


PR 2021/6 - Income tax: tax consequences of investing in the Aberdeen Standard Authorised Contractual Scheme I

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Product Ruling

Income tax: tax consequences of investing in the Aberdeen Standard Authorised Contractual Scheme I

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❶ Relying on this Ruling

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

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

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) that 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 that participates 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 16 have been capitalised.

3. In this Product Ruling the scheme is an investment in Units of the Aberdeen Standard Authorised Contractual Scheme I (the ACS) offered under a Prospectus issued by Aberdeen Standard Fund Managers Limited (ACS Manager) on 23 October 2020.

4. This Product Ruling does not address:

- the taxation consequences of any financial accommodation the Unitholder obtains to fund the purchase of their Units
- the taxation consequences of any costs or fees paid by the Unitholder in relation to their Units
- the taxation consequences arising upon the acquisition, switch, conversion or redemption of the Unitholder's Units
- the assessability of income derived by the ACS (or a Sub-fund) from a source outside of Australia
- the taxation consequences of any foreign exchange currency gains or losses arising under the scheme
- the taxation consequences arising upon the termination of the ACS or a Sub-fund
- a Unitholder's entitlement to a foreign income tax offset under Division 770 of the *Income Tax Assessment Act 1997* (ITAA 1997), and
- 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:

- a 'superannuation fund for foreign residents', as defined under section 118-520 of the ITAA 1997, and

- accepted to participate in the scheme described in paragraphs 16 to 34 of this Product Ruling on or after 23 October 2020 and on or before 30 June 2023.

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

- are not a 'superannuation fund for foreign residents'
- are accepted to participate in the scheme described in paragraphs 16 to 34 of this Product Ruling before 23 October 2020 or after 30 June 2023, or
- participate in the scheme through offers made other than through the Prospectus, or that 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.

Qualifications

8. 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 16 to 34 of this Product Ruling.

9. 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
- may be withdrawn or modified.

Date of effect

10. This Product Ruling applies from 23 October 2020. It therefore applies only to the specified class of entities that enter into the scheme from 23 October 2020 until 30 June 2023, 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.

11. 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

12. 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.

13. Entities that 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

14. 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

15. Subject to paragraph 4 of this Product Ruling and the assumptions in paragraph 355 of this Product Ruling:

- (a) The relationship between the ACS Manager (and/or Northern Trust Global Services SE (the Depositary)) and the Unitholders constitutes a trust relationship for Australian income tax purposes, including Division 6.
- (b) Subparagraph 97(1)(a)(ii) 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 as is attributable to sources in Australia to which the Unitholders (as beneficiaries) are presently entitled.
- (c) Interest derived by the ACS and to which subsection 128B(2) applies, and unfranked dividends derived by the ACS and to which subsection 128B(1) applies, will be exempt from Australian withholding tax pursuant to paragraph 128B(3)(b).
- (d) Amounts referred to in paragraph 15(c) of this Product Ruling will constitute income that is not assessable income and is not exempt income of the Unitholders pursuant to section 128D.
- (e) 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 Unitholders.

Scheme

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

- application for a Product Ruling as constituted by documents and information received on 22 February 2021 and 17 March 2021
- the ACS Prospectus dated 23 October 2020 (Prospectus)
- Co-Ownership Deed in respect of the Aberdeen Standard Authorised Contractual Scheme dated 20 October 2020 (Deed)
- Depositary Agreement between ACS Manager and Northern Trust Global Services SE dated 10 November 2020 (Depositary Agreement), and
- Investment Management Agreement in respect of Aberdeen Standard ACS I between ACS Manager and Aberdeen Asset Managers Limited dated 10 November 2020.

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

17. 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.

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

Overview of the Authorised Contractual Scheme

19. The ACS is an authorised contractual scheme in umbrella form authorised by the Financial Conduct Authority under section 261D of the *Financial Services and Markets Act 2000*. The ACS is constituted by the Deed entered into by the ACS Manager and the Depositary which was made under and is governed by the laws of England and Wales.

20. The ACS is not established as an incorporated entity, but is a contractual arrangement for the unincorporated co-ownership of assets referred to in paragraph 21 of this Product Ruling, as permitted by the laws of England and Wales. As such, the ACS does not have a separate legal personality and is represented by the ACS Manager.

21. The object of the ACS is the collective investment in transferable securities, money market instruments, derivatives, debt instruments including debentures, government and other public securities, warrants, certificates representing certain securities, options, futures, contracts for differences and forward transactions, commodity contracts, deposits, cash, near cash, gold, units or shares in collective investment schemes, immovable property and any rights or interests in any of these investments, using capital raised from registered holders of Units in the ACS (the Unitholders), each being an investor which meets the eligibility criteria in the Prospectus (an Eligible Investor).

22. The Unitholders are co-investors in a co-ownership scheme. They are not carrying on business in common.

23. The ACS comprises of separately identifiable pools of funds by reference to which Units are issued (the Sub-funds). Each Sub-fund represents a portfolio of assets which is invested in accordance with the investment objectives and policies of the governing agreements on behalf, and for the exclusive benefit, of the Unitholders as co-owners of the relevant Sub-fund's assets.

24. The ACS Manager is authorised and regulated by the Financial Conduct Authority and has such permissions as are necessary to act as a manager to an authorised contractual scheme. The ACS Manager has primary responsibility for the management and administration of the ACS. The ACS Manager is also responsible for portfolio and risk management of the ACS. Additionally, under the Deed, the Unitholders authorise the ACS Manager to:

- acquire, manage and dispose of the assets which are subject to the ACS from time to time
- enter into contracts which are binding on the Unitholders for the purposes of, or in connection with, the acquisition, management and/or disposal of any property which is subject to the ACS from time to time, and
- keep books in which all transactions relating to the relevant Sub-fund are separately recorded and the assets and the liabilities, income and expenditure attributable to that Sub-fund are applied or charged to such Sub-fund.

25. The Depositary, appointed on the terms of the Depositary Agreement, is responsible for the safe keeping of the assets (subject to any exception permitted by the Financial Conduct Authority Handbook). The assets of each Sub-fund (except for sums standing to the credit of its distribution account) are held by the Depositary for, on behalf and in the interests of, its Unitholders in accordance with the regulations governing the ACS and the number of Units held by the Unitholders. Accordingly, legal title to the assets of the ACS is held by the Depositary.

26. The Deed declares that the assets of each Sub-fund:

- except for sums standing to the credit of its distribution account, are beneficially owned by the Unitholders in that Sub-fund as tenants in common
- belong exclusively to that Sub-fund
- shall be segregated from the assets of other Sub-funds, and
- must not be used to discharge any liabilities of, or meet any claims against, any person other than the Unitholders in that Sub-fund.

27. Each Sub-fund will be charged with the liabilities, expenses, costs and charges of the ACS attributable to that Sub-fund. Any assets, liabilities, expenses, costs or charges not attributable to one Sub-fund alone may be allocated by the ACS Manager between Sub-funds in accordance with the Regulations in a manner which the ACS Manager considers is fair to the Unitholders.

28. The debts of each Sub-fund are to be paid by the ACS Manager out of the assets of that Sub-fund. Unitholders are not liable for the debts of the Sub-fund in which they have invested.

29. Unitholders are entitled to be paid the distributable income attributed to those Units, but can choose to automatically re-invest the distributable income attributed to the Units to purchase more Units of the relevant Sub-fund.

30. The ACS Manager does not intend to hold Units in the Sub-funds as a strategic business activity. It may from time to time hold Units as principal but, where it does, it does not seek to make a profit.

31. Income shall be allocated to Unitholders at such intervals as stated in the Prospectus. Allocations of income are made in respect of the income available for allocation in each accounting period. Distributions of income for each Sub-fund are paid on or before the annual income allocation date. Unitholders are entitled to the income of the Sub-fund as it arises irrespective of whether or not a distribution is made.

32. Any sums standing to the credit of each distribution amount are held by the Depositary to distribute or apply them in accordance with the Regulations.

33. Unitholders are not entitled to transfer ownership of their Units. Units may be switched, converted or redeemed in accordance with the terms set out in the Prospectus and Deed.

34. The ACS has an unlimited duration.

Assumptions

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

- (a) The Unitholders are 'superannuation funds for foreign residents' as defined in section 118-520 of the ITAA 1997, whose income is exempt from income tax in the jurisdiction where the Unitholders reside for tax purposes.
- (b) Each of the Unitholders holds a total participation interest of less than 10% in the ACS at the time the income was derived and for a continuous period of 12 months in the 24 months up to the time the income was derived.
- (c) None of the Unitholders are directly or indirectly able to determine the identity of persons who make the decisions that comprise the control and direction of the ACS's operations, nor are those persons accustomed or obliged to act, or might be reasonably expected to act, in accordance with the directions, instructions or wishes of the Unitholders.
- (d) The Unitholders are not sovereign entities to which Division 880 of the ITAA 1997 or the *Income Tax (Transitional Provisions) Act 1997* (IT(TP)A 1997) applies.
- (e) Subject to any election of the Unitholder to have their distributable income re-invested, the ACS Manager shall declare and pay income (reduced for costs, charges and expenses) on or before the income allocation date to the relevant Unitholders, as declared at or before the end of the corresponding accounting period.
- (f) 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 16 of this Ruling.
- (g) All dealings by the Unitholders, the ACS Manager, the Depositary and the Investment Manager under the scheme will be at arm's length.

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 Authorised Contractual Scheme constitutes a trust

36. 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.

37. In *Harmer, R.W. & Ors v The Commissioner of Taxation* [1989] FCA 651, French J stated 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.

38. Having regard to the documents listed in paragraph 16 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 Depositary (and/or the ACS Manager) and the Unitholders in the ACS. This is because:

- the Depositary acting in the capacity of trustee (as defined in subsection 6(1)), holds legal title to the assets of each Sub-fund (directly or through a Sub-custodian)
- the assets of the ACS (and each Sub-fund), being the trust property, are capable of being held on trust
- the Depositary holds these assets and, together with the ACS Manager, has a legal obligation to deal with these assets on behalf of, in the best interest and for the benefit of, the Unitholders of each Sub-fund, and
- the Unitholders of the ACS (as beneficiaries of a trust estate) are entitled to the income from the assets (less any costs, charges and expenses) of the relevant

Sub-fund. However no Unit confers a specific interest or share in any particular part of the assets of the relevant Sub-fund. Put another way, Unitholders of a particular Sub-fund could not resolve to cause the Sub-fund to end and have the assets of that Sub-fund transferred to them as per the rule in *Saunders v Vautier* 4 Beav 115 [49 ER 282].

39. Therefore, the Unitholders of the ACS, as non-resident beneficiaries of a trust estate, are taxable on their share of the net income of the trust as is attributable to sources in Australia where the requirements of subsection 97(1) are met.

Are the Unitholders presently entitled to the income of a Sub-fund as it arises?

40. The meaning of 'presently entitled' has been considered by the High Court in *Federal Commissioner of Taxation v Whiting* [1943] HCA 45; 68 CLR 199 where Latham CJ and Williams J stated at pages 215-216:

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.

41. The Unitholders have no right under the Deed to demand immediate payment of amounts of income to which they are entitled. Their interests may be defeated by the Depositary or ACS Manager in respect of costs, charges or expenses incurred as per the method outlined in paragraph 26 of the Deed and in Part Three of the Schedule to the Deed. It is only after the ACS Manager has determined a Unitholder's proportionate interest in the assets and income of the Sub-fund 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 ACS Manager has done this calculation in respect of Units in a Sub-fund 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.

42. The Unitholders will, at that time, be required under subparagraph 97(1)(a)(ii) to include an amount in assessable income equal to so much of that share of the net income of the trust estate of the Sub-fund as is attributable to sources in Australia to which they are presently entitled.

No liability to Australian withholding tax

43. Generally, an unfranked dividend or interest paid from Australia is subject to Australian withholding tax if it is derived by a non-resident (subsections 128B(1) and (2)).

44. For the purposes of Division 11A (of which subsections 128B(1) and (2) form part), a beneficiary who is presently entitled to a dividend or interest included in the income of a trust estate is deemed to have derived that dividend or interest at the time of present entitlement (subsection 128A(3)).

45. However, paragraph 128B(3)(b) provides an exemption from withholding tax on dividends and interest income paid by a resident company and derived by a non-resident that is a superannuation fund for foreign residents and exempt from income tax in the country in which the non-resident resides where certain requirements contained in subsection 128B(3CA) (and discussed in paragraphs 46 to 48 of this Product Ruling) are satisfied.

46. Paragraph 128B(3CA)(a) requires that the superannuation fund for foreign residents satisfies the portfolio interest test in subsection 128B(3CC) at the time the income was derived and throughout any 12 month period that began no earlier than 24 months before that time and ended no later than that time. The portfolio interest test in subsection 128B(3CC) is satisfied where the superannuation fund holds less than 10% of the total participation interests in the trust.

47. Paragraph 128B(3CA)(b) requires that the superannuation fund does not, at the time the income was derived, have influence of a kind described in subsection 128B(3CD) in relation to the trust. This comprises two tests. The first test assesses whether the superannuation fund is able to determine the identity of at least one of the persons who, individually or together with others, make (or might reasonably be expected to make) the decisions that comprise the control and direction of the trust's operations. The second test assesses whether at least one of the relevant decision makers is accustomed or obliged to act, or might reasonably be expected to act, in accordance with the directions, instructions or wishes of the superannuation fund.

48. Paragraph 128B(3CA)(c) requires that the income is not non-assessable non-exempt income of the superannuation fund pursuant to Subdivision 880-C of the ITAA 1997 or Division 880 of the IT(TP)A 1997.

49. As the relationship between the Depositary (and the ACS Manager) and the Unitholders of the ACS constitutes a trust for Australian tax purposes (per paragraph 38 of this Product Ruling), any dividend or interest income received by the Depositary (or ACS 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.

50. Any dividend and interest income paid by a company residing in Australia for tax purposes and received by the Depositary (or ACS Manager) under the ACS will, for the purposes of paragraph 128B(3)(jb), therefore be deemed to have been derived by the Unitholders, each being a non-resident that is a superannuation fund for foreign residents that satisfies the requirements contained in subsection 128B(3CA) (pursuant to the assumptions made for the purposes of this Product Ruling at paragraphs 35(b), (c) and (d) of this Product Ruling) and is exempt from income tax in the country in which it resides (as assumed for the purposes of this Product Ruling at paragraph 35(a) of this Ruling).

51. For the reasons stated in paragraph 50 of this Product Ruling, interest and dividend income paid by a company residing in Australia for tax purposes to the ACS is income to which paragraph 128B(3)(jb) applies and excluded from being income that is otherwise subject to withholding tax under Division 11A.

52. Income upon which withholding tax would, but for paragraph 128B(3)(jb), be payable, is not assessable income and is not exempt income of a person pursuant to section 128D.

Part IVA – anti-avoidance

53. 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

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

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References

Previous draft:

Not previously issued as a draft

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 Div 6
- ITAA 1936 97(1)
- ITAA 1936 97(1)(a)(ii)
- ITAA 1936 Div 11A
- ITAA 1936 128A(3)
- ITAA 1936 128B(1)
- ITAA 1936 128B(2)
- ITAA 1936 128B(3)(jb)
- ITAA 1936 128B(3CA)
- ITAA 1936 128B(3CA)(a)
- ITAA 1936 128B(3CA)(b)
- ITAA 1936 128B(3CA)(c)
- ITAA 1936 128B(3CC)
- ITAA 1936 128B(3CD)
- ITAA 1936 128D
- ITAA 1936 Pt IVA

- ITAA 1997 118-520
- ITAA 1997 Div 230
- ITAA 1997 Div 770
- ITAA 1997 Div 880
- IT(TP)A 1997 Div 880
- TAA 1953
- Financial Services and Markets Act 2000 261D

Case references:

- Federal Commissioner of Taxation v Whiting [1943] HCA 45; 68 CLR 199
- Harmer, R.W. & Ors v The Commissioner of Taxation [1989] FCA 651; 91 ALR 550; 89 ATC 5180; 20 ATR 1461
- Saunders v Vautier 4 Beav 115 [49 ER 282]
- Tito & Ors v Waddell & Ors (No 2) [1977] Ch 106

ATO references

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