

[This interpretation statement was issued by the Office of the Chief Tax Counsel on 28 June 2007. It was previously released for public consultation as exposure draft IS0092.]

## **IS 07/02: IS AN AGREEMENT FOR THE SALE AND PURCHASE OF PROPERTY AN “INVOICE” FOR GST PURPOSES?**

This interpretation statement applies to agreements for the sale and purchase of property entered into on or after 1 July 2007.

This interpretation statement was originally released for consultation on 11 May 2005 under the title “Whether a Standard Form Agreement for the Sale and Purchase of Real Estate Constitutes an “Invoice” under the Goods and Services Tax Act 1985 thus Triggering the Time of Supply under that Act”. As a result of comments received, the scope of the statement has been broadened from agreements for the sale and purchase of real estate to agreements for the sale and purchase of property more generally.

As from 1 July 2007 this interpretation statement withdraws and replaces Part (a) of the Commissioner’s previous public item “GST—Time of Supply of Real Estate” published in *Public Information Bulletin* 173 (April 1988), p10.

### **SUMMARY**

1. This interpretation statement considers whether an agreement for the sale and purchase of property constitutes an “invoice” under the Goods and Services Tax Act 1985 (“the Act”) thus triggering the time of supply under that Act.<sup>1</sup> In doing so it considers three types of agreements for the sale and purchase of property:
  - (i) conditional agreements;
  - (ii) conditional agreements that become unconditional; and
  - (iii) unconditional agreements.
2. It is concluded that a conditional agreement for sale and purchase of property will not constitute an “invoice” for the purposes of the Act. Also, it is concluded that a conditional agreement for the sale and purchase of property that becomes unconditional will not constitute an “invoice” for the purposes of the Act. Therefore, a conditional standard form agreement for sale and

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<sup>1</sup> The time of supply determines when a registered vendor is required to account for output tax on the sale of a property but (as recipients must also hold a tax invoice in respect of a supply in order to be entitled to an input tax credit: section 20(2)) the time of supply does not determine when a registered purchaser is entitled to an input tax credit on the purchase of a property. The time of supply is also relevant to determining whether the sale of a property could be zero-rated under section 11(1)(m) (as for section 11(1)(m) to apply the sale must be the supply of a taxable activity or part of a taxable activity that is a going concern at the time of supply).

purchase of property will not trigger the time of supply—even if the conditional agreement becomes unconditional. This conclusion is consistent with the Commissioner’s previous public item “GST—Time of Supply of Real Estate” published in *Public Information Bulletin 173*.

3. It is also concluded that unconditional agreements for the sale and purchase of property will not constitute “invoices” for the purposes of the Act. Therefore, the formation of an unconditional agreement for the sale and purchase of property will not trigger the time of supply. This conclusion is different to the Commissioner’s previous public item “GST—Time of Supply of Real Estate” found in *Public Information Bulletin 173*.
4. While the Commissioner’s previous public item “GST—Time of Supply of Real Estate” only dealt with agreements for the sale and purchase of real estate, the principles and discussion within this interpretation statement will also apply to contracts more generally. Thus, the discussion in this statement should be considered when considering whether a document (including a contract) meets the statutory definition of “invoice” for the purposes of the time of supply rules under the Act.

## **BACKGROUND**

5. Inland Revenue has previously considered the issue of whether an agreement for the sale and purchase of real estate triggers the time of supply for GST purposes in *Public Information Bulletin 173* under the title of “GST—Time of Supply of Real Estate” (April 1988). According to the previous statement in PIB 173, a conditional agreement for sale and purchase cannot be an invoice—either when it is executed or once the conditions are satisfied. However, the previous statement in PIB 173 did accept that an unconditional agreement for sale and purchase could constitute an “invoice” and could trigger the time of supply under section 9(1) of the Act.

## **THE ISSUE**

6. This interpretation statement considers whether the previous conclusions in respect of agreements for sale and purchase triggering the time of supply in the earlier PIB 173 are correct. Accordingly, it considers whether an agreement for the sale and purchase of property that is:
  - (i) conditional on execution;
  - (ii) conditional on execution, that later becomes unconditional; and
  - (iii) unconditional on execution;

can constitute an “invoice” and thus trigger the time of supply under section 9(1) of the Act.

## LEGISLATION

7. Section 9(1) of the Act states:

9(1) Subject to this Act, for the purposes of this Act a supply of goods and services shall be deemed to take place at the earlier of the time an invoice is issued by the supplier or the recipient or the time any payment is received by the supplier, in respect of that supply.

8. Section 2 of the Act defines “invoice” as follows:

2(1) In this Act, other than in section 12, unless the context otherwise requires,—  
...  
“Document” includes any electronic data, computer programmes, computer tapes, and computer discs:  
...  
“Invoice” means a document notifying an obligation to make payment:  
....

## APPLICATION OF THE LEGISLATION—THE COMMISSIONER’S INTERPRETATION

### Meaning of “invoice”

9. Section 9(1) of the Act states that “a supply of goods and services shall be deemed to take place at the earlier of the time an *invoice* is issued by the supplier or the recipient...” (emphasis added).
10. Under section 2(1) of the Act, “invoice” means “a document notifying an obligation to make payment”.
11. The earlier public statement in PIB 173 appears to have accepted that an unconditional agreement for sale and purchase of real estate could be an “invoice” based on what was thought to be a literal reading of the words of the definition. It appears that as an unconditional contract is not contingent on the completion of a condition and obliges the purchaser to make payment in accordance with its terms this was regarded as “notifying” the purchaser of their obligation to make payment. However, since the publication of PIB 173, the Commissioner has reconsidered this issue. To be an “invoice” an agreement for sale and purchase:
- Must be a document that notifies an obligation to make payment;
  - In the context of section 9(1), must be issued.

### *Notify*

12. The term “notify” is not defined in the Act. In the absence of a statutory definition the meaning of a term will generally be determined in accordance with the ordinary meaning. “Notify” is defined in the *Concise Oxford Dictionary* as follows:

**notify • v. (notifies, notified)** inform, typically in a formal or official manner. ► report formally or officially.

13. The meaning of “notify” has been discussed in two Canadian cases. Lacombe JA said in *Briere v Canada (Employment & Immigration Commission)* (1988) 57 DLR (4th) 402 (CA):

The word ‘notify’ means, in its everyday sense, “to inform expressly,” and in law: ... “to make known, to give notice, to inform”.

14. In *Re Hornby* (1993) 63 FTR 188 at 194 Cullan J said:

The word ‘notify’ is defined in the Concise Oxford Dictionary, seventh edition as:

Make known, announce, report; inform, give notice to (person of, that)...which connotes, in my opinion, some sort of concrete action.

15. In *Shell NZ Holding Co Ltd v CIR* [1994] 3 NZLR 276 the Court of Appeal discussed the meaning of “notify” in the context of the definition of “invoice”. The Court of Appeal commented (p. 283):

“Notify” has its ordinary dictionary meaning of “to give notice to -, to inform”.

16. Therefore, the term “notify” connotes information passing from one person to another and appears to require some deliberate action on the part of the person “notifying” – whether by formal or official communication or merely “some sort of concrete action”.

### *Obligation*

17. “Obligation” is also not defined in the Act. The *Concise Oxford Dictionary* definition of “obligation” reads as follows:

**obligation • n. 1** an act or course of action to which a person is morally or legally bound. ► the condition of being so bound. **2** a debt of gratitude for a service or favour.

18. The ordinary meaning of “obligation” refers to a situation where a person is legally or morally bound. The case law on the meaning of “obligation” indicates that for there to be an obligation, there must be a present obligation.

19. In *Watkinson v Hollington* [1943] 2 All ER 573 Scott LJ stated:

The word “obligation” primarily means a tie, and legally it was in origin the binding tie established by what is called a “bond” as between the obligor and the obligee, and I see no reason for disregarding that ordinary legal meaning of the word “obligation” in construing the long title. (p. 575)

20. Thus, the court considered that the word “obligation” referred to a situation involving a “binding tie”. In order for the “tie” to be “binding”, it is considered that there would need to be a present obligation.

21. In *Mercer v Pearson* (1973-1978) 51 TC 213 Fox J considered that “obligation” in the context of a provision which limited concessionary tax treatment for redundancy payments to payments “made in pursuance of an obligation incurred before 6<sup>th</sup> April 1960” meant a legally binding obligation. Fox J held:

It seems to me that the normal meaning of ‘obligation’ in a legal context is a legally binding obligation, not necessarily contractual—it could be statutory—but it must be some tie or obligation which is legally enforceable. (p. 217)

22. The Commissioner considers that in the context of the definition of “invoice” an obligation means a present legal obligation. In the High Court in *Shell NZ Holding Co Ltd v CIR* (1993) 15 NZTC 10,136 Heron J said:

Invoice is defined as “a document notifying an obligation to make payment”. There is no immediate obligation to make payment on the passing of the entry in the circumstances of this case. The Act does not speak in terms of future obligation or conditional obligation or contingent obligation. It speaks of obligation. It is an obligation to make payment.

23. While the taxpayer’s appeal was successful the observations of Heron J regarding the meaning of the term “obligation” remain relevant. An “obligation”, then, means a present legally binding tie to make payment. Future, conditional or contingent obligations to make payment will not suffice.
24. A present or existing obligation to make payment for the goods or services is to be distinguished from a credit facility granted by the supplier of the goods or services which allows the necessary payment to be made at any time up until the date specified in a statement issued by the supplier e.g. on the 20<sup>th</sup> day of the following month. The obligation to make the payment for the goods and services would have arisen on the day the goods were handed over or the services were performed and, from that date, the supplier would have been legally entitled to payment and could have sued for its payment if necessary e.g. if bankruptcy or liquidation proceedings were instigated against the recipient before the date specified in the statement. Thus, in cases where credit facilities have been granted, the distinction needs to be drawn between the conditions that concern the creation of the liability (i.e. the goods being handed over or the services performed) and the conditions that merely affect the discharge of the liability. At the time the monthly statement is issued, the liability would already have been created and so the statement would constitute a document notifying an obligation to make payment i.e. it would constitute an “invoice”.

#### *How an invoice is issued*

25. The *Concise Oxford Dictionary* definition of the verb “issue” is as follows::

**issue • v. (issues, issued, issuing)** 1 supply or distribute for use or sale. > (issue someone with) supply someone with. > formally send out or make known.

26. As with the ordinary meaning of “notify”, the ordinary meaning of “issued” connotes a situation involving two parties, one of whom issues something which is received by the other. The term “issue” also seems to require a positive deliberate act on the part of the person who has “issued” the item in question.

27. In *Commissioners of Customs and Excise v Woolfold Motor Co Ltd* (1983) 1 BVC 564 the meaning of “issue” in the context of the UK VAT rules was considered. The primary rules regarding time of supply under the VAT rules in the Finance Act 1972 relates to when the goods are removed. However, there is a general exception to those rules that if a tax invoice is issued prior to that time, then the time of supply is “at the time the invoice is issued”. After considering the dictionary meanings of the term “issued”, McNeill J summarised counsels’ arguments and concluded as follows:

Both counsel argued that the ordinary and natural meaning of the words ‘issue a tax invoice’ supported the conclusion for which they respectively contended. Mr. Shirley [counsel for the taxpayer] did not suggest that mere communication of the fact or existence of a tax invoice was sufficient, but he said communication plus acceptance was. That was truly publication or emission of the tax invoice. Mr. Brown [counsel of the Commissioners] submitted that such a contention emphasised the artificial construction Mr. Shirley was seeking to put on the word ‘issue’.

Having considered the submissions on both sides and having regard to the careful decision of the tribunal, I have come to the conclusion that Mr. Brown’s submissions are correct. In my view the ‘issue’ of a tax invoice for the purposes of the Act requires the provision to the customer of the tax invoice. (p. 569)

28. These comments reinforce the dictionary definition of “issued”. It is acknowledged that under the UK legislation, the issue of a “tax invoice” rather than an ordinary invoice is required to trigger the time of supply. As a tax invoice also had to be held by the purchaser under the UK legislation in order to support an input tax credit claim, McNeill J concluded that the scheme of the Act required the tax invoice to be actually provided to the purchaser in order for it to trigger the time of supply by being “issued”. However, given that to be an “invoice” under the New Zealand legislation, there must be a document “notifying” an obligation to make payment, the New Zealand legislation also contemplates that when an invoice is issued, a document would be provided by one person to another.
29. Therefore, the statutory definition of “invoice” refers to a document which is provided by one person to another and gives notice to or informs the recipient of the document of an existing legal obligation to make payment. This appears to be consistent with the ordinary meaning of “invoice”.

#### *Ordinary meaning of “invoice”*

30. The term “invoice” is defined in the *Concise Oxford Dictionary* (10<sup>th</sup> ed, Oxford University Press, Oxford, 1999) as follows:

**invoice** • **n.** a list of goods sent or services provided, with a statement of the sum due.

31. This same meaning is also reflected in definitions from commercial and legal dictionaries. The *Penguin Macquarie Dictionary of Economics and Finance* (Penguin Books Australia, Ringwood, Victoria, 1988) states:

**invoice** A bill for goods or services provided. It is sent by a creditor to a debtor, as the document against which payment of the debt will be made.

32. *Butterworths New Zealand Law Dictionary* (5<sup>th</sup> ed, LexisNexis Butterworths, 2002) states:

**invoice** A list of goods that have been sold by one person to another, stating the particulars and prices. The invoice is sent by the seller to the buyer, either along with the goods or separately by post.

33. These definitions indicate that:

- an “invoice” is a record of a past transaction where goods and services have been provided;
- an invoice lists the goods and services provided and the price for those services; and
- ordinarily, an invoice will be provided by the seller to the purchaser.

34. The Commissioner considers that the statutory definition of “invoice” in the context of section 9(1) is consistent with the ordinary meaning of “invoice”. Generally an invoice:

- will not be issued until the transaction has occurred;
- will be issued as the result of a positive act by the vendor to the purchaser;
- will be a document listing what has been provided and stating the price payable; and
- will give notice of a present obligation to make payment.

35. This approach is consistent with the approach of the Court of Appeal in *Shell*. *Shell* concerned whether an “import entry form” completed by the Customs Department on the importation of goods was an invoice for the purposes of triggering the time of supply. The Court concluded that the import entry form was an invoice and did trigger the time of supply. In commenting on the meaning of “invoice” Richardson J, for the Court, stated (at page 283):

Invoices are rendered in commercial transactions where goods are supplied or work is done by one party for another. Invoices record what was done and the charge. It may be a cash or credit transaction and in the latter case it is common for a monthly or other periodic statement to be issued subsequently. Whether payable on delivery or under the credit arrangement the invoice states the price or charge involved. And it is both unnecessary and uncommon in practice for commercial invoices to specify the time for payment.

In our view the GST obligation is in the same position. The statutory definition of “invoice” recognises that it is not a commercial two party transaction. It uses the central feature of an invoice which is “a document notifying an obligation to make payment”. The time for payment is not part of the definition. “Notify” has its ordinary dictionary meaning of “to give notice to -, to inform”. Certainly when completed by the Customs officer it is the Customs’ document and a copy is furnished to the importer. It is the signing of the document by the Customs officer which under the statute is the entry of the goods. It is that act which constitutes the duty as a debt due to the Crown. At that point the document is notice to the importer of the obligation to make payment. On its face it states the Total Duty, Total GST and Total Payable.

36. Given the Court’s conclusion that the import entry form was an “invoice” for GST purposes, the deferred payment statement (issued in cases where the Collector of Customs had exercised his discretion to allow payment of duty to be deferred) could not be an “invoice”. A supply involves only one taxable event and the same goods and services cannot be supplied twice. Only one document can be the “invoice” which triggers the time of supply.
37. Despite “invoice” being defined in section 2 of the Act, Richardson J commences his comments by considering the ordinary meaning of the word “invoice”. The reason for considering the ordinary meaning of the word “invoice” is that he considers the words of the definition of “invoice” to be consistent with its ordinary meaning.
38. Richardson J notes the role that invoices generally play in commercial transactions. When there has been a supply of goods or services, an invoice is created detailing “what was done” and “the charge” for that supply. He states that the definition of “invoice” in the Act recognises that it “is not a commercial two party transaction”. He also says that an “invoice” does not require a due date for payment: “it is both unnecessary and uncommon in practice for commercial invoices to specify the time for payment.”
39. Richardson J reads the statutory definition in light of the *ordinary* meaning. He says that the statutory definition reflects the “central feature” of an invoice which is “a document notifying an obligation to make payment”. With regard to the statutory definition four points are noted.
40. Firstly, Richardson J readily accepted that the word “notify” should bear its ordinary meaning:—being “to give notice to, to inform”. This ordinary meaning of “notify” implies that the notice moves from the person giving notice to the person receiving notice. This is consistent with the idea of an invoice being *sent* by the seller to the purchaser.
41. Secondly, although there was no direct comment on the words “obligation to make payment” in the Court of Appeal judgment, the Court’s focus upon the ordinary meaning of an “invoice” would indicate that the “obligation” that is to be paid must be an existing obligation or an obligation that has arisen and is due for payment. This contrasts with an obligation that will or may arise in the future. As Richardson J stated: “[i]nvoices record what was done and the charge”. This point is consistent with the dictionary definitions which illustrate that commonly an invoice lists what has been provided or sent—not what has been agreed or what will be provided or sent—and requires payment for the supplier completing their part of the agreement. This can be contrasted with a contract that is entered into by the parties—a contract *creates* rather than *notifies* the obligation to make payment. A contract records an agreement—it evidences the parties’ meeting of minds.
42. Thirdly, to be an “invoice” there need only be a “document notifying an obligation to make payment”—the document is not required additionally to specify a due date for payment. Richardson J stated that “[t]he time for payment is not part of the [statutory] definition” and noted that “it is both

unnecessary and uncommon in practice for commercial invoices to specify the time for payment.”

43. Fourthly, Richardson J’s interpretation of “invoice” is also consistent with the requirement of section 9 that the invoice must be “issued”. The fact that an invoice must be “issued” from one party to another is consistent with the idea that an invoice “notifies” the purchaser/recipient of their “obligation to make payment”. It is the *issuing* of the invoice which triggers the time of supply. A contract, in contrast, is entered into by both parties and records their agreement. It does not follow that a contract is issued by one party to the other.
44. In summary, Richardson J confirms that the statutory definition of “invoice” is consistent with the *ordinary* meaning of “invoice” and should be read in that light. The inference from Richardson J’s judgment is that an “invoice” is a document issued by one party that has supplied goods or services to another party and is requesting payment for the goods or services supplied from that other party. A number of key findings in relation to the meaning of the term “invoice” as it occurs in section 9 of the Act can be identified. It is considered that the case is authority for the following propositions:
- While the word “invoice” is defined in section 2 of the Act, the definition is to be interpreted consistently with the ordinary meaning of the term as it is generally understood in commercial parlance.
  - An “invoice” is a post-transaction record—“it records what was done and the charge for the work” or goods supplied and notifies the recipient of the supply that payment is now due in respect of the work carried out or the goods supplied. In contrast, a contract *creates* the obligations between the parties.
  - An “invoice” is not a two party transaction. It is ordinarily issued by the supplier to the recipient. In contrast, a contract is entered into by two parties—it records the meeting of minds.
  - The ordinary meaning of the term “notify” implies a positive act in which notice moves from one person to another. This is consistent with the ordinary meaning of an invoice being “issued”. In contrast, a contract *creates* and *evidences* an agreement rather than *notifying* the parties’ obligations and being *issued* from one party to another.
  - An obligation to make payment has to be a present legal liability. Thus, an invoice will notify a present obligation to make payment. This is to be contrasted with a contract which *creates* the obligation, but it is not necessarily a present obligation.
  - An invoice need not provide a due date for payment, it need only notify that there is an obligation to make payment and be issued.
45. It is noted that Alastair McKenzie in his book *GST: A Practical Guide* (7ed, CCH, Auckland, 2002, paragraph 403) makes reference to the earlier approach in the PIB item as representing the Commissioner’s view, but seems to prefer a “contrary approach”. A number of the points McKenzie makes in support of the “contrary approach” are consistent with the principles set out above.

## Other case law

46. Other cases have also commented on the meaning of “invoice” and/or observed that an agreement for sale and purchase of property, whether in conditional or unconditional form, could be an invoice for the purposes of the Act. These cases are:
- In *Case K24* (1988) 10 NZTC 236, Judge Barber makes the *obiter* comment that an agreement for sale and purchase may be an “invoice” (p 238). Judge Barber also recognised that he did not hear argument on the issue (p 238).
  - In *Case NI* (1991) 13 NZTC 3,001, Judge Bathgate considered that contracts, whether conditional or not, could be “invoices” as they notified (informed) the purchaser of their obligation to pay (p 3,011). However, with respect, Judge Bathgate’s comments must be read in light of the subsequent Court of Appeal decision in *Shell* where a number of his propositions were rejected. Judge Bathgate also specifically states that these points were not subject to detailed argument and should be read in that light (p 3,012).
  - In *Shell NZ Holding Co Ltd v CIR* (1993) 15 NZTC 10,136 (HC), Heron J noted that the parties accepted that an agreement would be an invoice (p 10,140), although this point does not appear to have been in dispute between the parties.
  - In *Lanauze v King* (2001) 20 NZTC 17,360 (HC), Young J had to determine the time of supply in the context of a swap of paua quota for a house and contents. It was held that an “approved form of transfer and notification of transfer of individual transferable quota or transferable term quota” was not an invoice. In the course of the judgment, Young J considered that the transfer form was not an “invoice” in the “traditional commercial sense of a notification by the supplier of goods and services to the recipient of the amount which is due” (following *Shell*) and nor was it akin to an unconditional agreement for sale and purchase of property, which he considered was an “invoice” on the basis of the decision in *Case K24* (p 17,363). However, Young J accepted that an unconditional agreement for sale and purchase of property is an invoice without any analysis or specific reference to any particular paragraph or quote from *Case K24*.
47. While these cases make reference to unconditional or conditional contracts being “invoices” for the purposes of the Act, none of these cases considered or analysed the issue in any detail and none of these cases are more authoritative than the Court of Appeal decision in *Shell*. The Commissioner was not a party to *Lanauze v King* where the High Court referred to *Case K24* as authority for the proposition that an unconditional agreement for sale and purchase is an invoice. In *Case K24* Judge Barber suggested that in some instances an agreement for sale and purchase might be an invoice, however, there was no analysis supporting that proposition. The decision in *Case NI* and the decision in *Shell* at the High Court must be regarded as being superseded by the *Shell*

Court of Appeal decision. Accordingly, the Court of Appeal decision in *Shell* remains the leading judgment on the interpretation of “invoice”.

### **Form of agreement for the sale and purchase of property**

48. Obviously, the parties to a sale and purchase of property transaction can choose to document it in a variety of ways. The Auckland District Law Society / Real Estate Institute of New Zealand form of agreement for sale and purchase tends to be used in a significant number of cases. This is a word processed or printed document which comprises a number of pages. The matters particular to a specific transaction are generally handwritten or typewritten onto the standard form. In draft form, it may record an offer or counter-offer, but in its final form it records the agreement ultimately reached between a vendor and purchaser of real estate. Generally, this document will be signed on one day and the settlement of the contract will be at a time in the future. Applying the previous discussion of what is an “invoice” to agreements for sale and purchase of property in relation to the three fact situations leads to the following results.

### **An unconditional agreement for sale and purchase**

49. While an unconditional agreement for the sale and purchase of property document creates the legal obligations between the parties, the issue is whether an unconditional agreement for sale and purchase can constitute an “invoice” from the time of execution and thus trigger the time of supply under section 9(1) of the Act. With regard to the propositions based on the ordinary meaning of the terms used in the legislation and identified in *Shell*, the following points are noted.
50. Firstly, an unconditional agreement for the sale and purchase of property is a contract. It is an agreement signed by a purchaser and a vendor. It sets out the terms and conditions of the agreement, what will be supplied and the purchase price. An agreement for the sale and purchase of property does not have the characteristics of an invoice. It does not on its face state what has been supplied and the actual amount that the purchaser is required to pay. That function is fulfilled by the settlement statement which includes the adjustments (apportionments of incomings and outgoings in respect of the property) which affect the final amount payable by the purchaser under the agreement.
51. Secondly, an invoice is a demand or request for payment. An agreement for sale and purchase is not a demand or request for payment. It is a document which evidences an agreement between the parties and creates rights and obligations on the part of both parties. Such obligations are interdependent. The agreement documents a transaction that will be completed in the future. The agreement will generally provide, for example, that at settlement date, the property will be provided and the purchase price will be payable. It is not a demand or request for payment issued by one party to another.
52. Thirdly, an invoice is not a “two party transaction”. The ordinary meaning of the term invoice (as noted by the Court of Appeal in *Shell*) indicates that one would ordinarily see an invoice completed by one party to the transaction (the

supplier) and provided to the recipient with, or following, the supply of goods or the completion of the contracted work giving notice that payment was now due. An unconditional agreement for sale and purchase of property is a two party transaction—it is a contract that records the parties’ “meeting of minds”. Some commentators have suggested that the import entry form considered in *Shell* was, in fact, a “two-party document” as import entry forms were required to be prepared by the importer. The Commissioner’s view is that the Court considered that the import entry form was a document that was issued by the Customs Department rather than a two-party document. It was irrelevant that the information on the import entry form was completed by the importer as the Customs officer was not obliged to act on that information and could make a different assessment of the value of goods for the purpose of the assessment of duty: see p. 11,168. The provision of a copy of the import entry form signed by the Customs officer to the importer constituted notification of an obligation to make payment of the duty assessed.

53. Fourthly, the ordinary meaning of the term “notify” implies a positive act in which notice moves from one person to another. This is also consistent with the ordinary meaning of an invoice being “issued”. The fact that two parties sign the unconditional agreement for the sale and purchase of property raises difficulties with that document “notifying” a present obligation to pay and actually being “issued”. As an agreement for sale and purchase ultimately reflects an agreement reached between two parties, it will not always be the case that the vendor provides the final version that is accepted by the purchaser. There may be further counter-offers by both parties. It may be that it is the purchaser’s offer that is accepted by the vendor. As such, there may not be any positive act of issuing a document by the vendor to the purchaser notifying an obligation to make payment.
54. Finally, there must be an existing obligation to make payment of a present legal liability. This is consistent with an invoice seeking payment from the recipient as the supplier is entitled to do from the terms of the original obligation. Admittedly, from the terms of an unconditional agreement for the sale and purchase of real property, it is possible that there could be a present and legal obligation to make payment although the obligation may not in fact arise until settlement occurs. In situations where a present obligation to make payment exists, this would result from the unconditional agreement for the sale and purchase of property creating the bargain *and* the obligation. However, merely having this element is not considered to satisfy the general characteristics of an invoice.
55. Accordingly, it is considered that an unconditional agreement for sale and purchase of property would not conform to these requirements to constitute an invoice. For there to be an “invoice” for GST purposes, there must be a document issued which notifies an obligation to make payment. These are cumulative requirements and must be read in light of the ordinary understanding of an invoice. The fact that a document may appear to satisfy one of the requirements does not mean that it will constitute an invoice as the whole of the statutory definition (read in light of the ordinary meaning) needs to be satisfied. An agreement for the sale and purchase of property does not come within the

expression “document notifying an obligation to make payment” considered as a whole. Even if an agreement is formed by the vendor’s acceptance of the purchaser’s offer and that acceptance is communicated by the vendor providing a copy of the agreement to the purchaser, an agreement for sale and purchase is not a document that is issued by the vendor and it does not perform and is not intended to perform the function of notifying the purchaser of an obligation to make payment. The formation of an agreement for the sale and purchase of property results in obligations on the part of both parties. These obligations are interdependent. An agreement for sale and purchase does not on its face state the exact amount that the purchaser is required to pay. It does not contain the adjustments affecting the final amount which the purchaser is required to pay under the agreement.

56. While this statement considers agreements for sale and purchase of property, the principles stated here will generally apply when considering whether other contracts and other “documents” may meet the statutory definition of “invoice”.

### **A conditional agreement for sale and purchase of property**

57. For similar reasons discussed in relation to an unconditional agreement for the sale and purchase of property (paragraphs 49 to 56), a conditional agreement for sale and purchase cannot be an invoice. As it is a conditional contract it is an agreement for a supply that may not even proceed, due to the agreement being conditional on the fulfilment or waiver of its conditions. Further, a conditional agreement for sale and purchase is a document evidencing a contractual agreement between two parties, stating that a sale and supply may take place if the conditions are satisfied. It cannot be a demand or request for payment as it is not clear whether the transaction will proceed. There is no list of goods supplied and a price to pay. Therefore it cannot notify a present legal obligation to make payment. The nature of a conditional agreement for sale and purchase is also that it is a two party transaction. It is the document in which two parties record their agreement. Being an agreement, it is likely to reflect negotiations between the parties. As such, it will not necessarily be a notice provided by the supplier to the recipient, or issued, either.

### **A conditional agreement for sale and purchase of property that becomes unconditional**

58. If a conditional agreement for sale and purchase becomes unconditional, this also cannot be an “invoice”. This is for similar reasons discussed in relation to unconditional and conditional agreements for the sale and purchase of property (paragraphs 49 to 57). A conditional agreement for the sale and purchase of property that goes unconditional cannot be a demand or request for payment. Once the conditions are satisfied there may be a present and legal obligation to make payment. However, that obligation does not arise from the execution of the agreement. Under the terms of the agreement for sale and purchase, the agreement was conditional. It is only through the subsequent satisfaction of the conditions and the notification of that fact that the price for the supply becomes payable. Therefore, the agreement did not notify a present and legal obligation to make payment—it was the subsequent notification (due to satisfying the

conditions) in conjunction with the agreement for sale and purchase that brought the obligation into effect.

59. Moreover, a conditional agreement that becomes unconditional is not issued; it would already be in the possession of the parties when it goes unconditional. If the contract was conditional on one party completing a condition of the contract then a question might arise as to whether the notice to the other party that the condition is satisfied might constitute an “invoice”. In determining whether such a notice is an “invoice” one should consider the principles discussed earlier.

#### **What if no other invoice is issued?**

60. It is noted that an agreement for the sale and purchase of property may not always be followed with an “invoice”, though it *may* be. In determining whether a document is an “invoice” one should consider the principles discussed earlier.
61. Nonetheless, even if there is no other document which could be regarded as an “invoice”, this fact does not lead to or support the conclusion that an unconditional, conditional, or conditional that goes unconditional, agreement for the sale and purchase of property must be an invoice. The absence of an invoice on any particular supply does not mean that the Act ceases to function. As stated in section 9 of the Act, the time of supply will be triggered “at the earlier of the time an invoice is issued by the supplier or the recipient or at the time any payment is received by the supplier, in respect of that supply”. Thus, if there is no invoice, the Act directs one to consider “the [first] time any payment is received by the supplier, in respect of that supply” as triggering the time of supply. This point is consistent with the earlier PIB 173 statement.
62. It is noted that in the case of an unconditional agreement, a deposit will often be paid to the vendor when the agreement is signed. If this is done, the time of supply will generally be triggered at that time irrespective of whether an unconditional agreement for the sale and purchase of property is an invoice.

#### **General application to contracts**

63. The principles stated in this interpretation statement are generally also applicable when considering whether other contracts and other “documents” meet the statutory definition of “invoice” the purposes of the Act. Generally, a contract does not perform and is not intended to perform the function of notifying the purchaser of an obligation to make payment.

#### **CONCLUSION**

64. The statutory definition of “invoice” is consistent with the *ordinary* meaning of “invoice” and should be read in that light. An “invoice” is a document issued by one party to another party setting out the details of the goods and services supplied and noting the payment due. This is supported by the Court of Appeal’s judgment in *Shell*. Therefore, for an “invoice” to trigger the time of

supply, there must be an invoice, in the ordinary sense of the word, that notifies the purchaser of the obligation to make payment.

65. It is considered that an unconditional agreement for the sale and purchase of property will not constitute an “invoice” as it will not satisfy the definition in the Act, which is to be read consistently with the ordinary meaning of “invoice”. Similarly, a standard form agreement for sale and purchase of property that is conditional on execution, or is conditional on execution that later goes unconditional, will also not constitute an invoice.
66. The conclusion that a conditional agreement and a conditional standard form agreement that goes unconditional, for the sale and purchase of property are not “invoices” is consistent with the earlier public statement in PIB 173. The conclusion with regard to the unconditional agreement is inconsistent with earlier public statement.
67. The principles stated in this interpretation statement will generally also be applicable when considering whether other contracts and “documents” may meet the statutory definition of “invoice”. The Commissioner considers that a contract would not meet the statutory definition of an “invoice”.