2004. This Ruling continues to apply, in respect of the tax law(s) ruled upon, even following 30 June 2004, for arrangements entered during the income years ended 30 June 2002, 30 June 2003 and 30 June 2004. This is subject to there being no material change in the arrangement or in the class of persons involved in the arrangement. However, this 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).

Arrangement

9. The arrangement that is the subject of the Ruling is described below. It is entered into when the subscriptions referred to in paragraph 14 below are made by employees. This description is based on the documents identified below. These documents, or the relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of arrangement are:

- By-laws of Aventis Shares FCPE;
- Information notice 'Aventis Shares FCPE';
- Copy of the Aventis Group Savings Plan (with amendments) for the 2002 and 2003 offers; and
- Employee brochure including 'Australian supplement' for the 2002 and 2003 offers.

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.

Description of the arrangement

10. 'Aventis Shares 2002' and 'Aventis Shares 2003' are arrangements under which Australian resident employees of the Aventis SA group may invest in securities concerning a portfolio of Aventis SA shares. It is referred to as the 'Classic Plan' to distinguish it from the 'Aventis Performance 2002' and 'Aventis Performance 2003' offers, known as the 'Leveraged Plan.'

11. Under the Classic Plan the share portfolio is held through a *Fonds Commun de Placement D'Enterprise* ('FCPE'). A FCPE is a collective investment vehicle without legal personality commonly used in France to facilitate employee share offers.

12. The FCPE manager subscribes for ordinary shares in the capital of Aventis SA pursuant to a capital increase reserved to company employees on a worldwide basis by Aventis SA. The shares are held by the FCPE custodian in the name of Aventis Shares 2002 or Aventis Shares 2003 (hereafter referred to as 'the Fund').

13. The 'Subscription Price' for the Aventis Shares 2002 offer, of 64.35 Euros or \$107.18 payable is at a discount of 15% to the 'reference price' being the closing price of Aventis SA ordinary shares on the day of the Aventis SA board meeting of 23 May 2002. The 'Subscription Price' for the Aventis Shares 2003 offer, of 38.80 Euros or \$66.08 payable is at a discount of 15% to the reference price being the closing price of Aventis SA ordinary shares on 2 September 2003.

14. An employee may invest as little as an amount equal to the Subscription Price of one Aventis SA share. For the 2002 offer the maximum amount that may be invested is 25% of the employee's 2001 annual gross salary. For the 2003 offer the maximum amount that may be invested is 25% of the employee's 2003 annual gross salary. The amount invested may be paid by salary deduction or by cheque.

15. In consideration for their investment employees are allotted units in the Fund. When a unit is issued, one unit is equivalent to the value of one Aventis SA share. However, from that time the value of a unit is the 'Net Asset Value' as defined under the FCPE By-laws. Accordingly the units held are an entitlement to a fraction of the net assets held under the name of Aventis Shares 2002 or Aventis Shares 2003.

16. Units may be redeemed by a unit holder for Net Asset Value at the maturity date of 1 April 2007 (1 April 2008 for the 2003 offer) or earlier in the event that a condition of early redemption is satisfied.

17. At the maturity date unit holders may redeem their entitlements for either cash or Aventis SA shares. In the case of early redemption, e.g. the unit holder ceases employment with the Aventis SA Australian employer companies, the unit holder's entitlements based on the Net Asset Value at the relevant time are satisfied by a cash payment. Unit holders may also leave their entitlements in the Fund.

18. Dividends paid on Classic Plan shares are not paid on to unit holders but are reinvested by the FCPE manager in further Aventis SA shares. This is reflected by the issue of additional units or fractions of units to the unit holders.

Ruling

19. When units in the FCPE are issued to an Aventis SA Australian employee, they constitute a fringe benefit as defined in subsection 136(1) of the FBTA 1986.
20. Fringe benefits are exempt from income tax under section 23L of the ITAA 1936.
21. In the fraction denoted by the number of units held, income of the Fund is included in the Australian resident unit holder's assessable income. The income is derived by the unit holder when it is received by the custodian and dealt with on the unit holder's behalf by reinvestment and the issue of additional units on account of the reinvested income (subsection 6-5(4) or subsection 6-10(3) of the ITAA 1997 applies).
22. If an Australian resident unit holder redeems units in the Fund, a CGT event C2 occurs pursuant to section 104-25 of the ITAA 1997. A capital gain results if the capital proceeds exceed the cost base of the units. A capital loss occurs if the capital proceeds are less than their reduced cost base.
23. The capital proceeds of a redemption (CGT event C2) consist of any cash received and the market value of any shares acquired in consideration for the redemption (subsection 116-20(1) applies).
24. The cost base or reduced cost base of the units redeemed consists of the subscription price paid for the units in the case of units acquired by subscription. For additional units acquired on account of reinvested income, the income so applied forms the cost base (section 110-25 applies).
25. If an Australian resident unit holder makes a capital gain on redemption of the unit holder's units and the interest in the Fund represented by the units redeemed was acquired 12 months or more prior to the CGT event C2 happening, the gain is a discount capital gain pursuant to Division 115 of the ITAA 1997.
26. If an Australian resident unit holder, having redeemed their units in the Fund in consideration for Aventis SA shares, disposes of the shares a CGT event A1 happens (refer section 104-10). The capital gain or capital loss with respect to the disposal is calculated on the basis of the first element of cost base or reduced cost base of the shares being their market value at the date of acquisition. If a capital gain is made, it will be a discount capital gain pursuant to Division 115 if the acquisition of the shares occurred 12 months or more prior to the disposal.

Explanation

Exemption of the benefit from acquisition of units at a discount

27. The provision of units in the Fund to Australian resident employees is a fringe benefit for the purposes of the FBTAA 1986. The provision of the units is a 'benefit' as defined in relation to the employee's employment by the Aventis SA employer or its associate.

28. The benefit provided is not excluded from the fringe benefits tax regime by paragraph (ha) as it is not 'a benefit constituted by the acquisition by a person of a share or right under an employee share scheme (within the meaning of Division 13A of Part III of the Income Tax Assessment Act 1936)'. In this regard the unit holder's interest under the Fund regulations (a *chose in action*) is not identical with the inherent or underlying interest that the unit holder may have in shares that are part of the net assets. This issue is discussed in greater depth in CR 2003/53 at paragraphs 47 to 56 inclusive.

29. The fringe benefit is classified as an external property fringe benefit, the taxable value of which falls for determination under section 43 of the FBTAA 1986.

30. In accordance with section 23L of the ITAA 1936 Australian resident employees acquiring units in the Fund are exempt from tax on the benefit obtained.

Taxation of Fund Income

31. Income (principally dividends) received on assets held in the Fund is income in the hands of the unit holder if there is an entitlement thereto under the terms of the investment.

32. In this regard it is accepted that unit holders do not have a shareholder's title to the dividends. The dividends are paid to the custodian bank which receives them in that capacity. The unit holders entitlement to income under the Fund regulations is not a claim for immediate payment of the dividends received by the custodian but a right to have that money reinvested on their behalf and in recognition be allocated additional units.

33. It is considered that a unit holder's entitlement incorporating as it does an unconditional right to have income reinvested on the unit holder's behalf indicates an entitlement to the income as it is received notwithstanding that it cannot be enjoyed as an immediate cash distribution. In accordance with subsections 6-5(4) and 6-10(3) of the ITAA 1997 the income is derived by the unit holder when it is received and dealt with on the unit holder's behalf. For further discussion of this issue, see CR 2003/53 at paragraphs 60 to 66.

Capital Gains Tax

34. The general capital gains tax rules under Part 3-1 of the ITAA 1997 would apply to CGT events in relation to the interests in net assets of the Fund represented by units and shares acquired via redemption of units. The units are not units in a unit trust and Taxation Determination TD 2000/32 does not apply.

35. Section 104-25 provides that CGT event C2 happens if your ownership of an intangible CGT asset ends by it being redeemed or cancelled. Accordingly when an Australian resident unit holder redeems units there will be a CGT event.

36. If the redemption is satisfied fully or partly by the transfer of Aventis SA shares, the capital proceeds with respect to CGT event C2 will, in addition to any money received, include the market value of the shares at the date of the redemption (refer subsection 116-20(1)).

37. Under Division 110, the cost base or reduced cost base of units acquired by subscription includes the subscription price paid. The cost base or reduced cost base of units obtained on account of reinvested income, is the amount of the reinvested income. In the event that, during the period of the unit holder's membership of the Fund, unit holders' interests have been redenominated by the manager adjusting the number of units in the Fund and accordingly the number held by each unit holder, the original cost base or reduced cost base will be spread over the revised number of units.

38. If a unit holder redeems units for Aventis SA shares and subsequently sells the shares, a CGT event A1 occurs pursuant to section 104-10 with respect to the shares. The first element of the cost base or reduced cost base of the shares will be the market value of the shares at the date they were acquired (subsection 112-20(1) applies).

39. For the purposes of Division 115 (discount capital gains) the time of acquisition of units will be the date that the units related to the interest redeemed were subscribed for by the unit holder or in the case of reinvested income, when the units are issued. This is when the relevant interest in the Fund was acquired regardless of whether at the date of redemption the interest was denominated differently as a result of adjustments made by the Fund manager for the purpose of equalising unit value with the market price of an Aventis SA share.

40. Aventis SA shares obtained by redeeming units in the Fund are acquired at the redemption time for the purposes of Division 115 (discount capital gains).

Detailed contents list

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Commissioner of Taxation

14 January 2004

Previous draft:

Not previously released in draft form

- Fonds Commun De Placement

D'Enterprise

- fringe benefit

Related Rulings/Determinations:

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

TR 92/20; TD 2000/32; CR 2003/53

- fringe benefits tax

- reduced cost base

- reinvested income

Subject references:

- Acquisition of share or right

- capital gains tax

- CGT event A1

- CGT event C2

- cost base

- chose-in-action

- derivation of income

- discount capital gains

- dividends

- employee savings plan

- employee share schemes

- external property fringe benefit

Legislative references:

- ITAA 1936 23L

- ITAA 1936 Div 13A

- ITAA 1936 Div 13A Part III

- ITAA 1997 6-5(4)

- ITAA 1997 6-10(3)

- ITAA 1997 Part 3-1

- ITAA 1997 104-10

- ITAA 1997 104-25

- ITAA 1997 110-25

- ITAA 1997 112-20(1)

- ITAA 1936 Div 110

- ITAA 1997 Div 115

- ITAA 1997 116-20(1)
- FBTA 1986 43
- FBTA 1986 136(1)

- Copyright Act 1968
- TAA 1953 Part IVAAA

ATO references

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