


# ***PR 2016/8 - Income tax: tax consequences of investing in Wellington Management Funds (Luxembourg)***

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## Product Ruling

# Income tax: tax consequences of investing in Wellington Management Funds (Luxembourg)

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### **! 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

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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. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated.
2. In this Product Ruling the scheme is an investment in Units of Wellington Management Funds (Luxembourg) (the Umbrella Fund) offered under a Prospectus issued by Wellington Luxembourg S.à r.l (the Management Company) on 28 June 2016.
3. 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 paid by the Unitholder in relation to their Units
  - (c) the assessability of distributions received, or entitled to be received, by the Unitholder from the Umbrella Fund in respect of their Units
  - (d) the taxation consequences arising upon the acquisition or redemption of the Unitholder's Units
  - (e) a Unitholder's entitlement to a tax offset under Subdivision 207-B for their share of the franking credits on a franked distribution derived by and flowing from the Umbrella Fund (or a Fund) in relation to equities traded on the Australian Securities Exchange
  - (f) the taxation consequences of any foreign exchange currency gains or losses arising under the scheme
  - (g) the taxation consequences arising upon the liquidation of the Umbrella Fund or a Fund, or upon a merger involving the Umbrella Fund or a Fund
  - (h) the taxation consequences arising in relation to the ownership of units in a Wellington Management Fund other than the Umbrella Fund referred to specifically in paragraph 2 above, and
  - (i) whether this scheme constitutes a financial arrangement for the purposes of Division 230 (Taxation of financial arrangements).

**Class of entities**

4. 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. In this Product Ruling, those entities that can rely on the Ruling section are referred to as the Unitholder.

5. The class of entities who 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 16 to 29 of this Product Ruling on or after 1 July 2016 and on or before 30 June 2019.

6. The class of entities who 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 16 to 29 of this Product Ruling before 1 July 2016 or after 30 June 2019, 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***

7. 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**

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 29 of this 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
- this Product Ruling may be withdrawn or modified.

## Date of effect

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10. This Product Ruling applies prospectively from 1 July 2016. It therefore applies only to the specified class of entities that enter into the scheme from 1 July 2016 until 30 June 2019, 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 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

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

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15. Subject to paragraph 3 of this Product Ruling and the assumptions in paragraph 29 of this Ruling:

- (a) The relationship between the Management Company (or the Depositary) and the Unitholders constitutes a trust relationship for Australian income tax purposes.

- (b) Subject to the foreign income tax offset limit in section 770-75, the Unitholder will be entitled to a foreign income tax offset under Division 770 in an income year for foreign income tax paid by the Unitholder (or the Depositary) on an amount received by the Unitholder from the Umbrella Fund that is included, in part or whole, in the Unitholder's assessable income for that income year.
- (c) The Unitholder will be entitled to a credit for Australian withholding tax under section 18-30 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) to the extent that the tax is withheld from:
- an unfranked dividend derived by the Umbrella Fund and to which subsection 128B(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) applies, or
  - interest derived by the Umbrella Fund and to which subsection 128B(2) of the ITAA 1936 applies,
- and that Australian withholding tax has been included in the Unitholder's assessable income.
- (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 of the ITAA 1936 will not apply to the Unitholder.

## Scheme

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

- application for a Product Ruling as constituted by documents and information received on 18 April 2016 and 3 August 2016
- Wellington Management Funds (Luxembourg) Prospectus dated 28 June 2016 (Prospectus), and
- Wellington Management Funds (Luxembourg) Management Regulations dated 28 June 2016 (Management Regulations).

**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. Unless otherwise defined, capitalised terms in this Ruling take their meaning as per the Prospectus.

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

### **Overview of the Umbrella Fund**

19. The Umbrella Fund is an open-ended unincorporated mutual investment fund in the form of a 'fonds commun de placement'. It is governed by Luxembourg law and qualifies as an Undertakings for Collective Investment in Transferable Securities (UCITS) as regulated by Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities, as amended.

20. As a pooled investment vehicle and form of collective investment fund, the Umbrella Fund receives cash or assets from Unitholder subscriptions and invests its cash/assets in various assets comprising Transferable Securities, Money Market Instruments and some non-transferable securities. Investments are made within permitted parameters as set out in the Management Regulations and Prospectus, and in accordance with the requirements applicable to UCITS under Luxembourg laws and regulations.

21. Subscription for Units in the Umbrella Fund is made by completing required documentation (including an Account Opening Agreement) and submitting that, together with payment of the full purchase price of the Units subscribed for, for acceptance by the Management Company. The issue price of a particular Unit class in the Umbrella Fund or a Fund is based on the net asset value of that Unit class (subject to adjustments for swing pricing) at the Valuation Point on the relevant Dealing Day (that is the time of subscription).

22. The key features of the Umbrella Fund are that:

- it is managed by the Management Company, the sole and exclusive objective in respect of which is the management of the Umbrella Fund (and its assets) on behalf, and in the interests, of its Unitholders
- its assets are kept separate from the Management Company which entrusts the Depositary with the custody of its assets in separate accounts or deposits on behalf of the Unitholders
- the Umbrella Fund is divided into separate sub-funds referred to as Funds
- Units issued with respect to each Fund may be divided into separate classes with each such class representing an interest in the underlying net assets of

- the Fund but with different characteristics as are established specifically with respect to such class
- the Unitholders legally own Units in the Umbrella Fund (or Fund), as evidenced by mention in the Register of Unitholders
  - a Unitholder's acquisition of Units in the Umbrella Fund implies their acceptance of the Management Regulations of the Umbrella Fund which govern the legal relationship between the Unitholders, the Management Company and the Depositary
  - the entire assets of the Umbrella Fund are the joint property of all Unitholders, who have equal rights in proportion to the number of Units of each class they hold in individual Funds
  - each Unit confers an equal and undivided interest in the assets of the Umbrella Fund as a whole or the relevant Fund, and does not confer an interest in any particular asset
  - the Unitholders of Distributing Unit Classes (as beneficiaries of the Umbrella Fund) are beneficially entitled to the income of a Fund as it is earned by the Fund
  - the extent to which distributions are made with respect to any Fund will be determined by the Management Company with consideration to net investment income and net realised capital gains, and the net asset value of the Umbrella Fund not falling below the minimum capital amount prescribed by law, and
  - distributions to the Unitholders of Distributing Unit Classes of the Funds will generally be declared and paid at least annually within one month following the end of the financial year of the Umbrella Fund.

23. Distributions to the Unitholders of Distributing Unit Classes in a Fund may represent both dividends and capital gains received by the Umbrella Fund as a result of holding and/or disposing its assets, and on-paying these income streams to the Unitholders in the form of a fund distribution, net of taxes, fees and other expenses.

24. Depending on the domestic tax laws of the jurisdiction that the Umbrella Fund has invested in, withholding tax is likely to be incurred by the Umbrella Fund when income and/or capital proceeds are remitted from that jurisdiction to the Umbrella Fund. The amount of dividend income and/or capital proceeds that is then on-paid by the Umbrella Fund to the Unitholders, in the form of a fund distribution, will effectively be net of withholding tax.

25. Unitholders may request redemption of their Units from a Fund at the redemption price. The redemption price is based on the

net asset value of the relevant Unit class in the Umbrella Fund or a Fund (subject to adjustments for swing pricing) at the Valuation Point on the relevant Dealing Day (that is the time of redemption).

26. Legal or beneficial ownership of Units cannot be transferred other than by redemption in accordance with the Management Regulations.

## **The Management Company**

27. Amongst other things, the Management Company:

- is entitled to buy, sell, subscribe for, exchange and receive any assets and to exercise all the rights directly or indirectly connected with the Umbrella Fund's assets
- shall determine the investment policy of the Umbrella Fund, but may avail itself of services of Investment Managers
- is authorised to file any tax elections and tax certifications with tax authorities outside of Luxembourg as it deems necessary, and
- is responsible for making Units available to Unitholders.

## **The Depositary**

28. Amongst other things, the Depositary:

- holds the legal title to all of the Umbrella Fund's assets for the benefit of all Unitholders
- is the administrative, registrar, transfer and paying agent for the Umbrella Fund
- may only draw on the Umbrella Fund's assets or make payments to third parties for the Umbrella Fund by order of the Management Company within the scope of the Management Regulations
- shall ensure that the sale, issue, redemption, conversion and cancellation of Units effected for the account of the Umbrella Fund or by the Management Company are carried out in accordance with the law and the Management Regulations
- shall ensure that the value of Units is calculated in accordance with the law and the Management Regulations, and
- shall ensure that the Umbrella Fund's proceeds/earnings are employed in accordance with the Management Regulations.

**Assumptions**

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

- (a) the Unitholder is an Australian resident for taxation purposes
- (b) for the purposes of the anti-avoidance rule under section 770-140, the Unitholder or any other entity will not become entitled to either a refund of any foreign income tax paid by the Unitholder (or the Depositary), or any other benefit worked out by reference to the amount of the foreign income tax (other than a reduction in the amount of the foreign income tax)
- (c) no amount of Australian withholding tax withheld from a withholding payment referred to in paragraph 15(c) of this Product Ruling must be refunded under Subdivision 18-B of Schedule 1 to the TAA 1953
- (d) individual Unitholders are not under a legal disability
- (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 16 of this Ruling, and
- (f) all dealings by the Unitholder, the Umbrella Fund, the Management Company and the Depositary under the scheme will be at arm's length.

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**Commissioner of Taxation**5 October 2016

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## Appendix 1 – Explanation

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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 Umbrella Fund constitutes a trust**

30. The term 'trust' is not defined in the ITAA 1936 or ITAA 1997. Whether a trust relationship between the Management Company (or the Depository) and a Unitholder exists upon the Unitholder's acquisition of Units in the Umbrella Fund should therefore be determined in accordance with guidance provided by the Courts.

31. Gaudron, McHugh, Gummow, Kirby and Hayne JJ in *Associated Alloys Pty Limited v. ACN 001 452 106 Pty Limited (in liquidation) (Formerly Metropolitan Engineering and Fabrication Pty Limited) and Anor* [2000] HCA 25, at paragraph 29, endorsed the joint judgment of Dixon CJ, Williams and Fullagar JJ, in *Kauter v. Hilton* (1953) 90 CLR 86 who, at page 97, identified:

...the established rule that in order to constitute a trust the intention to do so must be clear and that it must also be clear what property is subject to the trust and reasonably certain who are the beneficiaries.

32. French J in *Harmer & Ors v. Federal Commissioner of Taxation* 89 ATC 5180; (1989) 20 ATR 1461 stated that a trust 'is notably a definition of a relationship by reference to obligations'. His Honour further 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 the property.

33. All four essential elements of a trust are present so as to give rise to a trust relationship between the Management Company, the Depository and the Unitholders. This is held because:

- legal title to the assets of the Umbrella Fund vests with the Depository (or a member of the Depository's sub-custody network).
- the assets of the Umbrella Fund (being Transferable Securities, non-transferable securities and Money Market Instruments) are capable of being held on trust and, pursuant to the terms of the Management Regulations, are dealt with by the Management

Company and the Depositary acting in a trustee capacity on behalf of, in the interests and for the benefit of, the Unitholders, and

- Unitholders (who are clearly intended to be beneficiaries of the Umbrella Fund) are beneficially entitled to a proportion of the underlying assets of the Umbrella Fund (or a relevant Fund) in accordance with their Unit holding and receive income from the investment of the Umbrella Fund assets by the Management Company and/or the Depositary as it arises.

### **Division 770 – foreign income tax offsets**

34. Division 770 allows a non-refundable tax offset for an income year for foreign income tax paid where that amount of foreign income tax is paid in respect of an amount that is included in your assessable income for the year.

35. To the extent that the Unitholder has paid, or is deemed to have paid, foreign income tax such as withholding tax at source:

- (a) the foreign taxes paid by the Unitholder will be regarded as foreign income tax for the purposes of section 770-15
- (b) where those foreign taxes are paid by the Management Company or Depositary, the foreign income tax will be deemed, under section 770-130, to have been paid by the Unitholder, and
- (c) subject to the foreign income tax offset limit in section 770-75 the Unitholder will be entitled to a non-refundable foreign income tax offset in an income year for the foreign income tax the Unitholder paid, or is deemed to have paid, on amounts that are included in the Unitholder's assessable income that year.

### **Section 18-30 – credit for withholding tax deducted**

36. Generally, an unfranked dividend, interest or royalty paid from Australia is subject to Australian withholding tax if it is derived by a non-resident (subsections 128B(1), (2) and (2B) of the ITAA 1936).

37. For the purposes of Division 11A of the ITAA 1936 (of which subsections 128B(1), (2) and (2B) form part), a beneficiary who is presently entitled to a dividend, interest or royalty included in the income of a trust estate is deemed to have derived that dividend, interest or royalty at the time of present entitlement, ensuring that this income retains the character of a dividend, interest or royalty when the trust income is distributed to the beneficiary (subsection 128A(3) of the ITAA 1936).

38. A resident beneficiary presently entitled to an unfranked dividend, interest or royalty paid to the trustee of a non-resident trust estate is therefore subject to Australian withholding tax (and not the non-resident trustee).

39. Section 18-30 of Schedule 1 to the TAA 1953 allows a resident beneficiary of a non-resident trust estate a credit for Australian withholding tax where:

- the resident beneficiary receives, or is entitled to receive, a distribution of income that includes an unfranked dividend, interest or royalty from an Australian source
- that Australian withholding tax had been deducted from the unfranked dividend, interest or royalty when it was paid to the non-resident trust estate (and thus ultimately borne by the resident beneficiary), and
- that Australian withholding tax had been included in the resident beneficiary's assessable income in addition to the trust distribution received, or entitled to be received.

40. The Unitholder will be entitled to a credit for Australian withholding tax pursuant to section 18-30 of Schedule 1 to the TAA 1953 to the extent that:

- the Unitholder receives, or is entitled to receive, a distribution from the Umbrella Fund that includes an unfranked dividend or interest from an Australian source
- that Australian withholding tax had been deducted from the unfranked dividend or interest when it was paid to the Umbrella Fund, and
- both the distribution from the Umbrella Fund and the Australian withholding tax amount has been included in the Unitholder's assessable income.

## **Part IVA – anti-avoidance**

41. 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 of the ITAA 1936 will not apply.

## **Appendix 2 – Detailed contents list**

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

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## References

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*Previous draft:*

Not previously issued as a draft

- TAA 1953 Sch 1 18-30
- SISA 1993
- TAA 1953

*Legislative references:*

- ITAA 1936
- ITAA 1936 Div 11A
- ITAA 1936 128A(3)
- ITAA 1936 128B(1)
- ITAA 1936 128B(2)
- ITAA 1936 128B(2B)
- ITAA 1936 Pt IVA
- ITAA 1997
- ITAA 1997 Subdiv 207-B
- ITAA 1997 Div 230
- ITAA 1997 Div 770
- ITAA 1997 770-15
- ITAA 1997 770-75
- ITAA 1997 770-130
- ITAA 1997 770-140
- TAA 1953 Sch 1 Subdiv 18-B

*Case references:*

- Associated Alloys Pty Ltd v. ACN 001 452 106 Pty Ltd (in liq) (2000) 46 ATR 91; (2000) 202 CLR 588; [2000] HCA 25; (2000) 171 ALR 568; (2000) 74 ALJR 862; (2000) 18 ACLC 509
- Harmer & Ors v. Federal Commissioner of Taxation - (1989) 91 ALR 550; (1989) 20 ATR 1461; 89 ATC 5180
- Kauter v. Hilton (1953) 90 CLR 86; (1953) 27 ALJ 714; [1953] HCA 95

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ATO references

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