

by an arm's length customer when applying the 20% test.

Wow, so even if no fees charged because connected client, then consideration should be given to what would have been paid if customer were at arm's length.

• A Google search of the terms "CRS Custodial Institution attributed income connected" returns the CRS legislation of a handful of commonwealth countries, such jurisdictions as Cyprus, Hong Kong, Ghana, New Zealand, Australia, Saudia

Arabia, Canada, and Mauritius.
 New Zealand Revenue Authorities in their CRS guidance claims CRS Section VIII(A)(6) definition of an Investment Entity includes an attribution test, which considers the nexus between such income and who performs such specified investment activities. New Zealand notes "This paragraph shall be interpreted in a manner consistent with similar language set forth in the definition of Financial Institutions in the Financial Action Task Force Recommendations, now updated recently as of November 2023, New Zealand claims the FATF recommendations underpin countries' Anti-Money Laundering regimes, and also contain a similar "activity-based" focus, i.e. looking at what entity performs the relevant specified activities.

The arrangement is a trust whose gross income is 50% or more due to investing, reinvesting, or trading in Financial Assets.

The trust was set up on the advice of a professional firm (for example a law firm or accounting firm) to their client and that firm's own corporate trustee is the trustee of the trust.
The corporate trustee acts for the firm's client without charging any fees to the client directly for the trustee's services. However, its related entity (the firm) charges the client for the corporate trustee's services of managing and administering the trust (i.e. providing trustee services).

• Even though the corporate trustee does not charge, it is a Financial Institution by virtue

• Its related entity (the firm) is charging the clients for the corporate trustee's services of

managing the trust's assets.
The fees are attributable to prescribed activities (services) performed by the corporate trustee for or on behalf of the customer (the trust).
The corporate trustee therefore primarily conducts as a business, for or on behalf of a customer, the prescribed activities. This in turn means the trust is also an investment entity.
The analysis above is limited to a corporate trustee of a firm that derives most 50% or

Corporate trustee does not charge fees

of being a managing Investment Entity.

prescribed investment activities).

more of its gross income from investing, administering, or managing Financial Assets (as opposed to non-debt direct interests or real property)

Background Context

This approach is consistent with the "attribution" reference in the CRS definition of

investment entity (i.e. where there is connectivity – attribution between the fees and the

This "attribution" (connection) remains even though the firm charges for these services for the purposes of billing. This same principle also applies to the definition of custodial

This is because the fees are paid for the corporate trustee's services.

See page 160, paragraph 108 of the CRS commentary, which refers to the circumstances when income will be "attributable to" custodial services in terms of the definition of the custodial institution i.e. where the income results from and has a causal connection to those services.
This approach to the interpretation of these definitions is also in line with the interpretation that other Participating Jurisdictions (i.e. jurisdictions that have

implemented the CRS) have adopted when considering this issue in the context of both

the definition of Investment Entity and the definition of Custodial Institution.
Corporate trustees of a firm that derive most of their income from investing, administering, or managing direct interests in real property would not be "in business" financial institutions.
This point is also reinforced by paragraph 11 of the CRS commentary, which refers to the issue of whether or not an entity is a Custodial Institution as being driven by whether the entity performs the requisite custodial services (i.e. the safekeeping of financial assets for the account of others).
Notably, these overseas jurisdictions have explicitly based their approach to this issue on

the "attribution" interpretation outlined above.

• Furthermore, as noted above, the definition of Investment Entity specifically refers to this attribution test (as, indeed, does the definition of Custodial Institution).

Custodial Institution fees. There is no attribution clause in the OECD CRS or the OECD CRS Commentaries or the Implementation Handbook or the CRS-realted FAQ. The OECD CRS FAQ page 14 Q. 9 - Treatment of corporate trustees and SPV custodians

unrelated/unconnected but earns the Trustee /

2. The counter-argument - Entity

The OECD CRS FAQ page 14 Q. 9 - Treatment of corporate trustees and SPV custodians

In certain instances, a professional accounting or law

and, as part of that process, appoints a corporate trustee. The client then pays the accounting or law firm for all services rendered in relation to the set-up of the trust, including the appointment of the corporate trustee and other trustee services. As such, the corporate trustee itself does not receive direct remuneration for its services as these are paid to the accounting or law firm as part of the overall package.

In that light, for purposes of the gross income tests to be applied in the context of the definitions of Investment Entity

and Custodial Institution, is it required that the remuneration

No. For the purposes of the gross income tests to be applied in

for the relevant activities carried out is paid to the Entity to

which the test is applied?

firm (note not related or connected) sets up a trust for a client

the context of the definitions of Investment Entity and Custodial Institution all remuneration for the relevant activities of an Entity is to be taken into account, independent of whether that remuneration is paid directly to the Entity to which the test is applied or to another Entity. This issue can also arise in the context of Entities that provide custodial services if the fees for such services are paid to another Entity.

There is no attribution clause concerning payments made to related or

______connected_parties

Attribution test of CRS Section VIII(A)(6).

I smell bullshit about the CRS attribution clause of income for Custodians and Corporate trustees

(Well, I do not see that)
 Here is the entire CRS Section VIII Defined Terms - Paragraph A Reporting Financial Institutions - Subparagraph (6) Investment Entity:
 I do not see where the CRS definition of an Investment entity

New Zealand Revenue Authorities in their CRS guidance claim that the definition of an

Investment Entity in CRS Section VIII(A)(6) includes an attribution test, which considers

the nexus between such income and who performs such specified investment activities.

the FATF reference Mmmh, maybe it's contained indirectly in "this paragraph shall be interpreted in a manner consistent with similar language outlined in the definition of Financial Institutions in the Financial Action Task Force Recommendations, now updated recently as of

includes an attribution test, or nexus feature, I sit indirectly in

November 2023,
New Zealand stated proudly that the FATF recommendations underpin countries' Anti-Money Laundering regimes, and *also* contain a similar "activity-based" focus, i.e. looking at what entity performs the relevant specified activities does not prove that an attribution clause exists.
Again, I find no reference in the FATF Recommendations concerning Financial Institutions to "attribution of income to connected/related parties
I have to be honest here. I think the attribution test of income paid to connected entities for FIs is a bunch of horse pucky.

focus, i.e. looking at what entity performs the relevant specified activities" is bingo bullshit promulgated by New Zealand and a the few other Commonwealth countries.
Certainly, CRS regulation and its commentaries and implementation handbook and CRS FAQ do not contain attribution tests for the income of FIs.

• Claiming support by FATF of such a view, and throwing in terms of "similar activity-based

So why do some countries deem (fictional reality) an

attribution test for Custodial Institutions and Trustee

Domestic tax laws can contain attribution tests to attribute income to the correct party. Institutions in CRS do not have to follow domestic financial laws

For those schmucks with an opinion that FIs, such as Investment Entities or Custodial Institutions, need to

be supervised by a country's domestic financial regulations to qualify as an FI for CRS (except bizarro Canada) Page 159-160 on the OECD CRS Commentary

Page 159-160 on the OECD CRS Commentary

Commentary on CRS section VIII Financial Institutions

services?

The term "Financial Institution" means a Custodial Institution, a Depository Institution, an Investment Entity, or a Specified Insurance Company, as defined in subparagraph A(3) - (8).

Whether an Entity is subject to financial laws and regulations of a Participating Jurisdiction or is subject to supervision and examination by agencies having regulatory oversight of Financial Institutions, is relevant to, but not necessarily determinative of, whether that Entity qualifies as a Financial Institution under subparagraph A(3) - (8)

Summary My overall conclusion is that the few countries mandating an attribution-connection of fees paid the third parties is not a CRS requirement. It's origin is in domestic tax laws, not

fees paid the third parties is not a CRS requirement. It's origin is in domestic tax laws, not CRS or FATCA.

Mark Morris

CRS and CARP expert. No, truly.

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