LCR 2020/2EC - Compendium

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Australian Government
Australian Taxation Office

Public advice and guidance compendium – LCR 2020/2

Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Law Companion Ruling LCR 2019/D2 *Non-concessional MIT income*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

Issue number	Issue raised	ATO response
1	Paragraph 22 of the draft Ruling observes that streaming of non-concessional MIT income (NCMI) and income that is not NCMI between beneficiaries is not permitted. The attribution managed investment trust (AMIT) rules, consistent with paragraph 3.49 of the Explanatory Memorandum to the Tax Laws Amendment (New Tax System for Managed Investment Trusts Bill 2015 (AMIT EM), acknowledge the possibility of different classes of units with different entitlements. The draft Ruling should be updated to reflect the reference to streaming is in relation to beneficiaries within the same class.	No changes have been made to the final Ruling. Streaming of NCMI/non-NCMI may potentially breach subsection 276-210(4) of the *Income Tax Assessment Act 1997* on the basis it is for 'tax purposes'. Paragraph 3.49 of the AMIT EM, introducing the AMIT provisions, merely makes the point that where the defined interests of members relate to underlying assets (including, for example, where this is done within a class of beneficiaries), if tax attributes follow such defined interests, the anti-streaming rules would not be breached.
2	In determining whether the trustee is investing in land for the purpose, or primarily for the purpose, of deriving rent, paragraphs 11 to 17 of the draft Ruling need to highlight the importance of the timing of the intention of the trustee, which is critical. The focus needs to be the intention of the trustee at the time of acquisition.	Paragraph 13 of the final Ruling has been updated to confirm the need to consider the intention of the trustee. However, we consider the intention of the trustee needs to be objectively assessed both initially and during the course of holding the investment in land.
3	It is recommended that the ATO provides more guidance as to what constitutes 'land'. There are several scenarios where a particular piece of land may be held for strategic purposes and not for generating rental income.	No changes have been made to the final Ruling. Further interpretive guidance on this topic goes beyond clarification of the current legislation.

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4	Example 2 of the draft Ruling (characterisation as a licence) should be deleted. The physical characteristics described regarding control of access would render most commercial lease arrangements as licenses.	Example 2 and paragraph 67 of the final Ruling have been modified to acknowledge that control of access is but one factor to consider.
5	Further guidance is required on what arrangements are considered rent, including under different calculation methodologies based on a percentage of profit or turnover. Guidance is also required on what 'substantially all' means for the purposes of the term 'excluded rent', as set out in section 102M of the *Income Tax Assessment Act 1936*.	No changes have been made to the final Ruling. Further interpretive guidance on this topic goes beyond the clarification of the current legislation.
6	Regarding payment in substitution of rent – paragraph 85 of the draft Ruling needs to be clarified to confirm that the value of something received in substitution for rent is properly attributable to rent. The value of something received in substitution for the payment of rent should be distinguished from future returns on the instrument (which is not rent).	Paragraph 85 is focused on dealing with circumstances where payments are made in substitution of rent, as opposed to payments made in satisfaction of rent. The paragraph has been updated in the final Ruling to clarify that where a periodic amount of rent is satisfied by a means of payment other than cash that is specifically provided for under the lease agreement, that payment in kind may still be a payment in the nature of rent.
7	The final Ruling should provide further guidance on the types of arrangements or terms of arrangements, which, if altered, could risk ongoing access to the transitional relief, including whether it is only alterations which affect the terms upon which the 'facility' is leased by the asset entity to the operating entity that have the potential to affect the continuing existence of a transitional cross staple arrangement.	No changes have been made to the final Ruling. Whether an alteration of a cross staple arrangement is so substantial to risk ongoing access to transitional relief will be dependent on the specific facts and circumstances. We invite taxpayers to engage with us to discuss their specific circumstances.
8	For completeness, paragraph 26 of the draft Ruling should note that an asset entity cannot control either directly or indirectly the affairs or operations of another person in respect of the carrying on by that person of a trading business.	Paragraph 26 has been updated in the final Ruling to incorporate further detail regarding the meaning of an asset entity.
9	For completeness, paragraph 27 of the draft Ruling should note that an operating entity includes an entity that so controls a trading entity.	Paragraph 27 has been updated in the final Ruling to incorporate further detail regarding the meaning of an operating entity.

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10	Any references to cases which interpret 'facility' as a defined term in a specific statutory context (that is, section 7 of the *Telecommunications Act 1997*) has almost no relevance to the ordinary meaning of the word 'facility' in the NCMI rules.	The final Ruling has been updated regarding what is a 'facility'. The references to the interpretation of 'facility' in the context of the *Telecommunications Act 1997* have been removed.
11	It should be clarified that a facility undergoing expansion or enhancement, once completed, is still the same facility and not a new facility.	The final Ruling has been updated (see paragraph 157) to note that it is possible that subsequent works which expand or alter a facility may still form part of the existing facility. However, it should be noted where such expansions or alterations are so substantial in changing its functions, it is possible that the same facility does not exist. This will be dependent on the facts and circumstances.
12	In providing guidance on the term 'facility', the draft Ruling introduces a new concept of an 'ultimate facility' which was not used in the law design consultation process. Where multiple facilities make up an ultimate facility, then each of those facilities would need to be considered separately in assessing whether the facility meets the transitional rules, and whether the facility is eligible to be an economic infrastructure facility.	The final Ruling has been updated regarding what is a 'facility'. There are no longer references to 'ultimate facility'. It is acknowledged this term is neither legislated, nor in the Revised Explanatory Memorandum to the Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2019 (Explanatory Memorandum) and may lead to confusion when determining what the facility is.
13	Some of the examples in the draft Ruling have a common theme regarding the requirement for a physical connection between the assets (including enhancements) to comprise part of the same facility. Example 5 of the draft Ruling suggests physical connection is a factor in determining whether the assets comprise part of an existing facility. The relevant considerations set out in paragraph 1.118 of the Explanatory Memorandum focus on functional connection, rather than physical connection.	We consider that the factors relevant to identifying a 'facility' for the purposes of the measure will depend on the facts and circumstances. Further, this is not limited to an analysis of the four expressly specified criteria set out in the Explanatory Memorandum. The absence of a statutory definition of 'facility' in the Tax Acts lends support to an interpretation in accordance with the ordinary meaning of that word, in the context that it appears in the Act. In this regard, we believe that physical and function connection between a group of assets are likely to be influential factors in assessing whether assets comprise part of the same facility. However, that is not to say that either factor will always be determinative, or that they are the only factors. A practical approach should be taken, based on the specific facts and circumstances, to assess what is the relevant 'facility'. The final Ruling has set out general principles to be applied in identifying a facility.

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		Examples 5 and 9 have been modified, and new Example 10 inserted into the final Ruling, to draw out some of these principles. We note that the final Ruling cannot address all possible circumstances and there is a need to balance coverage. We invite taxpayers to engage with us to discuss their specific circumstances.
14	Exclusion of so-called 'complementary facilities' from comprising a single facility is not supported by either the transitional provisions or the Explanatory Memorandum. Guidance is required to assist in determining what assets and facilities may form part of a single facility. The reference in paragraph 173 of the draft Ruling to a non-exhaustive list of complementary facilities that may not be a single facility is confusing and lacking in any supporting analysis. Physical separation should not be used as a determining factor as it is not one of the factors listed in the Explanatory Memorandum.	The final Ruling has been amended to remove the reference to complementary facilities. However, we note that some assets which have a complementary function may not necessarily form part of the same facility. We do not consider that the specific factors listed in the Explanatory Memorandum will exhaustively govern how the word 'facility' should be interpreted.
15	The final Ruling should state that where an asset is solely used in the operation and maintenance of a facility, this is a factor that strongly suggests it is part of the facility.	The guidance regarding what is a 'facility' has been updated in the final Ruling. Where assets are used solely to operate or maintain a facility, this is a factor that is suggestive (but not necessarily conclusive) that they are part of the same facility.
16	Paragraph 165 of the draft Ruling provides a view that assets must have a connection to land on which they are situated, with the result that moveable property and items not characterised as fixtures cannot comprise part of a facility. Moveable property may form a part of a facility where such items of moveable property appropriately display the characteristics of being a part of the facility, as identified at paragraph 1.118 of the Explanatory Memorandum.	The final Ruling has been updated to clarify that moveable property will not necessarily be excluded from forming part of a facility. Assets which constitute moveable property as contemplated by subsection 102MB(1) of the *Income Tax Assessment Tax Act 1936* may form part of a facility in certain circumstances, having regard to the principles of what is a facility.
17	It is not clear from the facts in Example 6 of the draft Ruling whether the additional parcel of land was acquired (or entered into a contract for) after 27 March 2018. As such, it is unclear as to what the Commissioner's views are as to whether an existing facility can be expanded on land not	Example 6 of the final Ruling has been updated to indicate that the timing of when a parcel of land is acquired does not influence whether the subsequent expansion or enhancement could form part of the existing facility.

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	owned (or under a contract to purchase) as at 27 March 2018.	
18	It would be useful to have further guidance regarding the impact of technological change and its integration into enhancements and expansions of a facility.	No change has been made to the final Ruling. We note that the final Ruling cannot address all possible circumstances and there is a need to balance coverage with likelihood. We invite taxpayers to engage with us to discuss their specific circumstances.
19	Examples 5, 6, and 9 in the draft Ruling contain limited detail and provide little certainty to taxpayers.	Examples 5 and 9 in the final Ruling have been updated to provide further detail regarding the facts and the analysis supporting the determination of whether the assets comprise a single facility.
20	An indicative example of an electricity distributor upgrading the existing network should be included in the final Ruling to illustrate how the rules were intended to operate.	Example 1.13 in the Explanatory Memorandum provides an example of enhancements to an existing income-producing facility. We note that the final Ruling cannot address all possible circumstances, and that the principles outlined in the final Ruling provide general guidance to be applied in identifying a facility. These principles can be applied in expansion or enhancement scenarios. If there is uncertainty regarding specific assets involved in a particular expansion or enhancement scenario, we invite taxpayers to engage with us to discuss their circumstances.
21	Paragraphs 216 and 217 of the draft Ruling note the ordinary meaning of energy infrastructure facility will include 'only' certain renewable energy generation and storage facilities. The inference is that many will not meet the ordinary meaning.	Paragraph 218 of the final Ruling has been amended to remove the reference to 'certain' when referring to renewable energy generation and storage facilities.
22	The Commissioner states at paragraph 267 of the draft Ruling that the introduction of assets and facilities that are not part of the existing facility may result in a new cross staple arrangement – particularly where they dramatically augment the earlier facility. Determining whether the addition gives rise to a new arrangement should be considered solely by reference to whether the expansion qualifies as part of the existing facility under the criteria in the Explanatory Memorandum –	Paragraph 273 of the final Ruling has been amended to clarify that a new cross staple arrangement would arise where the facility is dramatically augmented such that the original facility can no longer be identified.

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	regardless of whether it dramatically augments the original facility.	
23	Paragraph 266 of the draft Ruling should be amended to confirm that the renewal of a lease after a period of occupation under a periodic tenancy pursuant to a 'holding over clause', would not be expected to create a new cross staple arrangement.	No change has been made to the final Ruling. While it is possible that such a situation may not give rise to a new cross staple arrangement, this will be dependent on the facts and circumstances surrounding a specific case.
24	Further clarification is required of what amendments to the terms and conditions may result in a new cross staple arrangement.	No change has been made to the final Ruling. This issue will be dependent on the facts and circumstances surrounding a specific case.
25	Clarification is sought that a change in custodian or trustee will not itself impact access to the transitional rules for the MIT cross staple arrangement income provisions.	Paragraph 274 of the final Ruling has been added in relation to changes to parties to the cross staple arrangement. We consider that a mere change in trustee does not result in a new cross staple arrangement. Depending on the circumstances, this could include where a custodian is replaced.
26	Regarding the concessional cross staple rent cap, guidance is required on the concept of agreeing a 'component of the rent formula'. This has not been addressed in the Explanatory Memorandum or during consultation.	The final Ruling has been updated with an example where a component of the calculation method is applied subject to the parties' discretion. We consider that once there is a discretion involved in applying any element of the method, it will not be an objective method.
27	Regarding the concessional cross staple rent cap, clarification is sought whether the renewal of the cross staple lease, which does not affect a termination of the cross staple arrangement, would nonetheless result in the existing lease method ceasing to apply such that future payments would be subject to a statutory cap.	Paragraph 290 in the final Ruling has been updated to provide the renewal of a cross staple lease which does not affect termination of a cross staple arrangement but does give rise to a new lease would however result in the existing lease method/existing amount ceasing to apply for the purposes of the concessional cross staple rent cap.
28	The final Ruling requires more guidance on what is an objective method and what are 'associated documents'.	More detail on what is an objective method has been added to the final Ruling – see paragraphs 293 to 297. Given the apparent breadth of 'associated documents', no specific guidance has been provided, however, Example 14 in the final Ruling provides an illustration of what may constitute associated documents.
29	Clarification on the concessional cross staple rent cap is required for situations where a lease involves a start-up phase with a predetermined rent amount. Once the project is	No change has been made to the final Ruling. This appears to be the outcome provided for under the law.

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	operational the rent is set at market rent. If this does not meet the requirements to be an objective method, it would seem the earlier amount adjusted for CPI would need to be used as the cap.	
30	Paragraph 137 of the draft Ruling notes that there is no retrospective application of a choice to apply the transitional rules. The ATOview will result in a fund payment that occurs between the choice being made and the choice being provided to the Commissioner being ineligible for the transitional rules.	Paragraph 137 of the final Ruling has been amended to delete the following sentence: While the Commissioner retains the discretion to permit the late making of the choice, there is no retrospective application for any choice and taxpayers will need to be mindful of the timing of any fund payments.
31	The final Ruling should acknowledge that errors with the election form (for the transitional rules), in particular in identifying a facility, will not impact on the ability to claim transitional relief.	We have provided practical guidance on ato.gov.au to support taxpayers making the choice to apply the transitional provisions, including in identifying a facility.