Tax News & Insights

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OmniTax Professionals

Division 296 Super Tax – now law

On 13 March 2026, the Bills imposing the Division 296 tax on super balances over $3 million received Royal Assent to become *Treasury Laws Amendment (Building a Stronger and Fairer Super System) Act 2026* and the *Superannuation (Building a Stronger and Fairer Super System) Imposition Act 2026.* No amendments were made to the Bills. The Division 296 tax applies from 1 July 2026. An additional 15% tax will be imposed on accumulation phase earnings based on the percentage of an individual's total superannuation balance exceeding the $3 million threshold and a further 10% tax on earnings based on the percentage of total superannuation balance exceeding $10 million. This will result in the overall tax rate applied to earnings of 15% for superannuation balances up to $3 million, 30% to earnings on superannuation balances between $3 million and $10 million, and 40% to earnings on any superannuation balances above $10 million.

Pre-CGT Land – partial win for taxpayer – *Brisbane Club v FCT*

The taxpayer, the Brisbane Club (the "Club"), has had a partial win in respect of CGT imposed on the sale of the Brisbane Club Tower, which was built on land acquired in 1963, and two sub-leases. The key facts, timelines and outcomes of *Brisbane Club v FC of T* [2026] FCA 220 are summarised as follows:

- *1963* – the Brisbane Club acquired land in Adelaide St, Brisbane
- *8 May 1985* – the Club entered into a Deed in respect of the re-development of the land with a developer, which contemplated a Building Agreement
- *10 January 1986* – the Club entered into a Building Agreement with the developer
- *14 February 1986* – construction on the land commenced on or after this date
- *18 June 1986* – the Club (as lessor) granted a lease over the whole of the land (including the building) to CML (as lessee), with the lease term commencing on 27 March 1986. On the same day, CML (as lessor) and the Club (as lessee) executed 2 subleases of part of the building, each for a term commencing on 1 September 1986.
- *24 June 1986* – the developer and CML enter into a Development Agreement
- *1988* – Brisbane Club Tower was completed
- *10 June 2021* – the Club entered a contract to sell the land, the building and the two subleases.

Building – Taxpayer Wins

- **Issue** – was the capital gain from the disposal of the building to be disregarded pursuant to paragraph 104-10(5)(a) as it was acquired before 20 September 1985, or did paragraph 108-55(2)(a) apply to separate the building from the land for CGT purposes?
  - Pursuant to subsection 108-55(2), a building or structure constructed on land acquired before 20 September 1985 was taken to be a separate CGT asset if a contract for its construction was entered into on or after 20 September 1985
- **Federal Court decision** – the Building Agreement was not a condition precedent to the formation or the existence of the Deed, but rather, a condition precedent to the performance of the building works – i.e. the Building Agreement was part of the Deed, which was entered into on 8 May 1985. Accordingly, the building was a pre-CGT asset and the capital gain on disposal was to be disregarded.
- **Key takeaways**
  - Pre-CGT land can include a building if construction is committed to prior to 20 September 1985
  - Contract analysis includes interaction between multiple documents (and not just the Building Agreement itself) and consideration of conditions precedent to performance and/or contract formation

Sub-Leases – Commissioner wins

- **Issue** – was the capital gain from the disposal of the subleases to be disregarded pursuant to paragraph 104-10(5)(a) because each of the subleases was acquired by the Club before 20 September 1985?
  - The Club submitted that the origin of the Club's right to obtain the first sublease was the Deed, with the second sublease acquired on or about 12 August 1985, when the Club exercised an option for that sublease under the Deed
- **Federal Court decision** – the subleases were not between the developer and the Club, but rather between CML (as lessor) and the Club (as lessee), which were entered into post-CGT. This was notwithstanding that the Deed provided for the developer to be able to assign the right, title and interest of the lease provisions.
- **Key takeaway** – a lease is acquired when the lease contract is entered into and not when the underlying right to lease arises.

FBT – What attracts the ATO's attention & other key issues

With the end of the 2025-26 FBT year upon us, we have outlined below some matters that attract the ATO's attention in relation to FBT and some key late-year FBT issues that should be considered:

Area	Details
Nil lodgement	• Lodging a nil FBT return when fringe benefits were provided
Employee contributions	• Applying an estimated employee contribution with the intention to reduce their FBT liability to nil without calculating the liability first • Seeking to amend past income tax returns by including employee contributions • Reporting employee contributions in FBT return but not reporting the corresponding amount in the income tax return, or reporting at the incorrect label

Motor vehicles	• Motor vehicles classified incorrectly
	• Private use treated as business use – claiming 100% business use without having sufficient evidence to support this claim
	• Logbook errors
	  ○ Not keeping logbooks, invalid logbooks and logbooks that are not representative of actual use
	  ○ Insufficient information about the purpose of the journey – simply saying it was a 'business' journey is not sufficient
	  ○ Co-mingled business and private trips listed as one entry
	  ○ Discrepancies and inconsistencies – the logbook entries should match the actual travel
	• EV FBT exemption – claiming the exemption for luxury cars that are over the luxury car tax limit

Inadequate record keeping	• Importance of keeping appropriate records to support FBT calculations, positions, exemptions and concessions – taxpayers can be otherwise subject to penalties and interest charges • Outdated policies for the maintenance of records
Classification of benefits	• Ongoing confirmation required for benefit exemptions being applied to ensure criteria met and consistent treatment throughout the year

The ATO have previously acknowledged there is a material FBT gap, being the estimate of the difference between the FBT collected and the total amount expected if all employers were fully compliant. The net FBT gap estimate for 2022-23 was $1.8 billion or 30.4%. This is being actively addressed by the ATO through:

- Providing increased education and guidance for employers on FBT
- Analysis of third-party data and information reported to the ATO to identify employers who may be non-compliant (data-matching)
- Addressing non-compliance through reviews or audits
- Correspondence with employers to remind them of their obligation to lodge FBT returns if they have an FBT liability

Contact

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