Australian Government
Australian Taxation Office

Public advice and guidance compendium – LCR 2019/5

Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Law Companion Ruling LCR 2018/D7 *Base rate entities and base rate entity passive 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	The draft Ruling reaches the conclusion that for base rate entity passive income (BREPI) purposes a royalty is as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936). The stated reason for this is that section 4 of the *Income Tax Rates Act 1986* ITRA 1986[1]) incorporates the two Acts and requires them to be read as one. We disagree with this conclusion. In our view, royalty should take its ordinary meaning for the purposes of the BREPI analysis. This view is supported by both the text of the ITRA 1986 and the Explanatory Memorandum to the Treasury Laws Amendment (Enterprise Tax Plan Base Rate Entities) Bill 2018 (the EM).	We disagree. For the purposes of paragraph 23AB(1)(d), the definition of royalty in subsection 6(1) of the ITAA 1936 applies. The ATO's view is that section 4 of the ITRA 1986 incorporates the subsection 6(1) definition of royalty into the ITRA 1986.
2	The issue involves a company carrying on a business of hiring out equipment. The income derived is not passive within the ordinary meaning of the word however it could still be BREPI under paragraph 23AB(1)(d) on the basis that hiring fees are royalties. Paragraph 18 of Taxation Ruling IT 2660 *Income tax: definition of royalties* provides that 'payments for the use of…industrial, commercial or scientific equipment…will be royalties. In this context	Consistent with paragraph 18 of IT 2660, a hiring fee for the use of or the right to use industrial, commercial or scientific equipment (including machinery) will be a royalty within the meaning of subsection 6(1) of the ITAA 1936 and will be BREPI. This is the case even, for example, when derived in the context of a company carrying on a business of hiring out equipment. A sentence has been added to paragraph 14 of the final Ruling

[1] All legislative references in this Compendium are to the ITRA 1986 unless otherwise indicated.

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	'equipment' does not have a narrow meaning and includes such things as machinery…' The final Ruling should include further examples and clarify the types of commercial income streams that it would consider to be included in the definition of royalties, or not to be royalties, for BREPI purposes.	(paragraph 13 of the draft Ruling) stating > Therefore, a hiring fee for the use of or the right to use industrial, commercial or scientific equipment (including machinery) will be a royalty within the meaning of subsection 6(1) and will be BREPI. A more detailed discussion of what constitutes a royalty for the purposes of subsection 6(1) of the ITAA 1936 is beyond the scope of this Ruling. The ATO's views on what is meant by a royalty that apply for the purpose of the BREPI definition are contained in: • Taxation Ruling IT 2660 *Income tax: definition of royalties* • Taxation Ruling TR 2008/7 *Income tax: royalty withholding tax and the assignment of copyright* • Taxation Ruling TR 93/12 *Income tax: computer software* • Taxation Ruling TR 95/6 *Income tax: primary production and forestry* • Taxation Ruling TR 2004/17 *Income tax: indemnification of royalty withholding tax*.
3	In relation to paragraph 12 (footnote 23) of the draft Ruling – there is no section 4 of the *Treasury Laws Amendment (Enterprise Tax Plan Base Rate Entities) Act 2018* so there appears to be a cross-referencing error. It should be a reference to section 4 of the ITRA 1986.	Agreed. Footnote 26 of paragraph 13 of the final Ruling (footnote 23 of paragraph 12 of the draft Ruling) has been amended to refer to section 4 of the ITRA 1986.
4	There is a question whether the concept of 'rent' will apply only to leasing real property (that is, tenant and landlord situation) or whether it would also extend to the leasing of personal property (for example, leasing equipment). What kinds of payments under a 'licence to occupy' arrangement would be included in definition of rent?	No change has been made in the final Ruling. Paragraph 15 of the final Ruling (paragraph 14 of the draft Ruling) states that: > Consistent with the purpose of the amendment, 'rent' in paragraph 23AB(1)(d) means the consideration payable by a tenant to a landlord for the exclusive possession and use of land or premises.

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5	The final Ruling should expand the current commentary on the meaning of rent, including drawing on the example in Taxation Determination TD 2006/78 *Income tax: capital gains: are there any circumstances in which the premises used in a business of providing accommodation for reward may satisfy the active asset test in section 152-35 of the Income Tax Assessment Act 1997 notwithstanding the exclusion in paragraph 152-40(4)(e) of the Income Tax Assessment Act 1997 for assets whose main use is to derive rent?* Does a reimbursement of outgoings constitute 'rent' (which is not defined in the ITAA 1936) for the purposes of paragraph 23AB(1)(d)?	This is beyond the scope of this Ruling, and no changes have been made to the final Ruling. See Issue 7 of this Compendium in relation to management fees – a similar approach would be applicable to reimbursements.
6	We query the inclusion of the reference to draft Taxation Ruling TR 2002/14DAC3 *Income tax: taxation of retirement village operators* in the box against 'Rent' and whether this Ruling is relevant to the concept of 'rent' in the draft Ruling. Irrespective, we think the reference should have been referred to as TR 2002/14A3.	The reference to draft TR 2002/14DAC3 has been changed in the final Ruling to Taxation Ruling TR 2002/14.
7	There is a question whether the receipt of a management fee that reflects actual management activities can be charged separate to rent and not be included in BREPI.	A management fee will not be rent and not BREPI under this element provided it is a management fee charged for services additional and separate to rent (separate fees) that is separately identifiable and apportioned on a reasonable basis reflecting the substance of the arrangement.
8	There is an issue with the franking tax rates of a company across two income years. A company may have a franking account balance as at 30 June 2017, paying a dividend at 30% but in the 2017–18 year, the company only received interest income and suffered a loss which is 100% passive income. Therefore, the dividend is paid out for the 2018 year at 27.5%, although tax has been paid in the past at 30%. Does the franking account carry forward at 30%?	No, the franking account doesn't carry forward at 30%. The franking account contains only a balance of credits available for distribution and is based on a dollar amount, which may be attached to frankable distributions in an income year at whatever the applicable rate for the year in which the distribution is made. Dividends may only be franked in an income year to a maximum allowed in accordance with the formula in subsection 995-1(1), paragraph (a) of the definition of 'corporate tax rate for imputation purposes' of the *Income Tax Assessment Act 1997* (ITAA 1997) and the benchmark franking and other rules in Division 207 of the ITAA 1997. This may be different from its tax rate in that income year. It is an inherent design feature of the imputation system that there may be a timing difference between when a franking credit is generated and when

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		it can be utilised due to changes in income tax rates.
9	An additional paragraph should be inserted after paragraph 49 of the draft Ruling to clarify that, when working out its corporate tax rate for imputation purposes, a company does not apply the aggregated turnover threshold for the previous income year; it compares its aggregated turnover for the previous income year against the aggregated turnover threshold for the **current** income year.	Agreed. Paragraph 57 has been included in the final Ruling: In determining the corporate tax rate for imputation purposes for an income year, a corporate tax entity does not apply the aggregated turnover threshold for the previous income year. Rather, it compares its aggregated turnover for the previous income year against the aggregated turnover threshold for the current income year.
10	An additional example should be included in the final Ruling which considers the corporate tax rate for imputation purposes of a dormant company. If a company derives no assessable income in a year, does it meet the requirement in paragraph 23AA(a) that no more that 80% of its assessable income is BREPI? What is the franking rate that applies if a company has nil assessable income?	Agreed. The final Ruling includes at paragraph 61 new Example 2.2 – company does not have any assessable income in the previous income year. If the company has no assessable income for a particular income year, its BREPI for that year cannot be 80% or more of its assessable income (refer to paragraph 23AA(a)). If the company was dormant in the previous year, and did not derive any assessable income, it would follow that the franking rate for the current year would be 27.5%.
11	Greater commentary is need on the imputation consequences of the lower corporate tax rate.	We are of the view that sufficient commentary has been provided in the context of the Ruling, and no changes have been made to the final Ruling.
12	The final Ruling should clarify whether the reference to 'net rental income' in Example 1.1 of the draft Ruling means rental income net of expenses or not. BREPI is intended to be a gross amount, which is compared with assessable income, before taking into account deductions. In summary, clarify whether rental income includes or excludes deductions.	In Example 1.1 of the Ruling, 'net rental income' means income net of expenses. Gross rental income is not included in the beneficiary's assessable income – it is only so much of the share of the net income of the trust. The BREPI of an entity is (subject to subsection 23AB(2)) assessable income that is any of the amounts listed in paragraphs 23AB(1)(a) to (g). Specifically, an amount included in the assessable income of a beneficiary of a trust estate under Division 6 of the ITAA 1936 is BREPI to the extent the amount is referable to another amount that is BREPI under a preceding paragraph of subsection 23AB(1). Division 6 includes so much of that share of the net income of the trust estate in the assessable income of the beneficiary. In relation to Example 1.1 this amount would be the trust's rental income (net of expenses). Example 1.1 has been amended in the final Ruling to make it clear that the rental income (net of expenses) is the amount included in the

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		beneficiary's assessable income as a share of the net income of the trust estate. For consistency, a similar change has been made in respect of services income. The following changes have been made in the final Ruling: • the reference to 'net rental income' has been changed to 'rental income (net of expenses)' • the reference to 'net services income' has been changed to 'services income (net of expenses)', and • the following words have been added to paragraphs 25 and 26 of the final Ruling (paragraphs 22 and 23 of the draft Ruling): Therefore, the amount included in the assessable income of each of the beneficiaries is $500,000 under Division 6 of the ITAA 1936 (as the beneficiary's share of the net income of the trust estate). The $500,000 distributed to Smith Pty Ltd will be BREPI, to the extent that it is referable to another amount that is BREPI.
13	There is a mistake in Example 1.5 of the draft Ruling. This example has been calculated using the amount of net trading income included in the trust distribution ($665,000) instead of the company's total assessable income ($950,000). The company's BREPI should be 30%, being $285,000 divided by $950,000, not 42.9%.	Agreed. The correct percentage of BREPI is 30%. Paragraph 52 of the final Ruling (paragraph 45 of the draft Ruling) has been amended to change the BREPI percentage from 42.9% to 30%.
14	In relation to Example 1.5 of the draft Ruling, paragraph 45 states that the aggregated turnover of the company is $950,000 which is incorrect. $950,000 is the assessable income of the company, being the net distribution received from the trust but the aggregated turnover should be $850,000, being the ordinary income derived in the ordinary course of business, and excluding the $400,000 of rent as rent is not derived in the ordinary course of business. Clarify whether rent, in Example 1.5 of the draft Ruling, is ordinary income derived in the ordinary course of business.	Example 1.6 of the final Ruling (Example 1.5 of the draft Ruling) has been amended to clarify that Orange Grove Co's aggregated turnover is below the relevant threshold and, as its BREPI is 30%, it qualifies as a base rate entity. The reference to Orange Grove Co's aggregated turnover has been removed as it is not relevant to this example.

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15	It needs to be clarified whether, in Example 1.4 of the draft Ruling, the passive rental income distributed to Succotash Pty Ltd is 'ordinary income' derived by the company 'in the ordinary course of carrying on a business' and that amount is the annual turnover of the company? The draft Ruling implies the ATO has formed a view under section 328-120 of the ITAA 1997 that passive rental income distributed to Succotash Pty Ltd is 'ordinary income' derived by the company 'in the ordinary course of carrying on a business' and that the amount is included in the annual turnover of the company. Whether this is the correct conclusion is queried.	Example 1.5 of the final Ruling (Example 1.4 of the draft Ruling) has been amended to clarify that Succotash Pty Ltd has failed the 80% BREPI test and is therefore not a base rate entity. The reference to Succotash Pty Ltd's aggregated turnover has been removed as it is not relevant to this example. A detailed discussion of the meaning of the terms 'aggregated turnover', 'carrying on a business' and 'in the ordinary course of carrying on a business' is beyond the scope of this Ruling.
16	Example 1.4 of the draft Ruling should include the statement that the company is not a base rate entity (because its BREPI is 90% of its assessable income).	Agreed. Paragraph 46 of the final Ruling (paragraph 39 of the draft Ruling) has been amended to read: *Of the $500,000 share of net income of the Beta Trust on which Succotash Pty Ltd is assessed, 90% is referable to BREPI. Consequently, Succotash Pty Ltd was not a base rate entity and did not qualify for the lower corporate tax rate of 27.5% in the 2017–18 income year. It is taxable at the 30% rate.*
17	In Example 1.4 of the draft Ruling it would be useful to include an example with business income being distributed from a sub-trust to compare the outcomes.	We are of the view that there are sufficient examples included in the final Ruling.

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18	The corporate tax rate that applies in Example 2.2 of the draft Ruling requires clarification. There is a mismatch between corporate tax rates and imputation rates across two consecutive years, similar to Example 2.2 of the draft Ruling. The example requires clarification as to how the corporate tax rate for imputation purposes is calculated. Suggested edits: *Emu Co has a 2017–18 corporate tax rate for imputation purposes of 27.5%. This is because it is assumed its aggregated turnover, BREPI and assessable income are the same as the previous year, being $24 million assessable income for the 2016–17 income year of which 55% was BREPI, in order to calculate its corporate tax rate for imputation purposes in the 2017–18 income year. This is below the $25 million dollar threshold, and less than 80%.*	Paragraph 67 of the final Ruling (paragraph 55 of the draft Ruling) has been amended along the lines suggested. The corporate tax rate that applies in Example 2.3 of the final Ruling (Example 2.2 of the draft Ruling) is 30%, as stated in paragraph 66 of the final Ruling. The corporate tax rate for imputation purposes in this Example is 27.5%, as stated in paragraph 67 of the final Ruling.
19	Similar comments as stated at Issue 18 of this Compendium are applicable for Example 2.3 of the draft Ruling.	Similar changes to those outlined at Issue 18 of this Compendium have been made to paragraph 70 of the final Ruling (paragraph 58 of the draft Ruling).
20	How is the aggregated turnover (of the pre-consolidated joining entity) calculated when the company joins a consolidated group part way through an income year?	Explanation of the aggregated turnover rules and how they interact with the consolidation rules is beyond the scope of this Ruling.
21	The final Ruling should clarify whether a distribution from a trust to a corporate beneficiary is excluded from that company's aggregated turnover as a 'dealing' between the company and the trust. The same issue arises for distributions from partnerships where a company is a partner.	Explanation of the aggregated turnover rules, including the meaning of 'dealings', is beyond the scope of this Ruling.
22	The final Ruling should articulate how the second condition, and the assumption in paragraph (a)(i) of the meaning of 'corporate tax rate for imputation purposes' in subsection 995-1(1) of the ITAA 1997 should be applied to a company that does not carry on a business.	This is based on Example 5 of draft Taxation Ruling TR 2017/D7 *Income tax: when does a company carry on a business within the meaning of section 23AA of the Income Tax Rates Act 1986?* which was removed from the final Taxation Ruling TR 2019/1 *Income tax: when does a company carry on a business?* when published on 15 April 2019. The question of whether a company carries on a business is outside the scope of this Ruling.
23	The final Ruling should clarify that – unlike the aggregated turnover	Agreed. New paragraph 7 has been added to the final Ruling to clarify that

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	test – the company's BREPI and assessable income should be worked out without taking into account the BREPI and assessable income of any other entity.	there are no 'grouping rules' that apply when a company is determining its BREPI: New paragraph 7 states that: Unlike the aggregated turnover test, a corporate tax entity does not include the BREPI or assessable income of any connected entity or affiliate when determining whether it meets the 80% BREPI test. In other words, it is only the BREPI and assessable income of the corporate tax entity that is relevant when determining whether 80% or more of its assessable income is BREPI. The BREPI and assessable income of any connected entity or affiliate is not relevant for this purpose.
24	The explanation in paragraph 6 of the draft Ruling of 'aggregated turnover' is inadequate and likely to mislead because it omits half of the meaning of aggregated turnover. Aggregated turnover is ordinary income derived in the ordinary course of carrying on a business.	This has been clarified at paragraph 6 of the final Ruling by adding '…, where that ordinary income is derived in the ordinary course of carrying on a business'. Note however that whether an amount is ordinary income derived in the course of carrying on a particular business for the purpose of the aggregated turnover rules is beyond the scope of this Ruling.
25	The reference to '…any connected or affiliate entity' in paragraph 6 of the draft Ruling should instead reflect the full and correct title of these terms.	This has been clarified in paragraph 6 of the final Ruling by replacing '…any connected or affiliate entity' with (footnotes omitted): …of any entity that is connected with or an affiliate of the corporate tax entity…
26	What happens if a new head company is interposed into a corporate structure? How do the consolidation rules apply in this circumstance?	Explanation of the aggregated turnover rules and how they interact with the consolidation rules is beyond the scope of this Ruling.
27	The final Ruling should mention the interactions between granting a substituted accounting period and its interactions with the aggregated turnover test.	Explanation of the aggregated turnover rules and how they interact with the substituted accounting period rules is beyond the scope of this Ruling.
28	The final Ruling should provide key messages arising from ATO guidance on the aggregated turnover test, in particular its interface with the conclusions reached in TR 2017/D7 (now finalised as TR 2019/1).	Explanation of the aggregated turnover rules and carrying on a business is beyond the scope of this Ruling.
29	The ATO should articulate in the final Ruling how taxpayers should determine the proportion of BREPI and non-BREPI in trust and partnership distributions received by a company in the current	The operation of the rules where certain information is not reasonably available is beyond the scope of this Ruling. If this emerges to be an issue in practice, we will consider whether to cover it in further guidance.

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	income year or the previous income year, when that information is not reasonably available to the company but is needed to work out its BREPI in order to determine its tax rate or its corporate tax rate for imputation purposes.	
30	Example 1.2 of the draft Ruling should clarify the differing views on 'streaming' for trust law purposes, taxation purposes and base rate entity rules and clarify that absent specific rules to stream amounts, BREPI will be a proportionate share of all income (irrespective of whether an amount can be streamed for trust law purposes). In finalising the Ruling, the ATO should consider including an example which illustrates how Example 1.2 of the draft Ruling would be if a beneficiary is specifically entitled to a type of income (for example, a franked distribution).	New paragraphs 20 and 21 of the final Ruling have been added to explain the streaming of a franked dividend as follows (footnotes omitted): 20. Where a franked dividend paid to a trustee of a trust is streamed to a beneficiary that is a corporate tax entity, it is not a non-portfolio dividend of the corporate tax entity, as the dividend is not paid to a company that has a voting interest of at least 10% of the voting power in the company paying the dividend. 21. The amount of a franked dividend streamed to a beneficiary of a trust is treated as being included in the beneficiary's assessable income under Division 6 of the ITAA 1936 for the purposes of applying the BREPI test in section 23AB.
31	The heading of Example 1.3 of the draft Ruling should be changed to 'How to characterise dividends received by a trust' so that it better reflects the content of the example.	Agreed. The final Ruling has been amended so that heading to Example 1.4 (Example 1.3 in draft Ruling) reads: *Example 1.4 – how to characterise dividends received by a trust*
32	An edit is suggested to Example 1.2 of the draft Ruling: *Company 1, Sub Trust 1 and Bob are beneficiaries of the Busy Trust. The net income of Busy Trust consisted of the following amounts:* • *$500,000 net business income;* • *$100,000 net franked dividend income;* • *$300,000 net unfranked dividend, and* • *$200,000 net rental income.* *Pursuant to the terms of the trust deed, the trustee of Busy Trust resolved to make Company 1 presently entitled to its net business income and specifically entitled to the net franked dividend income, Bob presently entitled to the net unfranked dividend, and Sub Trust 1 presently entitled to the net rental income.* *For tax law purposes, as Company 1 was presently entitled to $500,000, it was presently entitled to 50% of the net income of the*	We are of the view that the examples in the final Ruling are sufficient.

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	trust. *Although Company 1's share of net income is $500,000, that amount is not referable solely to business income. The effect of Division 6 of the 1936 Act is that Company 1's share of net income is attributable to:* • *$250,000 of business income, which is not BREPI* • *$150,000 of unfranked dividend income, which is BREPI, and* • *$100,000 of rental income, which is BREPI.* *Company 1 is also specifically entitled to $100,000 of franked dividend income, which is BREPI.* *Company 1 had no other income apart from the Busy Trust. Of the $600,000 of income from the Busy Trust to which Company 1 was presently or specifically entitled, 58% is referable to BREPI and Company 1 qualifies for the lower corporate tax rate.*	
33	Assume a trust has business income of $700,000 and a negatively geared rental property producing a rental loss of $300,000. This results in a net distribution of $400,000 being made to a corporate beneficiary. When applying the BREPI test, the company's assessable income is $400,000. What is the company's BREPI? Nil or ($300,000)? If ($300,000), could this loss be applied against other BREPI received by the company?	A loss cannot be distributed. The question is what part of the company's share of the net income of a trust or partnership is attributable to BREPI. In this case it seems the net income includes no rental income, because it is reduced to nil by the expenses attributable to it. Therefore, the answer in this scenario is nil.
34	In paragraph 29 of the draft Ruling, the sentence '*the trustee makes Freddy entitled to the interest*' could be read as the interest being streamed – counter to paragraphs 18 and 19 of the draft Ruling. This may be clarified along the lines of '*the trustee resolved to distribute all of the remaining net income of the trust (that is, being the interest income)*'.	Agreed. Paragraph 36 of the final Ruling (paragraph 29 of the draft Ruling) has been amended to include the following: *The trustee resolved to distribute all of the remaining distributable income of the trust to Freddy (that is, the interest income)*. Paragraph 22 of the final Ruling (paragraph 19 of the draft Ruling) has also been expanded to clarify that amounts of the net income of a trust are proportionately shared between beneficiaries based on their present entitlements to trust income, absent any specific statutory rules that lead to a different result (such as the case for franked distributions and capital gains).
35	The final Ruling should include commentary on compliance issues	The treatment of compliance issues in tracing through trusts and

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	in tracing through trusts and partnerships.	partnerships is beyond the scope of this Ruling. We will consider whether to cover this in further guidance (such as a practical compliance guideline).
36	The final Ruling should highlight other issues for taxpayers to consider in applying the definition of non-portfolio dividend, including what it means for distributions received via trust and partnerships, and for satisfying the 10% voting test, including: • Does it mean that those distributions cannot satisfy the non-portfolio definition? • Appendix 1 should highlight where additional guidance can be sought on the definition, including the 10% voting test.	A detailed discussion of non-portfolio dividends is beyond the scope of this Ruling. Refer also to related Issue 38 of this Compendium.
37	There is confusion about the operation of section 334A of the ITAA 1936 which feeds into section 317 of that Act which contains the meaning of a 'non-portfolio dividend' as taxpayers are uncertain how paragraph 334A(1)(b) works in practice.	This is beyond the scope of this Ruling. We will consider whether further guidance is required on this issue.

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38	Can a non-portfolio dividend pass through a trust or partnership and therefore not be BREPI in the hands of the ultimate beneficiary or partnership of that trust or partnership? This should be stated expressly. Paragraph 1.16 of the EM seems to suggest that the dividend may retain its non-portfolio characteristic as it passes through the trust. In Example 1.3 of the draft Ruling, the franked dividend received by the Mezanine Trust that is distributed to Mezanine Co should not be BREPI because it is a non-portfolio dividend.	If paid to a trustee, a dividend is not a non-portfolio dividend within the meaning of section 317. Taxation Determination TD 2008/25 *Income tax: can section 23AJ of the Income Tax Assessment Act 1936 apply to a dividend paid by a company (not being a Part X Australian resident) to the trustee of a trust, even where the trustee then pays an amount attributable to the dividend to an Australian resident company beneficiary?* deals with the issue of whether a dividend paid to a trustee can be a non-portfolio dividend within the meaning of section 317 of the ITAA 1936. In the hands of the trust it is not a non-portfolio dividend and is BREPI. The tracing rule in paragraph 23AB(1)(g) indicates that it is not a non-portfolio dividend in the hands of the recipient company and also BREPI when passed through. It would therefore be BREPI in the hands of the ultimate recipient. The corporate beneficiary is denied the lower rate as it hasn't received a non-portfolio dividend. Paragraph 1.4 of the EM provides that 'Under the passive income test, companies that are generating predominantly passive income will not be eligible for the lower corporate tax rate'. Paragraphs 1.16 and 1.17 of the EM indicate that it is only a dividend (and not a non-portfolio dividend) that can be traced through a trust in applying paragraph 23AB(1)(g). This is consistent with the test for BREPI applying at each entity, and the law does not provide for 'looking through' any dividend paid from a company to an entity further up the chain. The test for a distribution by a corporate tax entity is provided for in paragraph 23AB(1)(a) to include such distribution in BREPI of the entity, except if the distribution is a non-portfolio dividend. This is consistent with the EM. Paragraphs 20 and 21 have been added to the final Ruling to provide further explanation (see Issue 30 of this Compendium).
39	Submitter recommends that the final Ruling include a description of a non-portfolio dividend for ease of reference.	No change made. Table 1 in the Ruling already includes a reference to section 317 of the ITAA 1936 – definition of a non-portfolio dividend.
40	The definition of non-portfolio dividend, at least for the purpose of paragraph 23AB(1)(g), which deals with distributions from trusts,	Paragraph 23AB(1)(a) provides that BREPI includes a distribution by a corporate tax entity, other than a non-portfolio dividend (within the

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	should be read as including companies that act as trustees of trusts, otherwise this is unreasonable and contrary to the EM. It is unreasonable if Top Floor Co carries on an active business and does not derive any BREPI.	meaning of section 317 of the ITAA 1936). In interpreting this paragraph it would be incorrect to depart from the meaning of non-portfolio dividend for the purposes of paragraph 23AB(1)(g). This is not contrary to the EM.
41	The ATO could clarify that a discounted/concessional net capital gain from a trust (section 95 of the ITAA 1936 net income) distributed to a corporate beneficiary would be grossed-up in the hands of the company before applying capital losses and so forth.	Division 115 of the ITAA 1997 would apply as normal in this circumstance. A detailed discussion of these rules is beyond the scope of this Ruling.
42	The final Ruling should specifically comment on when the franking credits associated with various dividends and distributions are, or are not, BREPI.	This is beyond the scope of this Ruling.
43	The final Ruling should include a few common examples that highlight what is, and is not, interest or in the nature of interest.	This is beyond the scope of this Ruling.
44	The ATO could clarify that gains on qualifying securities (section 159P of the ITAA 1936) are included as BREPI even if the gain instead arises under Division 230 of the ITAA 1997.	The ATO's view is that paragraph 23AB(1)(e) would include any gain on a Division 16E of the ITAA 1936 qualifying security, regardless of the mechanism by which the gain is included in assessable income. That is, it is not relevant which provision includes the gain in assessable income, what is relevant is that there is a taxable gain and that it relates to a qualifying security.
45	To provide further guidance, the examples in the final Ruling should also calculate the proportion of the company's assessable income that is BREPI.	We are of the view the examples provided in the final Ruling are sufficient.
46	The ATO should consider including the following examples in the final Ruling: • The effect of the increase in the aggregated turnover threshold – from $25 million to $50 million from the 2018–19 income year – when working out if a company has satisfied the second condition to be a BRE and a company's corporate tax rate for imputation purposes. • How a company determines its BREPI when receiving distributions from one or more trusts in a chain of trusts, where one or more of those trusts has applied prior year revenue losses. The final Ruling should explain, in addition to	We are of the view the examples provided (including the addition of Example 2.2 in the final Ruling) are sufficient. A detailed discussion of non-portfolio dividends and what constitutes 'royalties' and 'rent' is beyond the scope of this Ruling.

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	expenses, how prior year revenue losses applied by trusts before distributing trust income to a company should be apportioned when working out the company's BREPI. • How a non-portfolio dividend paid from one company to another is not BREPI (for example, holding company and subsidiary company). • How a dividend that is not a non-portfolio dividend paid from one company to another is BREPI (for example, where a private company holds less than a 10% voting interest in a public company). • How different types of licence fees may or may not constitute royalties, which affects whether income from licence fees is included in BREPI. • That the treatment of rent as BREPI does not turn on whether the rent is derived from a commercial, industrial or residential property, the property is used in the course of carrying on a business or the property is an active asset and that the meaning of 'rent' excludes hire of equipment, motor vehicles, temporary fencing as well as the primary income derived by hotels/ motels.	
47	The reference to TR 2004/17 should be moved from the box against 'Interest' to the box against 'Royalties'.	Agreed. The reference in the final Ruling has been moved.
48	A company has derived income from passive investment activities. An individual begins to derive personal services income through the company which is attributed to the individual for tax purposes. Once the net amount (net of deductions) is removed from company's taxable income, the only taxable income remaining in the company is passive, but because 23AA(a) tests the assessable income of the company then the 27.5% rate applies. Is this consistent with the policy intent?	The personal services income (PSI) rules in Subdivision 86-A of the ITAA 1997 provide that to the extent that personal services income has been attributed to the individual to whom it relates, it does not form part of the assessable income of the personal services entity, nor is it exempt income in the hands of the personal services entity. Therefore where a company has derived PSI income and that income has been attributed to an individual, the assessable income of the company would not include that amount and, in the case described in the previous column, the entity would not be a base rate entity (as the remaining income is passive). The corporate tax rate would be 30%. A reference to Subdivision 86-A of the ITAA 1997 has been included in footnote 6 of paragraph 9 of the final Ruling.

Issue number	Issue raised	ATO response
49	Could Part IVA of the ITAA 1936 apply to a re-characterisation of a company to ensure it is a base rate entity and therefore access the lower tax rate?	This is beyond the scope of this Ruling.
50	How do attribution managed investment trust (AMIT) distributions to beneficiaries work in conjunction with the definition of BREPI in 23AB?	It is possible for an AMIT distribution to be included in BREPI – where the operation of section 276-80 of the ITAA 1997 results in a corporate tax entity being treated as if it had derived an AMIT distribution directly. The Ruling has been amended to add new Example 1.3 – working out the amount of a company's BREPI where it receives a distribution from an AMIT.