


PR 2018/1 - Income tax: tax consequences of investing in the HSBC UCITS Common Contractual Fund

 This cover sheet is provided for information only. It does not form part of *PR 2018/1 - Income tax: tax consequences of investing in the HSBC UCITS Common Contractual Fund*



Product Ruling

Income tax: tax consequences of investing in the HSBC UCITS Common Contractual Fund

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	11
Ruling	16
Scheme	17
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
Explanation	41
Appendix 2:	
Detailed contents list	82

! This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

No guarantee of commercial success

The Commissioner **does not** sanction or guarantee this product. Further, the Commissioner gives no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Potential participants must form their own view about the commercial and financial viability of the product. The Commissioner recommends a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out in the **Ruling** part of this document are available, **provided that** the scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document. If the scheme is not carried out as described, participants lose the protection of this Product Ruling.

Terms of use of this Product Ruling

This Product Ruling has been given on the basis that the entity(s) who applied for the Product Ruling, and their associates, will abide by

strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Product Ruling.

What this Ruling is about

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified in the Ruling section apply to the defined class of entities who take part in the scheme to which this Ruling relates.
2. All legislative references in this Product Ruling are to the *Income Tax Assessment Act 1936* (ITAA 1936) unless otherwise indicated. In this Product Ruling, terms defined in the documents listed at paragraph 17 have been capitalised.
3. In this Product Ruling the scheme is an investment in Units of the HSBC UCITS Common Contractual Fund (the CCF) offered under a Prospectus dated 13 October 2016 and 25 October 2017.¹
4. This Product Ruling does not address:
 - (a) the taxation consequences of any financial accommodation the Unitholder obtains to fund the purchase of their Units
 - (b) the taxation consequences of any costs or fees paid by the Unitholder in relation to their Units
 - (c) the taxation consequences arising upon the acquisition or redemption of the Unitholder's Units
 - (d) the assessability of income other than dividends and interest derived by the CCF (or a Fund)
 - (e) the assessability of income derived by the CCF (or a Fund) from a source outside of the United States of America, Japan or the Netherlands
 - (f) a Unitholder's entitlement to a tax offset under Subdivision 207-B of the *Income Tax Assessment Act 1997* (ITAA 1997) for their share of the franking credits on a franked distribution derived by and flowing from the CCF (or a Fund) in relation to equities traded on the Australian Securities Exchange
 - (g) the taxation consequences of any foreign exchange currency gains or losses arising under the scheme
 - (h) the taxation consequences arising upon the termination of the CCF or a Fund, or upon a merger involving the CCF or a Fund

¹ All references to 'Prospectus' in this Product Ruling refer to both the Prospectus dated 13 October 2016 and the Prospectus dated 25 October 2017 unless otherwise indicated.

- (i) the taxation consequences arising in relation to the ownership of units in a fund other than the CCF referred to specifically in paragraph 3 above
- (j) a Unitholder's entitlement to a foreign income tax offset under Division 770 of the ITAA 1997, and
- (k) whether this scheme constitutes a financial arrangement for the purposes of Division 230 of the ITAA 1997 (Taxation of financial arrangements).

Class of entities

5. This part of the Product Ruling specifies which entities can rely on the Ruling section of this Product Ruling and which entities cannot rely on the Ruling section. Those entities that can rely on the Ruling section are referred to in this Product Ruling as the Unitholder.

6. The class of entities that can rely on the Ruling section of this Product Ruling consists of those entities that are Australian residents for taxation purposes and are accepted to participate in the scheme described in paragraphs 17 to 40 of this Product Ruling on or after 1 July 2017 and on or before 30 June 2020.

7. The class of entities that can rely on the Ruling section of this Product Ruling does **not** include entities that:

- are non-residents for Australian taxation purposes
- are accepted to participate in the scheme described in paragraphs 17 to 40 of this Product Ruling before 1 July 2017 or after 30 June 2020, or
- participate in the scheme through offers made other than through the Prospectus, or who enter into an undisclosed arrangement with the promoter or a promoter associate, or an independent adviser that is interdependent with scheme obligations and/or scheme benefits (which may include tax benefits) in any way.

Superannuation Industry (Supervision) Act 1993

8. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA). The Commissioner gives no assurance that the scheme is an appropriate investment for a superannuation fund. The trustees of superannuation funds are advised that no consideration has been given in this Product Ruling as to whether investment in this scheme may contravene the provisions of SISA.

Qualifications

9. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 17 to 40 of this Ruling.

10. If the scheme actually carried out is materially different from the scheme that is described in this Product Ruling, then:

- this Product Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled, and
- this Product Ruling may be withdrawn or modified.

Date of effect

11. This Product Ruling applies prospectively from 1 July 2017. It therefore applies only to the specified class of entities that enter into the scheme from 1 July 2017 until 30 June 2020, being its period of application. This Product Ruling will continue to apply to those entities even after its period of application has ended for the scheme entered into during the period of application.

12. However the Product Ruling only applies to the extent that there is no change in the scheme or in the entity's involvement in the scheme.

Changes in the law

13. Although this Product Ruling deals with the income tax laws enacted at the time it was issued, later amendments may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to that extent, this Product Ruling will have no effect.

14. Entities who are considering participating in the scheme are advised to confirm with their taxation adviser that changes in the law have not affected this Product Ruling since it was issued.

Note to promoters and advisers

15. Product Rulings were introduced for the purpose of providing certainty about tax consequences for entities in schemes such as this. In keeping with that intention the Commissioner suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Product Ruling has issued.

Ruling

16. Subject to paragraph 4 of this Product Ruling and the assumptions in paragraph 40 of this Ruling:

- (a) The relationship between the Manager (or the Depositary) and the Unitholders constitutes a trust relationship for Australian income tax purposes, including Division 6.
- (b) Subsection 97(1) includes an amount in the assessable income of the Unitholders, equal to so much of that share of the net income of the trust estate to which the Unitholders (as beneficiaries) are presently entitled.
- (c) The CCF is a 'fiscally transparent entity' and any dividend and/or interest income derived by the CCF (or a Fund) will be beneficially owned or entitled (as applicable) by the Unitholder pursuant to Article 10 (in respect of dividends), and/or Article 11 (in respect of interest) of
 - the Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, with Protocol (referred to in this Product Ruling as the US DTA), to the extent the dividend and/or interest is derived from a source in the United States of America and the limitation on benefits in Article 16 of the US DTA do not apply in respect of the Unitholder
 - the Convention between Australia and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (referred to in this Product Ruling as the Japan DTA), to the extent the dividend and/or interest is derived from a source in Japan and the limitation on benefits in Article 23 of the Japan DTA do not apply in respect of the Unitholder, and
 - the Agreement between Australia and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, with Protocol (referred to in this Product Ruling as the Netherlands DTA), to the extent the dividend and/or interest is derived from a source in the Netherlands.

- (d) Provided the scheme ruled on is entered into and carried out as described in this Product Ruling, the anti-avoidance provisions in Part IVA will not apply to the Unitholder.

Scheme

17. The scheme that is the subject of this Product Ruling is identified and described in the following documents:

- application for a Product Ruling as constituted by documents and information received on 12 August 2016, 14 October 2016, 24 October 2016, 22 December 2016, 17 March 2017, 23 March 2017, 28 April 2017 and 11 January 2018
- HSBC UCITS Common Contractual Fund Prospectus dated 13 October 2016
- HSBC UCITS Common Contractual Fund Prospectus dated 25 October 2017
- Deed of Constitution constituting the HSBC UCITS Common Contractual Fund, as amended and consolidated on 13 October 2016 (Deed)
- UCITS Depositary Agreement CCF dated 13 October 2016 (Depositary Agreement), and
- Investment Management Agreement dated 24 January 2014.

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

18. All Australian Securities and Investments Commission (ASIC) requirements are, or will be, complied with for the term of the agreements.

19. For the purposes of describing the scheme to which this Product Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Unitholder, or any associate of a Unitholder, will be a party to, which are a part of the scheme.

Overview of the CCF

20. The CCF is a collective investment vehicle established in Ireland in accordance with the *Investment Funds, Companies and Miscellaneous Provisions Act 2005*.

21. The CCF is constituted under contract law by means of the Deed entered into by Carne Global Fund Managers (Ireland) Limited (the Manager) and the Depositary, as an open-ended umbrella Common Contractual Fund authorised pursuant to the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, 2011 (as amended from time-to-time) by the Central Bank of Ireland (Central Bank).
22. Under Irish law, a Common Contractual Fund is not an incorporated entity and does not have a separate legal personality.
23. The sole object of the CCF is the collective investment in Transferable Securities and/or other liquid financial assets, globally, using capital raised from registered holders of Units in the CCF (the Unitholders), each being an entity other than a natural person. The Deed is binding on all Unitholders.
24. The Manager has primary responsibility for the management and administration of the CCF while the Depositary, appointed on the terms of the Depositary Agreement, has responsibility for the safekeeping of the Assets of the CCF and the settlement of trades (clauses 2 and 24 of the Deed).
25. Pursuant to the Investment Management Agreement the Manager has delegated the authority to contract for the CCF in relation to investment activities to the Investment Manager.
26. Clause 3.4 of the Deed states:
- Each Unit represents an undivided co-ownership interest of a Unitholder with the other Unitholders in the Assets of the Fund. Units in the CCF are not shares but serve to determine the proportion of the underlying Assets of the CCF to which each Unitholder is beneficially entitled.
27. Further, regarding the income of the CCF, clause 3.4 of the Deed goes on to state:
- Unitholders are absolutely entitled to the income of the Funds as it arises whether or not a Gross Income Payment is made. No Unit shall confer any specific interest or share in any particular part of the Assets of the Fund.
28. Clause 2.1.1 of the Deed similarly provides that the income and gains of the CCF and each Fund derived from its underlying investments shall be treated as arising to each Unitholder in proportion to the value of the Units beneficially owned by each Unitholder as if the income and gains had not passed through the CCF or the relevant Fund.

29. Under the Deed, the Manager has the absolute discretion (with prior notification and clearance from the Central Bank) to create sub-funds of the CCF (Funds) and may issue different Classes of Units in relation to the Fund (clause 2.1.2 of the Deed). Any Asset which the Manager does not think is attributable to a particular Fund(s) will be allocated by the Manager on a pro rata basis amongst the Fund(s) and the Manager has the absolute discretion to determine the basis of allocation between Funds (subclause 2.5.1(4) of the Deed).

30. The Assets of each Fund shall belong exclusively to that Fund, and shall be recorded in the books and records maintained for that Fund as being held by that Fund and separately from Assets of other Funds (section 11.2 of the Prospectus).

31. The Manager is required to manage and administer the Assets of each Fund solely and exclusively in the interests of Unitholders in accordance with the provisions of the Deed and the Prospectus (and any Supplement to the Prospectus) (clause 2.3 of the Deed).

32. The liability of each Unitholder in respect of the CCF is limited to the amount subscribed for Units (clause 3.5 of the Deed). Further, there is segregated liability between the Funds and, accordingly, any liability incurred on behalf of or attributable to any particular Fund can be discharged solely out of the Assets of that Fund (subclause 2.5.1(2) of the Deed).

33. Gross Income means all dividends, interest income and all other income earned by a Fund to which each Unitholder is beneficially entitled as these items of income arise (clause 1.1 of the Deed).

34. The Manager is required to pay the Gross Income of a Fund to Unitholders on at least a yearly basis. Gross Income may only be paid out of funds available for the purpose which may be lawfully paid and they may be adjusted as the Manager deems appropriate, including deduction of such amount as the Manager may certify necessary in respect of any expenses, remuneration or other payments, including fees and expenses payable to the Manager, Depositary, Administrator and/or Investment Manager (clause 14.1 of the Deed).

35. The Manager is entitled to receive an annual fee for its services, paid from the Assets of each Fund (clause 19.1 of the Deed).

36. The Manager, Depositary, Administrator and Investment Manager are entitled to be reimbursed out of the Assets of the relevant Fund any expenses reasonably incurred in the performance of their respective duties, including in the case of the Manager, Administration Expenses (clause 19.1 of the Deed). Administration Expenses include all costs, charges and expenses the Manager incurs in litigation on behalf of the CCF or any of its Funds, or in

connection with the establishment of or ongoing administration of the CCF or any of its Funds (clause 1.1 of the Deed).

37. The Manager may at its discretion elect to pay the Administration Expenses out of its own remuneration (clause 19.1 of the Deed).

38. Among other things, the Deed also provides that the Manager has the power to, or must:

- differentiate between Classes (for example, level of management fees, redemption charges, return of capital, use of derivatives etc.) (clause 2.1.3 of the Deed)
- close any Fund or Class of Units (upon notice to the Central Bank) (clause 2.1.3 of the Deed)
- pay fees out of the income of the Fund (clause 3.16 of the Deed)
- borrow monies (clause 5 of the Deed) and deal with the Assets of the Funds as long as it is in the best interests of the Unitholders collectively (clause 6.1 of the Deed)
- maintain, keep and control a Register (clause 7 of the Deed)
- determine the Net Asset Value of each Fund (clause 9 of the Deed)
- impose minimum redemption amounts in relation to a particular Fund and refuse to redeem Units in certain situations (clause 12 of the Deed)
- redeem Original Units and issue New Units at its absolute discretion (clause 13 of the Deed)
- prepare annual reports (clause 15 of the Deed)
- be indemnified for losses, damages etc. unless they resulted from the Manager's negligence, fraud or wilful default or failure (clause 16 of the Deed), and
- resolve to redeem/cancel Units and use proceeds (less costs) to invest in another CCF (clause 18 of the Deed).

39. The duties and obligations of the Depositary are set out in clause 24 of the Deed and clauses 3 to 8 of the Depositary Agreement. Clause 3.3 of the Depositary Agreement states '[t]he Investments shall at all times belong exclusively to the relevant Sub-Fund.'

Assumptions

40. This Product Ruling is made on the basis of the following necessary assumptions:

- (a) the Unitholder is an Australian resident for taxation purposes
- (b) where there is Gross Income of a Fund in a Gross Income Period, the Manager shall make a Gross Income Payment (reduced for expenses and disbursements) to the relevant Unitholders, as declared at or before the end of the Gross Income Period
- (c) the CCF is a widely-held collective investment vehicle
- (d) Unitholders are 'persons' for the purposes of the US, Japan and Netherlands DTA
- (e) the scheme will be executed in the manner described in the Scheme section of this Product Ruling and the scheme documentation referred to in paragraph 17 of this Ruling, and
- (f) all dealings by the Unitholder, the CCF, the Manager, the Depositary, the Administrator and the Investment Manager under the scheme will be at arm's length.

Commissioner of Taxation

14 February 2018

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

The CCF constitutes a trust

41. The term 'trust' is not defined in the ITAA 1936 or ITAA 1997. Whether or not a trust exists depends on the circumstances of each case: see *Tito & Ors v. Waddell & Ors (No 2)* [1977] Ch 106 at 211 per Megarry V/C. Broadly speaking, a trust will exist where a person holds property or rights on behalf of another for a particular purpose. However, whether this creates a trust relationship depends on the intention of the parties, the factual setting and the wording of the particular documents.

42. French J in *Harmer & Ors v. Federal Commissioner of Taxation* 89 ATC 5180; (1989) 20 ATR 1461 stated at 89 ATC 5187 that there were four essential elements of a trust being:

- the trustee who holds a legal or equitable interest in the trust property
- the trust property which must be property capable of being held on trust and which includes a chose in action
- one or more beneficiaries other than the trustee, and
- a personal obligation on the trustee to deal with the trust property for the benefit of the beneficiaries, which obligation is also annexed to personal property.

43. Having regard to the documents listed in paragraph 17 of this Product Ruling, it is considered that all elements of a trust are present so as to give rise to a trust relationship between the Manager (or the Depositary) and the Unitholders in the CCF. This is because:

- the Depositary, and in some cases the Manager, each acting in the capacity of trustee (as defined in subsection 6(1)), hold legal title to the Assets of each Fund
- the Assets of the CCF, being the trust property, are capable of being held on trust
- the Depositary and the Manager hold these Assets, and have a legal obligation to deal with these Assets on behalf of, in the best interest and for the benefit of, the Unitholders of each Fund (as evidenced from clauses 2.3 and 6.1 of the Deed), and
- the Unitholders of the CCF (as beneficiaries of a trust estate) are absolutely entitled to the income from the Assets (less any expenses).

44. Therefore, the Unitholders of the CCF, as beneficiaries of a trust estate, are taxable on their share of the net income of the trust where the requirements of subsection 97(1) are met.

45. While the CCF is akin to a unit trust, the Deed gives the Manager full discretionary powers to make investments and distribute net income. The entitlement of the Unitholders (as beneficiaries) to income of the trust is not immediately ascertainable due to the clauses that enable the Manager to reduce Gross Income by fees and expenses incurred (see, for example, subclause 14.1(g)). This means that the CCF is both a unit trust and discretionary trust: see *Federal Commissioner of Taxation v. Vegners* (1989) 90 ALR 547 at 551-2.

What is the nature of the income received by the Unitholders?

46. As the relationship between the Manager (and the Depositary) and the Unitholders of the CCF constitutes a trust for Australian tax purposes, any dividend or interest income received by the Depositary or Manager (as trustee) is income of a trust estate for the purposes of subsection 128A(3) and, for the purposes of Division 11A, the Unitholders are deemed to have derived that income if they are presently entitled to it.

47. As a Unitholder's Unit holding in the CCF does not confer any specific interest or share in any particular part of the Assets of a Fund or a right to require the transfer of any Assets of a Fund, and as the Depositary and Manager have full discretionary powers to make Investments (as long as it is in the best interests of the Unitholders) and calculate the amount of Gross Income a Unitholder is entitled to be paid, the Unitholders do not have any proprietary interest in the underlying trust property: see *CPT Custodian Pty Ltd v. Commissioner of State Revenue* 2005 ATC 4925.

48. The Deed provides for expenses of the Manager (and other entities) to reduce the Gross Income of a Fund. When a Unitholder's entitlement to Gross Income of a Fund depends on a product of a calculation, the amounts received by the Unitholders from the trustee loses its connection to what was received by the trustee. What they are entitled to is the product from that calculation. Therefore, and subject to any specific statutory rules that lead to a different result, the distributions Unitholders receive do not retain the character of the income received by the CCF or Fund, and will constitute trust income: see the Decision Impact Statement on *Greenhatch v. Commissioner of Taxation* [2012] FCAFC 84 (*Greenhatch*) where the Commissioner noted:

...absent any specific rules elsewhere in the Tax Acts, the proportionate share of the net income of a trust that is included in the assessable income of a beneficiary under section 97 of the ITAA 1936 has no character beyond that inherent in the share of the net income as being a proportionate share of all of the net income. Absent specific statutory rules that lead to a different result (such as

can now be found in Subdivision 115-C of the ITAA 1997), the character for trust law purposes of the income to which the beneficiary was made presently entitled does not inform the character of the share of the net income assessed to the beneficiary under section 97 of the ITAA 1936 for tax law purposes. Therefore streaming of amounts for trust law purposes by reference to the character of those amounts will only be effective for tax law purposes where that result is facilitated by specific statutory rules.

Are the Unitholders presently entitled to the income of a Fund as it arises?

49. The meaning of 'presently entitled' has been considered by the High Court in *Federal Commissioner of Taxation v. Whiting* (1943) 68 CLR 190 where Latham CJ and Williams J stated at 215-6:

The words 'presently entitled to a share of the income' refer to a right to income 'presently' existing-i.e., a right of such a kind that a beneficiary may demand payment of the income from the trustee, or that, within the meaning of s.19 of the Act, the trustee may properly reinvest, accumulate, capitalize, carry to any reserve, sinking fund or insurance fund however designated or otherwise deal with it as he directs or on his behalf.

The Unitholders have no right under the Deed to demand immediate payment of amounts of Gross Income to which they are entitled. Their interests may be defeated by the Depositary or Manager in respect of fees or expenses incurred. It is only after the Manager has determined a Unitholder's entitlement to the Gross Income that the Unitholder is presently entitled to the income of the trust (whether or not it has been paid). This is because it is only after the Manager has done this calculation and applied their 'discretion' in respect of Units in a Fund or Class that it is clear what a Unitholder's entitlement to the income of the trust is. It is at that time that they have an absolutely vested and indefeasible interest in the income of the trust estate.

Is the CCF a fiscally transparent entity under Article 10 and/or Article 11 of the US DTA?

50. In order for the US DTA to apply, paragraph (1) of Article 1 of the US DTA provides:

Except as otherwise provided in this Convention, this Convention shall apply to persons who are residents of one or both of the Contracting States.

The Unitholders must therefore be considered both a 'person' and a 'resident' of Australia and/or the United States of America for the US DTA to apply.

Person

51. Subparagraph (1)(a) of Article 3 of the US DTA defines the term person to include an individual, an estate of a deceased individual, a trust, a partnership, a company and any other body of persons.

Residence

52. Paragraph (1) of Article 4 of the US DTA states for the purposes of the US DTA, a person is a resident of Australia if the person is:

- (i) an Australian corporation; or
- (ii) any other person (except a company as defined under the law of Australia relating to Australian tax) who, under that law, is a resident of Australia,

provided that, in relation to any income, a person who:

- (iii) is subject to Australian tax on income which is from sources in Australia; or
- (iv) is a partnership, an estate of a deceased individual or a trust (other than a trust that is a provident, benefit, superannuation or retirement fund, or that is established for public charitable purposes or for the purpose of enabling scientific research to be conducted by or in conjunction with a public university or public hospital, the income of which is exempt from tax under the law of Australia relating to Australian tax),

shall not be treated as a resident of Australia except to the extent that the income is subject to Australian tax as the income of a resident, either in the hands of that person or in the hands of a partner or beneficiary, or, if that income is exempt from Australian tax, is so exempt solely because it is subject to United States tax; and ...

Beneficially entitled

53. Pursuant to Article 10 of the US DTA, an amount of dividends to which an Australian resident is 'beneficially entitled' comes within the scope of Article 10 where the dividends are paid by a company resident in the United States of America. Similarly, pursuant to Article 11 of the US DTA, an amount of interest to which an Australian resident is 'beneficially entitled' comes within the scope of Article 11 where the interest arises in the United States of America. Accordingly, it is necessary to determine whether the Unitholders are beneficially entitled to amounts of dividends and/or interest derived from a source in the United States of America.

54. The term 'beneficially entitled', as utilised in Articles 10 and 11 of the US DTA, is not defined under the US DTA. In this regard, paragraph (2) of Article 3 of the US DTA provides the following:

As regards the application of this Convention by one of the Contracting States, any term not defined herein shall, unless the context otherwise requires, have the meaning which it has under the laws of that State relating to the taxes to which this Convention applies.

55. As such, the definition of the term 'beneficially entitled' in relation to any dividends and interest derived from a source in the United States of America shall be guided by the context of its use in the US DTA or, without such context, by the laws of Australia for the purposes of taxation. This approach is in keeping with the OECD Commentary on Model Tax Convention on Income and on Capital 2014 (OECD Commentary) which states at paragraph 12 of C(10) that the term 'beneficial owner', as referred to in Article 10 of the OECD Model Tax Convention on Income and on Capital 2014:

is not used in a narrow technical sense, rather, it should be understood in its context and in light of the object and purposes of the Convention, including double taxation and the prevention of fiscal evasion and avoidance.

56. Taxation Ruling TR 2001/13 *Income tax: Interpreting Australia's Double Tax Agreements* provides guidance on the Commissioner's interpretation of Australia's double tax agreements. Importantly OECD Model Tax Convention & Commentaries on the meaning of tax treaties are also relevant to fully understand double tax agreements.

57. Paragraph 49 of TR 2001/13 provides that '[d]iffering wording in two DTAs may represent the same intended meaning (such as, in the ATO's view, the terms 'beneficial entitlement' in the *Dividends, Interest and Royalties* Articles of some DTAs and 'beneficial ownership' in the corresponding Articles in other DTAs).'

58. In the context of collective investment vehicles, a question that arises in a cross-border context is whether the collective investment vehicle (CIV) in itself is a 'person' that is a 'resident' and 'beneficial owner' of (or 'beneficially entitled' to) income received for the purposes of Articles 10 and 11 (OECD Commentary, C(1) – paragraph 6.9).

59. Whereas the treatment of a CIV (including trusts) as a 'person' should begin with its legal form, a consistent goal of domestic CIV regimes is to ensure that there is only one level of tax, either at the vehicle level or investor level. Where holders of interests in CIVs are liable to tax on income received by the CIV rather than the CIV itself, such fiscally transparent CIVs would not be treated as a resident of the Contracting State in which it is established because it is not liable to tax therein.

60. Absent any specific statutory rules elsewhere in the Tax Acts, the proportionate share of the net income of a trust that is included in the assessable income of a beneficiary has no character beyond that inherent in the share of the net income as being a proportionate share of all of the net income: see *Greenhatch*. Section 6B is an example of a specific provision that applies to the Unitholders in respect to distributions that are attributable to dividend or interest income. Subsections 6B(1) and 6B(2) deem an amount of income to be derived by a person as a beneficiary in a trust to be income attributable to dividend or interest income if the amounts can be attributed directly or indirectly to the dividend or interest income. Subsection 6B(2A) deems an amount of income to be derived from a particular source if it is attributable by virtue of subsection 6B(1) or 6B(2) to dividend or interest income derived from that source. In this instance it is United States of America.

61. Section 6B therefore applies to Unitholders to deem a distribution received from the CCF that is attributable directly or indirectly to dividend or interest income to be income that is attributable to dividends or interest income with a source in the United States of America.

62. As:

- the CCF is not liable for tax in Ireland unless the income is sourced in Ireland
- the CCF is a trust for Australian income tax purposes
- the Unitholders are persons in their own right and Australian residents
- distributions made up of dividend and interest income are deemed to be income received by the Unitholders attributable to dividend and interest income from a source in the United States of America, and
- once the Unitholders are presently entitled to dividend and interest income received by the Depositary or Manager (and included in the income of the trust estate), it is the Unitholders that have ultimately derived, and are beneficially entitled to, that income,

the CCF is a fiscally transparent entity, and the Unitholder is the relevant person for the purposes of Articles 10 and 11 of the US DTA.

63. To the extent the Unitholder is a 'qualified person' or meets the other conditions in Article 16 of the US DTA, there will not be any limitation of benefits from the US DTA.

Is the CCF a fiscally transparent entity under Article 10 and/or Article 11 of the Japan DTA?

64. In order for the Japan DTA to apply, Article 1 of the Japan DTA provides:

This Convention shall apply to persons who are residents of one or both of the Contracting States.

The Unitholders must therefore be considered both a 'person' and a 'resident' of Australia and/or Japan for the Japan DTA to apply.

Person

65. Subparagraph (1)(e) of Article 3 of the Japan DTA defines the term 'person' to include an individual, a company and any other body of persons.

Resident

66. Subparagraph (1)(b) of Article 4 of the Japan DTA states for the purposes of the Japan DTA, a person is a resident of Australia if the person is:

... a resident of Australia for the purposes of Australian tax.

67. Subparagraph (5)(c) of Article 4 of the Japan DTA further provides that for the purposes of the Japan DTA:

an item of income, profits or gains:

- (i) derived from a Contracting State through an entity that is organised in a state other than the Contracting States; and
- (ii) treated as the income, profits or gains of the beneficiaries, members or participants of that entity under the tax law of the other Contracting State,

shall be eligible for the benefits of the Convention that would be granted if it were directly derived by a beneficiary, member or participant of that entity who is a resident of that other Contracting State, to the extent that such beneficiaries, members or participants are residents of that other Contracting State and satisfy any other conditions specified in the Convention, without regard to whether the income, profits or gains are treated as the income, profits or gains of such beneficiaries, members or participants under the tax law of the first-mentioned Contracting State or such state.

Beneficiary and beneficial owner

68. Pursuant to Article 10 of the Japan DTA, an amount of dividends 'beneficially owned' by an Australian resident comes within the scope of Article 10 where the dividends are paid by a company resident in Japan. Similarly, pursuant to Article 11 of the Japan DTA, an amount of interest 'beneficially owned' by an Australian resident comes within the scope of Article 11 where the interest arises in Japan. Accordingly, it is necessary to determine whether the Unitholders beneficially own amounts of dividends and/or interest derived from a source in Japan.

69. The terms 'beneficiary' and 'beneficially owned', as utilised in Articles 4, 10 and 11 of the Japan DTA, are not defined under the Japan DTA. In this regard, paragraph (2) of Article 3 of the Japan DTA provides the following:

As regards the application of this Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that Contracting State concerning the taxes to which the Convention applies, any meaning under the applicable tax law of that Contracting State prevailing over a meaning given to the term under other law of that Contracting State.

70. As such, the definition of the term 'beneficiary' and 'beneficially owned' in relation to any dividends and interest derived from a Japanese source shall be guided by the context of its use in the Japan DTA or, without such context, by the laws of Australia for the purposes of taxation.

71. Per paragraph 58 of this Product Ruling, although the Japan DTA uses the term 'beneficially owned' rather than 'beneficial entitlement', the concepts are regarded as analogous.

72. With reference to paragraphs 59 to 62 of this Product Ruling, as:

- the CCF is not liable for tax in Ireland unless the income is sourced in Ireland
- the CCF is a trust for Australian income tax purposes
- the Unitholders are persons in their own right and Australian residents
- distributions made up of dividend and interest income are deemed to be income received by the Unitholders attributable to dividend and interest income from a source in Japan, and
- once the Unitholders are presently entitled to dividend and interest income received by the Depositary or Manager (and included in the income of the trust estate), it is the Unitholders that have ultimately derived, and beneficially own, that income,

the CCF is a fiscally transparent entity, and the Unitholder is the relevant person for the purposes of Articles 10 and 11 of the Japan DTA.

73. To the extent the Unitholder is a 'qualified person' or meets the other conditions in Article 23 of the Japan DTA, there will not be any limitation of benefits from the Japan DTA.

Is the CCF a fiscally transparent entity under Article 10 and/or Article 11 of the Netherlands DTA?

74. In order for the Netherlands DTA to apply, Article 1 of the Netherlands DTA provides:

This Agreement shall apply to persons who are residents of one or both of the States.

The Unitholders must therefore be considered both a 'person' and a 'resident' of Australia and/or the Netherlands for the Netherlands DTA to apply.

Person

75. Subparagraph (1)(d) of Article 3 of the Netherlands DTA defines the term 'person' to mean an individual, a company and any other body of persons.

Residence

76. Article 4 of the Netherlands DTA states for the purposes of the Netherlands DTA, a person is a resident of Australia if the person is a resident of Australia for the purposes of Australian tax, subject to the following:

In relation to income from sources in the Netherlands, a person who is subject to Australian tax on income which is from sources in Australia shall not be treated as a resident of Australia unless the income from sources in the Netherlands is subject to Australian tax or, if that income is exempt from Australian tax, it is so exempt solely because it is subject to Netherlands tax.

Beneficially entitled

77. Pursuant to Article 10 of the Netherlands DTA, an amount of dividends to which an Australian resident is 'beneficially entitled' comes within the scope of Article 10 where the dividends are paid by a company resident in the Netherlands. Similarly, pursuant to Article 11 of the Netherlands DTA, an amount of interest to which an Australian resident is 'beneficially entitled' comes within the scope of Article 11 where the interest arises in the Netherlands. Accordingly, it is necessary to determine whether the Unitholders are beneficially entitled to amounts of dividends and/or interest derived from a source in the Netherlands.

78. The term 'beneficially entitled', as utilised in Articles 10 and 11 of the Netherlands DTA, is not defined under the Netherlands DTA. In this regard, paragraph (3) of Article 3 of the Netherlands DTA provides the following:

As regards the application of this Agreement by either of the States, any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that State relating to the taxes to which this Agreement applies.

79. As such, the definition of the term 'beneficially entitled' in relation to any dividends and interest derived from a source in the Netherlands shall be guided by the context of its use in the Netherlands DTA or, without such context, by the laws of Australia for the purposes of taxation.

80. With reference to paragraphs 59 to 62 of this Product Ruling, as:

- the CCF is not liable for tax in Ireland unless the income is sourced in Ireland
- the CCF is a trust for Australian income tax purposes
- the Unitholders are persons in their own right and Australian residents
- distributions made up of dividend and interest income are deemed to be income received by the Unitholders attributable to dividend and interest income from a source in the Netherlands, and
- once the Unitholders are presently entitled to dividend and interest income received by the Depositary or Manager (and included in the income of the trust estate), it is the Unitholders that have ultimately derived, and are beneficially entitled to, that income,

the CCF is a fiscally transparent entity, and the Unitholder is the relevant person for the purposes of Articles 10 and 11 of the Netherlands DTA.

Part IVA – anti-avoidance

81. Provided that the scheme ruled on is entered into and carried out as described in this Product Ruling, it is accepted that the scheme is an ordinary commercial transaction and Part IVA will not apply.

Appendix 2 – Detailed contents list

82. The following is a detailed contents list for this Ruling:

	Paragraph
What this Ruling is about	1
Class of entities	5
<i>Superannuation Industry (Supervision) Act 1993</i>	8
Qualifications	9
Date of effect	11
Changes in the law	13
Note to promoters and advisers	15
Ruling	16
Scheme	17
Overview of the CCF	20
Assumptions	40
Appendix 1 – Explanation	41
The CCF constitutes a trust	41
What is the nature of the income received by the Unitholders?	46
<i>Are the Unitholders entitled to the Income of a Fund as it arises?</i>	49
Is the CCF a fiscally transparent entity under Article 10 and/or Article 11 of the US DTA?	50
<i>Person</i>	51
<i>Residence</i>	52
<i>Beneficially entitled</i>	53
Is the CCF a fiscally transparent entity under Article 10 and/or Article 11 of the Japan DTA?	64
<i>Person</i>	65
<i>Resident</i>	66
<i>Beneficiary and beneficial owner</i>	67
Is the CCF a fiscally transparent entity under Article 10 and/or Article 11 of the Netherlands DTA?	74
<i>Person</i>	75
<i>Residence</i>	76
<i>Beneficially entitled</i>	77
Part IVA – anti-avoidance	81
Appendix 2 – Detailed contents list	82

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2001/13

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 6B
- ITAA 1936 6B(1)
- ITAA 1936 6B(2)
- ITAA 1936 6B(2A)
- ITAA 1936 Div 6
- ITAA 1936 97
- ITAA 1936 97(1)
- ITAA 1936 Div 11A
- ITAA 1936 128A(3)
- ITAA 1936 Pt IVA
- ITAA 1997
- ITAA 1997 Subdiv 115-C
- ITAA 1997 Subdiv 207-B
- ITAA 1997 Div 230
- ITAA 1997 Div 770
- SISA 1993
- TAA 1953
- Investment Funds, Companies and Miscellaneous Provisions Act 2005

Case references:

- *CPT Custodian Pty Ltd v. Commissioner of State Revenue* [2005] HCA 53
- *Federal Commissioner of Taxation v. Vegners* (1989) 90 ALR 547
- *Federal Commissioner of Taxation v. Whiting* (1943) 68 CLR 190
- *Greenhatch v. C of T* [2012] FCAFC 84
- *Harmer & Ors v. Federal Commissioner of Taxation* (1989) 89 ATC 5180
- *Tito & Ors v. Waddell & Ors* (No 2) [1977] Ch 106

Other references:

- OECD Model Tax Convention & Commentaries
- OECD Commentary on Model Tax Convention on Income and on Capital 2014
- OECD Model Tax Convention on Income and on Capital 2014

ATO references

NO: 1-98VSQAX

ISSN: 2205-6114

BSL: PGH

ATOlaw topic: Income tax ~~ Financial arrangements ~~ Other

Income tax ~~ Trusts ~~ Other

International issues ~~ Double tax agreements ~~ Other

**© AUSTRALIAN TAXATION OFFICE FOR THE
COMMONWEALTH OF AUSTRALIA**

You are free to copy, adapt, modify, transmit and distribute this material as you wish (but not in any way that suggests the ATO or the Commonwealth endorses you or any of your services or products).