

# ***CR 2004/6 - Income tax: Aventis SA 'Aventis Performance' Group Savings Plan for employees***



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## Class Ruling

### Income tax: Aventis SA ‘Aventis Performance’ 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;
  - Section 104-10 of the *Income Tax Assessment Act 1997* (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 26.

## 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 26 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

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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).

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## Arrangement

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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 listed 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:

- Copy of the Aventis Group Savings Plan (with amendments) for the 2002 and 2003 offers;
- Employee brochure including 'Australian supplement' for the 2002 and 2003 offers;
- By-laws of Aventis Performance 2002;
- Information notice 'Aventis Performance 2002';
- Minute confirming terms of the 'Swap Transaction' agreement between the Interepargne for the Aventis Performance FCPE and Deutsche Bank AG;
- Underwriting guarantee agreement; and
- Securities sale agreement.

**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 Performance 2002' and 'Aventis Performance 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 'Leverage Plan' to distinguish it from the 'Aventis Shares 2002' and 'Aventis Shares 2003' offers, known as the 'Classic Plan'.

11. Under the Leverage 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 Performance 2002 or Aventis Performance 2003 (hereafter referred to as 'the Fund').

13. The 'Subscription Price' of 64.35 Euros or \$A107.18 payable is at a discount of 15% to a '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 Performance 2003 offer, of 38.08 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 the lesser of 25% of the employee's 2001 annual gross salary or the Subscription Price of 60 Aventis SA shares. For the 2003 offer the maximum amount that may be invested is the lesser of 25% of the employee's 2003 annual gross salary or the Subscription Price of 80 Aventis SA shares. 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 Performance 2002 or Aventis Performance 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 for 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. If a unit holder fails to redeem their units at the maturity date their entitlements will be transferred to the Classic Plan.

18. Unit holders in subscribing for units in the Fund pay 10% of the Subscription Price, i.e. 10% of the amount that the FCPE manager must pay for the allotment of Aventis SA shares under the Plan. As indicated above the amount invested by a unit holder cannot be less than the Subscription Price for one Aventis SA share.

19. Deutsche Bank AG pays to the FCPE manager the remaining 90% of the Subscription Price, pursuant to a 'Swap Transaction' agreement e.g.:

Reference Price	\$100
Discount allowed by Aventis SA	\$(15)
Subscription Price payable by FCPE on behalf of employee to Aventis SA	\$85
Employee contribution (i.e. 10% of \$85)	\$(8.5)
<b>Deutsche Bank AG payment (90% of \$85)</b>	<b>\$76.5</b>

20. Accordingly, if on these assumed facts, an employee contributes the minimum amount of \$85 the FCPE manager will subscribe for and be allotted 10 Aventis shares. The balance of the subscription price of \$765 is met by a Swap Transaction payment from Deutsche Bank AG. The employee will then be allocated one unit in the Fund, the equivalent of one Aventis share.

21. Under the Swap Transaction agreement, Deutsche Bank AG also provides a guarantee to the effect that, upon redemption of the unit holder's units, the unit holder will receive the equivalent of the number of shares subscribed for by the FCPE manager with the unit holder's contribution to the Subscription Price. Based on the data given in paragraph 20 the unit holder would be entitled to at least one Aventis SA share or cash to the value thereof regardless of whether Deutsche Bank AG's contribution of \$765 can be fully recovered by the bank having regard to the value of Aventis SA shares at the date of redemption.

22. Under the Leverage Plan, unit holders renounce their right to receive any sums equivalent to dividends paid on the Aventis SA shares held by the FCPE custodian on behalf of the Fund. As dividends are received the FCPE manager is required to pay them to Deutsche Bank AG under the terms of the Swap Transaction agreement.

23. In addition, when the Swap Transaction agreement comes to an end, which is when the unit holder redeems their units or the unit holder's entitlements are transferred to the Classic Plan, the bank is entitled to payment of:

- a) the amount initially provided by the bank i.e. 90% of the Subscription Price (\$765 based on the example at paragraph 20 above);
- b) the difference between the Subscription Price and the Reference Price (\$135 based on the example above being \$15 discount on each of 9 shares that the FCPE manager subscribes for with the bank's contribution); and
- c) a specified proportion of 60% (the final percentage depends on market conditions and is determined when the Aventis subscription price is fixed) of any excess of the value of the Leveraged Plan shares over the Reference Price. (If the market value of Aventis SA shares at the redemption time is \$200, the amount would be \$540 being \$60 multiplied by 9).

24. The FCPE manager may meet this commitment under the Swap Transaction agreement by transfer of Aventis SA shares to Deutsche Bank AG.

25. The value of the obligations under the Swap Transaction agreement is taken into account in determining the value of net assets of the Fund. Accordingly, where the market value of Aventis SA shares rises above the Reference Price, it may be expected that the value of the obligation under the Swap Agreement will also increase. However, the Net Asset Value should also increase because unit holders are effectively entitled to a specified percentage (e.g. 40%) of the increase in value of shares acquired with the Bank's contribution. Continuing with the above example, at redemption time, the position simplified would be:

Value of Fund portfolio

- 10 Aventis SA shares @ \$200	\$2,000
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Value of Swap Agreement obligation

- Contribution	\$765	
- Discount	\$135	
- Share of increase in value	\$540	
		\$1,440
Net Asset Value = Unit Value		\$560

26. In the circumstances described above, at redemption the FCPE manager would pay \$540 to the unit holder or if the unit holder so elects, transfer two Aventis SA shares valued at \$400 and pay the balance of \$160 in cash. Unit holders may choose to pay an additional sum to the FCPE manager to acquire some or all of the Aventis SA shares that would have otherwise been applied in satisfaction of Deutsche Bank's entitlements. The amount required would be equal to the value of the shares that would otherwise have been transferred to Deutsche Bank by the FCPE manager. For instance if, in the example above, the unit holders at redemption time preferred to receive three Aventis SA shares instead of two shares plus \$160, it would be necessary for a payment of \$40 to be made to the FCPE manager.

**Ruling**

27. When units in the Fund are issued to an Australian resident employee, they constitute a fringe benefit as defined in subsection 136(1) of the FBTA 1986.

28. Fringe benefits are exempt from income tax under section 23L of the ITAA 1936.

29. Dividends received by the FCPE manager in relation to Aventis SA shares held in the name of the Fund are not assessable to the Australian resident unit holders.

30. If an Australian resident unit holder redeems units or the unit holder's entitlements are transferred to the Classic Plan, 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 the unit holders reduced cost base.



31. 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).

32. In the case of an Australian resident unit holder's entitlements being transferred to the Classic Plan, the capital proceeds consist of the market value of the units issued in the Classic Plan at the date of the transfer (subsection 116-20(1) applies).

33. The cost base or reduced cost base of the units redeemed or cancelled on transfer of entitlements to the Classic Plan consists of the amount invested by the employee i.e. their contribution to the Subscription Price (section 110-25 applies).

34. If an Australian resident employee makes a capital gain on redemption of units or the transfer of entitlements to the Classic Plan and units were 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.

35. If an Australian resident unit holder, having redeemed units 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.

36. If an Australian resident unit holder chooses to make a payment to the FCPE manager in order to acquire shares funded by the Swap Transaction payment, the value of which exceeds the employee's entitlements, the payment forms the cost base or reduced cost base of those shares.

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## **Explanation**

### **Exemption of the benefit from acquisition of units at a discount**

37. 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 clearly a 'benefit' as defined in relation to the employee's employment by the Aventis SA employer or its associate.

38. The benefit provided is not excluded from the fringe benefits tax regime by paragraph (ha) of the definition of 'fringe benefit' in subsection 136(1); 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 ITAA 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.

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

40. 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 dividends**

41. Dividend income received with respect to Aventis SA shares held in the name of the Fund will not be assessable income of Australian resident unit holder's as they are not entitled to that income. Under the terms of the offer and in accordance with the Swap Transaction agreement, the Deutsche Bank AG is entitled to the dividends.

### **Capital Gains Tax**

42. The general capital gains tax rules under Part 3-1 of the ITAA 1997 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.

43. 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.

44. 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 include the market value of the shares at the date of the redemption in addition to any money received (refer subsection 116-20(1)).

45. Under Division 110 the cost base or reduced cost base of the units includes the subscription price paid by the unit holder.

46. 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).

47. For the purposes of Division 115 (discount capital gains) the time of acquisition of units will be the date that the units were subscribed for by the unit holder.

48. Aventis SA shares obtained by redeeming units in the Fund are acquired when they are transferred to the unit holder on or immediately after the redemption time for the purposes of Division 115 (discount capital gains).

49. If an Australian resident unit holder does not redeem units on the maturity date of 1 April 2007, the unit holder's entitlements are transferred from the Leverage Plan to the Classic Plan. This involves a transfer made on the basis of the Net Asset Value for units under the two Funds at that time. The unit holder will then receive an allocation of units in the Classic Plan in satisfaction of rights under the Leverage Plan. This is a CGT event C2 under section 104-25.

50. The capital proceeds will include the market value of the units received in the Classic Plan at the date of the transfer of the Australian resident unit holder's entitlements (refer subsection 116-20(1)). The cost base or reduced cost base in relation to this CGT event will be as indicated in paragraph 46.

51. If an Australian resident unit holder chooses to make a payment to the Fund at the maturity date to acquire shares additional to the redemption value of the unit holder's units, that payment forms the cost base or reduced cost base of those shares. The date those shares are acquired is the date of the transaction. If the unit holder subsequently sells those shares the normal CGT consequences concerning a disposal of a CGT asset apply.

## **Detailed contents list**

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

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**Commissioner of Taxation**

14 January 2004

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*Previous draft:*

Not previously released in draft form

- fringe benefit
- fringe benefits tax
- reduced cost base
- reinvested income

*Related Rulings/Determinations:*

CR 2001/1; CR 2003/53; TR 92/1;  
TR 97/16; TR 92/20; TD 2000/32

*Legislative references:**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
- Fonds Commun De Placement
- D'Enterprise

- ITAA 1936 23L
- ITAA 1936 Div 13A
- ITAA 1936 Div 13A Pt III
- ITAA 1997 Part 3-1
- ITAA 1997 104-10
- ITAA 1997 104-25
- ITAA 1997 110-25
- ITAA 1997 112-20(1)
- ITAA 1997 Div 115
- ITAA 1997 116-20(1)
- FBTAA 1986 43
- FBTAA 1986 136(1)
- Copyright Act 1968
- TAA 1953 Pt IVA

## ATO references

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