

This advice is for the benefit of the Australian Securities Lending Association only. Whilst this advice may be shown to other persons, it may not be relied upon by them and they should seek independent advice referable to their particular circumstances.

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## **Your questions and our view**

### **Your question #1**

Is the Principal Lender or Borrower liable to pay or record any GST Liability assuming either cash or non-cash collateral?

### **Our View**

It is possible to analyse a securities loan as a composite of reciprocal supplies by both lender and borrower. However, the *A New Tax System (Goods and Services Tax) Regulations 1999* (“**Regulations**”) treat securities lending as one supply made by the securities lender, ignoring the reciprocal supply made by the borrower. See in this regard Part 7 item 11 and Part 8 item 5 of Schedule 1 to the Regulations.

Therefore, the “one supply” approach applies at least for the purposes of analysing securities lending as a financial supply. We think it reasonable to proceed on the basis that the ATO would be consistent and that this “one supply” approach would also apply for the purposes of analysing securities lending as a GST-free supply, or as a supply that is not connected with Australia.

Where all the elements of a securities loan are in Australia, the securities loan would be a financial supply. However, we note that the securities lending supply may be GST-free under section 38-190 (relating to supplies of things, other than goods or real property, for consumption outside Australia).

#### ***(a) where the securities loan is NOT an export***

We agree with your view in circumstances where the securities loan is connected with Australia, but is not GST-free under section 38-190.

That is:

- the principal lender under a securities loan makes an input taxed supply and is not required to remit GST in respect of the supply;
- the only input tax credits that the lender can claim are in respect of reduced input credit acquisitions.

We agree that this analysis is unaffected by the type of collateral the borrower provides.

#### ***(b) where the securities loan IS an export***

Where the securities loan is connected with Australia, but is GST-free under section 38-190, then the supply is not subject to GST and the lender can claim input tax credits for any GST paid in respect of its inputs in relation to the supply

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We caution that the circumstances of the particular supply should be examined closely to determine whether section 38-190 applies. This is because the current (and the proposed) drafting of section 38-190 is vague and can be difficult to apply. Currently, the only guidance to the application of section 38-190 is in Ruling GSTR 2000/31 which is not directly on point and in turn raises further issues.

In particular, we suggest that lenders take care when lending to foreign banks that have an Australian branch because the supply may not be a GST-free export where it is made to the Australian branch, even though the borrower of record is the foreign bank.

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### **Your question #2**

Between which parties does the GST liability exist for transactions on an Agency basis?  
Eg: The Lender authorises the Agent to lend their securities. The Agent signs a securities lending agreement with the Borrower where risk lies between the Lender and Borrower. The Borrower borrows securities from the Agent.

### **Our View**

We agree with your view in circumstances where the supply of securities lending agency services (“**Agency Services**”) from the agent to the lender is not GST-free under section 38-190.

That is, the supply to the lender of Agency Services is a supply by a financial supply facilitator and will be a taxable supply.

Where the Agency Services are GST-free under section 38-190, no GST is payable in respect of the supply of the Agency Services. Again, we caution that the circumstances of the particular supply should be examined closely to determine whether section 38-190 applies.

Subdivision 153-B would not apply because, despite the apparent breadth of section 153-50, the subdivision can only operate upon supplies where the principal makes taxable supplies: see section 153-55.

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### **Your question #3**

What is the consequence of fees received by Agents and Principals in the same GST group?

### **Our View**

Supplies between members of a GST group are treated as if they were not taxable supplies : section 48-40(2).

If GST has been paid by the agent on its inputs into the Agency Services, then the representative member of the group may be entitled to an input tax credit or reduced input tax credit in respect of the amount of GST: see section 48-45(1)(a) and our view in question #4.

Note that, the intra-group supply will be a taxable supply if, relevantly, section 84 applies to the supply: section 48-40(2)(a)(i). However, we do not believe that section 84 could apply to an Australian lender in circumstances where Agency Services are acquired from an offshore agent because the acquisition of the Agency Services would be for a creditable purpose: see sections 84-5(1)(a) and 70-10.

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#### **Your question #4**

Is the principal Lender able to claim a RITC for the agency fee paid?

#### **Our View**

The availability of input tax credits depend on the facts of the transaction.

#### ***Reduced input tax credit for lender***

Where neither the supply of the Agency Services nor the securities loan is a section 38-190 GST-free export, then the lender should be able to claim a reduced input tax credit for the GST paid in respect of the Agency Services.

However, this requires a close analysis of the character of those services to see whether they fall within any of the particular categories on the exclusive list in Division 70 of the Regulations. Although securities lending is specifically identified as a financial supply under the Regulations, the Regulations do not identify securities lending agency services generically as qualifying as reduced credit acquisitions.

The only potentially relevant items in Regulation 70-5.02(2) are:

- item 9 (which relates to securities transactions services); and
- item 29 (which relates to trustee and custodial services).

Item 29 could only apply where the agent supplies the Agency Services as a trustee or custodian. Nevertheless, we believe that the better view is that item 9 should encompass the Agency Services. That is, acquiring securities lending agency services should be a reduced credit acquisition under section 70. This would entitle the lender to a 75% reduced input tax credit for GST payable in respect of the supply of Agency Services.

This analysis is unaffected by the type of collateral the borrower provides.

#### ***Full input tax credit for lender***

Where the securities loan is GST-free under section 38-190:

- the supply of Agency Services to the lender will still be a taxable supply
- the agent should be entitled to full input tax credits for the GST paid in respect of its inputs
- the securities loan will be GST-free
- the lender should be able to claim a *full* input tax credit for GST paid in respect of

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the supply of the securities lending agency services: see sections 11-5 and 11-15.

This analysis is unaffected by the type of collateral the borrower provides.

***No input tax credit for lender***

Where the Agency Services are GST-free under section 38-190:

- no GST is payable in respect of the supply of the Agency Services
- the agent should be entitled to full input tax credits for the GST paid in respect of its inputs
- it is conceivable (although we imagine rare in practice) that the securities lending supply could be connected with Australia, and so input taxed. In these circumstances, because no GST is payable in respect of the supply of Agency Services, the lender would not be entitled to any input tax credits in respect of that acquisition.

This analysis is unaffected by the type of collateral the borrower provides.

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### **Your question #5**

Is a fee payable to an offshore principal Lender subject to GST?

### **Our View**

Section 9-10(4) expressly provides that a supply does not include a supply of money unless the money is provided as consideration for a supply that is a supply of money (ie; an exchange of money for money).

Furthermore, consistent with the “one supply” approach, we analyse the securities loan as one supply and treat the fee that relates to it as consideration for the supply, rather than a separate supply.

Therefore, we understand your question to be whether a securities loan from an offshore lender to an Australian borrower is a taxable supply. We also understand that your question relates to supplies that are not connected with Australia (because the GST treatment of securities lending supplies that are connected with Australia is dealt with in question #1).

Division 84 potentially applies where services that are not connected with Australia are provided to an Australia recipient. However, Division 84 would generally not apply to such a securities lending supply because:

- Division 84 does not apply where the supply is input taxed
- Regulation 40-5.09(2) preserves the financial supply (and therefore input taxed) character of the securities loan - provided that the other requirements of Regulation 40-5.09 are made out. [Where the other requirements are not made out, the securities loan is not a financial supply and Division 84 *may* apply.]

Therefore, there is generally no requirement for borrowers to self-assess and pay GST in respect of securities lending supplies received from offshore lenders.

In circumstances where Australian GST had been paid on inputs into the securities loan and the lender is registered or required to be registered for GST purposes (we imagine this to be rare in practice), the lender would be able to receive reduced input tax credits. This is because, as discussed above, Regulation 40-5.09(2) preserves the financial supply (and therefore input taxed) character of the securities loan.

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**Your question #6**

Is a fee receivable from an offshore principal Borrower subject to GST?

**Our View**

Consistent with the “one supply” approach, we analyse the securities loan as one supply and treat the fee that relates to it as consideration for the supply, rather than a separate supply.

Therefore, we understand your question to be whether a securities loan from an Australian lender to an offshore borrower is subject to GST.

As discussed in question #4 above, where a securities loan from an Australian lender to an offshore borrower is GST-free under section 38-190, no GST is payable on the supply.

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#### **Your question #7**

For the purpose of recovery of input tax credits, can fees payable/receivable with offshore lenders/borrowers be included in the value of GST free supplies?

#### **Our View**

Consistent with the “one supply” approach, we analyse the securities loan as one supply and treat the fee that relates to it as consideration for the supply, rather than a separate supply.

We also note that where an Australian borrower provides non-cash collateral to a non-resident lender, on the basis of the “one supply” approach, this should not be considered a separate supply of the non-cash collateral to which section 38-190 potentially applies.

We analyse the GST treatment (including input tax credits) of section 38-190 GST-free securities loans in question #4 and imported securities loans (that are not connected with Australia) in question #5.

The positions can be summarised as follows:

- where the securities loan is GST-free under section 38-190, no GST is payable in respect of the securities loan and the lender would be entitled to a full input tax credit for GST payable on its inputs;
- where the securities loan is connected with Australia, but is **not** GST-free under section 38-190, no GST is payable in respect of the securities loan and the lender would be entitled to a reduced input tax credit for GST payable on its inputs;
- where the securities loan is not connected with Australia, but the borrower is registered for GST purposes, then no GST is payable in respect of the securities loan and the lender is registered or required to be registered for GST purposes, then the lender would be entitled to a reduced input tax credit in respect of the GST payable (if any) on its inputs.