

Case No. D33/12

Profits tax – intention to trade at the time of acquisition – list of factors to decide are not comprehensive and exhaustive – considered in the light of and together with all the circumstances – whether the overall way of conduct was consistent with the claimed intention – objective intention – burden of proof – section 68(4) of the Inland Revenue Ordinance ('the IRO').

Panel: Chow Wai Shun (chairman), Lau Kun Luen Alex and Elaine Liu Yuk Ling.

Date of hearing: 2 August 2012.

Date of decision: 26 October 2012.

The Appellant was assistant manager of an organization. By a provisional agreement for sale and purchase dated 14 October 2007, the Appellant purchased the Subject Property. On 3 December 2007, the Appellant drew down a mortgage loan to finance the acquisition of the Subject Property. By a provisional agreement for sale and purchase dated 29 December 2007, the Appellant sold the Subject Property. The Assessor considered the Appellant's purchase and sale of the Subject Property amounted to an adventure in the nature of trade and raised profits tax assessment.

The Appellant's case was that his intention at the time he acquired the Subject Property was to use as his own residence when he realized how desperate he was in negotiating with his previous landlord for a renewal of tenancy. However changes in circumstances forced him to eventually sell the Subject Property. The Appellant appealed against the profits tax assessment raised on him.

Held:

1. It is clear from the law that trading requires an intention to trade, normally referable to that at the time of acquisition, but also to that during the time when the taxpayer is holding the relevant asset. Taking into consideration words spoken by and actions of the taxpayer is inevitable and in accordance with the legal principles set out above.
2. The list of factors in Lee Yee-shing and Marson v Morton are by no means comprehensive and exhaustive. They must also be considered in light of and together with all circumstances of the case before us (Lee Yee Shing v Commissioner of Inland Revenue [2008] 3 HKLRD 51 and Marson v Morton [1986] STC 463 followed).

3. Having considered the evidence, the Board found that the Appellant's overall way of conduct was inconsistent with his claimed intention and the Appellant's objective intention as ascertained in accordance with the law is to acquire the Subject Property with an intention to trade. Further or alternatively, the Appellant fails to satisfy the burden of proof under section 68(4) of the IRO in showing the assessment is excessive or incorrect.

Appeal dismissed.

Cases referred to:

Lionel Simmons Properties Limited (in liquidation) and others v Commissioners of Inland Revenue (1980) 53 TC 461
All Best Wishes Limited v Commissioner of Inland Revenue (1992) 3 HKTC 750
Marson v Morton [1986] STC 463
Lee Yee Shing v Commissioner of Inland Revenue [2008] 3 HKLRD 51
Real Estate Investments (NT) Limited v Commissioner of Inland Revenue (2008) 11 HKCFAR 433

Taxpayer in person.

Leung To Shan and Chan Tsui Fung for the Commissioner of Inland Revenue.

Decision:

1. The Appellant appeals against the Determination of the Deputy Commissioner of Inland Revenue dated 11 July 2011 in respect of the profits tax assessment raised on him for 2007/08 ('the Determination').

Two preliminary issues

2. By a fax dated 30 July 2012, the Appellant requested to have the additional papers submitted by the Respondent on 24 July 2012 be disregarded. He claimed that he was not given sufficient time to prepare for a response and the Respondent had imposed undue influence on him by enquiring his employer. He further informed this Board via the Office of the Clerk to this Board that he intended to call Mr A, an estate agent of Property Agency B, as a witness.

3. We found that the Clerk's Office acknowledged receipt of the said papers within the time stipulated under the letter from the Clerk dated 24 May 2012. In the same letter, the Clerk advised the Appellant to send her, inter alia, additional witness statements of any witness the Appellant intended to call. Indeed, the Clerk asked the Appellant at a very early stage if he would like to call any witness. The Appellant replied on

18 August 2011 ambiguously that he would prefer the dialect for oral communication with the Board to be Cantonese for him and his witness, if any.

4. Regarding the said papers, since assessors are given extensive and broad power to demand information from third parties under section 51(4) of the Inland Revenue Ordinance ('the IRO'), any challenge against the exercise of such power would have to resort to the court by way of judicial review. However, we also note that the Respondent should be in a position to send them over on or shortly after receipt of Clerk's letter of 24 May 2012. On the other hand, the Appellant should have (and could have) contacted Mr A and secured his agreement to serve as a witness much earlier given that Mr A was the estate agent instructed by the Appellant in the related transactions. While it would be much preferred to have all relevant papers and witnesses well settled and basic facts agreed upon by parties in advance, we find no basis to challenge submission of the said papers by the Respondent and its submission on 24 July 2012 and since in our view Mr A has in his possession the direct and relevant knowledge about the related transactions we allow him to be called by the Appellant and give evidence.

Facts

5. The Appellant raised no dispute to the following facts upon which the Determination was arrived at. We therefore find those facts as the facts relevant to this appeal:

- (a) At all relevant times, the Appellant was assistant manager of Organization C.
- (b)
 - i. In November 2002, the Appellant rented a place of residence at Unit D ('the Former Residence'), Estate E ('the Estate').
 - ii. The gross floor area of the Former Residence is 597 square feet.
 - iii. The tenancy of the Former Residence was later renewed for a term of 12 months ending on 7 November 2007 at a monthly rent of \$8,500.
 - iv. By a letter dated 19 September 2007, the landlord of the Former Residence asked the Appellant to confirm whether he would renew the tenancy for another term of 12 months commencing on 8 November 2007 at a monthly rent of \$10,800 (that is, \$18 per square feet). Should he decide not to renew, he was required to deliver vacant possession of the Former Residence on or before 7 November 2007 or to pay its market rent thereafter.
 - v. On 25 November 2007, the Appellant delivered vacant possession of the Former Residence to the landlord.

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- (c) i. By an agreement for sale and purchase dated 18 September 2007, the Appellant’s aunt, Ms F, purchased a property at Unit G of the Estate (‘the Aunt’s Property’). The purchase was completed on 1 November 2007.
- ii. The gross floor area of the Aunt’s Property is 723 square feet.
- iii. By a tenancy agreement dated 1 December 2007, the Appellant rented the Aunt’s Property for a term of two years from 1 December 2007 to 30 November 2009 at a monthly rent of \$14,500 (that is, \$20 per square feet) inclusive of rates and management fee.
- (d) During the period from 2003 to 2009, the Appellant purchased or sold the following properties in the Estate:

Location of property	Date of purchase	Date of sale
	(a) Formal agreement (b) Assignment [Price]	(a) Formal agreement (b) Assignment [Price]
Unit H	(a) 15-12-2003 (b) 09-01-2004 [\$1,828,000]	(a) 28-01-2004 (b) 25-02-2004 [\$2,200,000]
Unit J	(a) 28-01-2004 (b) 26-02-2004 [\$1,720,000]	(a) 17-06-2004 (b) 12-07-2004 [\$1,900,000]
Unit K	(a) 02-03-2004 (b) 13-04-2004 [\$2,160,000]	(a) 06-03-2006 (b) 03-05-2006 [\$2,390,000]
Unit L (‘the Block 24 Property’)	(a) 28-01-2005 (b) 15-04-2005 [\$2,963,000]	(a) 29-05-2009 (b) 03-07-2009 [\$4,350,000]
Unit M (‘the Subject Property’)	(a) 29-10-2007 (b) 03-12-2007 [\$2,750,000]	(a) 24-01-2008 (b) 28-02-2008 [\$3,380,000]
Unit N	(a) 28-10-2009 (b) 08-12-2009 [\$3,460,000]	Not applicable

- (e) (i) By a provisional agreement for sale and purchase dated 14 October 2007 (‘the Provisional Purchase Agreement’), the Appellant agreed to purchase the Subject Property through an estate agent, Property Agency B. The Provisional Purchase Agreement provided, among other things, that 90% of the

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purchase price should be paid upon completion on or before 3 December 2007.

- ii. The gross floor area of the Subject Property is the same as the Former Residence.
 - iii. On 3 December 2007, the Appellant drew down a mortgage loan of \$1,925,000 ('the Loan') from Bank Q, repayable by 360 monthly instalments of \$9,413.60 each, to finance the acquisition of the Subject Property. The Loan was subject to a prepayment handling fee of \$500 or 0.5% on prepaid amount, whichever was the higher during the first 12 months.
 - iv. By a provisional agreement for sale and purchase dated 29 December 2007, the Appellant agreed to sell the Subject Property through Property Agency B.
- (f) In his Tax Return – Individuals for the year of assessment 2007/08, the Appellant declared, among other things, that:
- i. His salaries income for the year was \$404,267;
 - ii. His employer fully refunded the rent of \$117,612 paid by him during the year in respect of the Former Residence and the Aunt's Property;
 - iii. The Block 24 Property was let during the year; and
 - iv. He did not have any sole proprietorship business during the year.
- (g) In answering a questionnaire in respect of his property transactions, the Appellant provided the following information about the Subject Property:
- i. He intended or actually used it for occupation as self residence.
 - ii. Reason(s) for selling the property:
 - (1) Change of residence Yes
 - (2) Reason for changing to new residence At the time of purchase, the vendor said that the transaction might be completed earlier in November but it was finally completed in December. As the tenancy of the Former Residence expired in

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December and the Subject Property was of poor condition and had water leakage that it could not be used for residence without renovation, another property was rented and the Subject Property was sold.

(3) Location of new residence The Aunt's Property

iii. Calculation of profits

	\$	\$
Sale proceeds	3,380,000	
<u>Less: Purchase cost</u>	<u>2,750,000</u>	
Gross profits		630,000
<u>Less: Expenses</u>		
Legal fees on purchase	8,000	
Stamp duty	41,250	
Commission to agent on purchase	27,500	
Bank interest	19,703	
Decoration ('the Decoration Expenses')	About 80,000	
Legal fees on sale	8,000	
Commission to agent on sale	33,800	
Rates and management fee	<u>2,800</u>	
Total expenses		<u>221,053</u>
Net profits		408,947
		=====

- (h) The Assessor considered the Appellant's purchase and sale of the Subject Property amounted to an adventure in the nature of trade. Accordingly, he raised on the Appellant the following Profits Tax Assessment for the year of assessment 2007/08:

	\$
Assessable profits (paragraph (g)iii)	408,947
Tax payable thereon (after tax reduction)	40,431

- (i) The Appellant objected to the above profits tax assessment and engaged in further correspondence with the Assessor. During the course, the Appellant submitted a copy of the Estate Agency Agreement for Leasing of Residential Properties in Hong Kong dated 4 December 2007. The agreement showed that the Appellant appointed Property Agency B as his exclusive agent for the period from 4 December 2007 to 3 January 2008 in marketing the Subject Property for lease and that the

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list rental of the Subject Property was \$13,000 per month exclusive of rates and management fee.

(j) The Assessor, on the other hand, ascertained the following information from Property Agency B:

i. By an Estate Agency Agreement for Sale of Residential Properties in Hong Kong dated 24 November 2007 ('the Sale Appointment Agreement'), the Appellant appointed Property Agency B as his exclusive agent for the period from 24 November 2007 to 23 January 2008 in the marketing of the Subject Property at the list price of \$3,300,000. The Appellant also opted, in the Sale Appointment Agreement, to:

- (1) allow viewing of the Subject Property by Property Agency B/purchasers at a mutually agreeable time;
- (2) pass the keys of the Subject Property to Property Agency B for safe custody and for the viewing of the Subject Property;
- (3) authorize Property Agency B to sub-list the Subject Property; and
- (4) authorize Property Agency B to issue advertisement in respect of the Subject Property.

ii. The Appellant revised the asking price of the Subject Property as follows:

<u>Date of revision</u>	<u>Asking price</u>
17 December 2007	\$3,270,000
27 December 2007	\$3,400,000

iii. On 22 December 2007, the Appellant received an offer to rent the Subject Property at a monthly rent of \$12,500.

(k) In reply to the Assessor's enquiries, Property Agency R and Property Agency S advised that according to their computer records, the Taxpayer first appointed them to market the Subject Property with the following particulars:

	<u>Property Agency R</u>	<u>Property Agency S</u>
Date of appointment	23 December 2007	2 January 2008
Asking price	\$3,500,000	\$3,700,000

Other evidence

6. In Mr A's evidence, he recalled that the Appellant said that he might purchase the Subject Property for self-occupation but he could not recall if the Appellant had asked for early completion. Mr A remembered that shortly before completion he encouraged the Appellant to sell the Subject Property instead in light of the booming market at that time but the Appellant replied that he would not wish to sell it. However, Mr A advised the Appellant to sell in case there would be a good offer and did manage to obtain eventually an exclusive agency agreement from the Appellant to sell the Subject Property. Mr A commented that the Appellant entered into such agency agreement not without reluctance. After completion, while he knew that the Appellant had moved to the Aunt's Property, Mr A urged the Appellant again to sell the Subject Property. The instruction he received from the Appellant was to simultaneously locate a suitable tenant but the Appellant would still be prepared to sell the Subject Property on a good offer from a potential buyer. In cross-examination, Mr A said that he did attempt to find a tenant but the Subject Property was sold out before he could achieve anything on that other front. He explained that it was because the market for sale was particularly active at that time. He also mentioned that the Appellant did not accept the first offer price at about \$3,250,000 although in his view the Appellant could have already sold at that price at a profit. Mr A, however, commented that the sale price at \$3,380,000 matched the level of market price.

7. Among the documentary evidence submitted to us prior to the hearing, there were listing records of the Subject Property from Property Agency B, S and R.

(a) Below is an extract from Property Agency B's record:

24-11-2007	15:20:58	MR SAID ASKING FOR SELL 3.3M
29-11-2007	18:17:41	AL SAID STILL 3.30M
04-12-2007	21:15:06	[CHANGE PRICE (ADD FOR RENT)]
04-12-2007	21:15:25	ADD FOR RENT 13000 CAN SHORT LEASE
.....		
12-12-2007	13:52:59	AL SAID STILL PRICE NO CHANGE
14-12-2007	15:58:21	VR SAID SHORT LEASE MIN 3 MONTH
17-12-2007	12:34:07	[CHANGE PRICE (REDUCE PRICE)]
17-12-2007	12:34:17	AL SAID FOR SELL AT 3.27M
22-12-2007	11:37:50	LEAVE MESSAGE TO MR
22-12-2007	12:08:20	OFFER 12.5K ALL & MR SAID WILL CONSIDER & CALL BACK
22-12-2007	16:57:21	ASK 3.21M MR SAID BT 3.27M
.....		
27-12-2007	14:11:20	[CHANGE PRICE (INCREASE PRICE)]
27-12-2007	14:11:35	OFFER 3.27M MR SAID BT CHANGE 3.4M

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.....
29-12-2007 16:05:51 ASK 3.3M MR SAID BT 3.4M
29-12-2007 20:11:56 SOLD OUT BY JT 3.38M

(b) Below is extracted from the screen prints of Property Agency S's record:

10-12-2007 05:01:40p.m. ADD VR NAME AND B-IN 2.75M...
10-12-2007 05:49:34p.m. ... ADD TEL..., IF NOT SELL PLS
TRF>>>>P

.....
20-12-2007 08:18:06p.m. [Mr T] SD NOW DECO. CAN'T FV,
NOW ASK 15K FOR RENT, NOT FOR
SELL, BUT IF FIRM CLIENT CAN
OFFER PX, MAYBE FOR SELL
28/12/2007 06:13:33p.m. [Mr T] SD KEEP 15K,...
02-01-2008 03:09:52p.m. MR SD PX\$3.70M (sic) CAN SELL
07-01-2008 07:10:08p.m. MR SD THINKING CAN FV OR NOT

(c) Below is extracted from Property Agency R's record:

14-12-2007 18:54:07 NEW LIST \$14.5K AFTER SO-A CAN
FV
22-12-2007 17:11:40 SOMEONE PI SAY A. AGT NEG
\$3.25M
23-12-2007 16:04:23 ADD FOR SELL \$3.5M FIRST
29-12-2007 11:07:57 [Mr T] SD A/P\$3.50 29/12-30/12
POLISH THE FLOOR CANNOT FV
BUT NEXT WEEK WANT FV CAN
CALL HIM OPEN THE DOOR
.....
07-01-2008 12:20:20 [Mr T] SD HOLD
07-01-2008 12:20:51 MAY BE SOLD
18-01-2008 18:48:54 [Mr T] SD NOT SELL
19-01-2008 16:12:00 [Mr T] S/O \$3.38M ALREADY

Grounds of appeal and the Appellant's submission

8. The Appellant referred to the Determination in which regard had been paid to such facts as: (a) that he had never resided in the Subject Property; (b) that he appointed estate agents for sale and revised the asking price from time to time; (c) that he rented and resided in the Aunt's Property; and (d) that he carried out renovation work which took place after the purchase. He argued that those could not be used to determine or deduce his intention at the time of his purchase of the Subject Property.

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9. The Appellant's case is that his intention at the time he acquired the Subject Property was to use it as his own residence when he realized how desperate he was in negotiating with his previous landlord for a renewal of tenancy. However, changes in circumstances forced him to eventually sell the Subject Property. Such circumstances include: (a) that while he was willing to complete earlier so that he could have moved to the Subject Property immediately after the expiry of his tenancy possession of the Subject Property was delivered only on the agreed completion date; (b) that because of the condition of the Subject Property renovation work would have to be carried out; (c) that after moving to the Aunt's Property, he could not manage to move again and at that time the appointment of Property Agency B was for rent; (d) that given the economy was getting unstable due to the financial tsunami he considered safer to reduce his liability and so accepted the offer to sell the Subject Property. He also said that he did not instruct any estate agency other than Property Agency B.

10. In his reply to this Board, the Appellant confirmed that he had had sale and purchase transactions earlier than the first one on the list shown in paragraph 5(d) above. The first two properties on the list were not rented out but the following two including the Block 24 Property had been let out before their final disposal. We attempted to figure out whether the Block 24 Property might be available for the Appellant instead of being rented out. From his Tax Return – Individual for the year of assessment 2007/08, it appeared that the Block 24 Property had been under short-term leases during the year of assessment covering the periods of: (a) 1 April 2007 to 19 June 2007; (b) 21 June 2007 to 20 August 2007; and (c) 7 September 2007 to 31 March 2008. The Appellant also indicated that he had asked other agents before raising the asking price to \$3,400,000.

The Law

11. The relevant provisions of the IRO are set out below:

(a) Section 14 provides:

'(1) Subject to the provisions of this Ordinance, profits tax shall be charged for each year of assessment at the standard rate on every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business (excluding profits arising from the sale of capital assets) as ascertained in accordance with this Part.'

(b) Section 2(1) defines 'trade' to include 'every trade and manufacture, and every adventure and concern in the nature of trade.'

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(c) Section 68(4) provides:

‘The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.’

12. We accept the authorities below referred to by the Respondent relevant in the disposal of this case.

- (a) Lionel Simmons Properties Limited (in liquidation) and others v Commissioners of Inland Revenue (1980) 53 TC 461;
- (b) All Best Wishes Limited v Commissioner of Inland Revenue (1992) 3 HKTC 750;
- (c) Marson v Morton [1986] STC 463;
- (d) Lee Yee Shing v Commissioner of Inland Revenue [2008] 3 HKLRD 51;
and
- (e) Real Estate Investments (NT) Limited v Commissioner of Inland Revenue (2008) 11 HKCFAR 433.

13. According to Simmons, *‘trading requires an intention to trade: normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss.’* (per Lord Wilberforce at page 491).

14. Mortimer J in All Best Wishes held that *‘the intention of the taxpayer, at the time of acquisition, and at the time when he is holding the asset is undoubtedly of very great weight. And if the intention is on the evidence, genuinely held, realistic and realizable, and if all the circumstances show that at the time of the acquisition of the asset, the taxpayer was investing in it, then I agree. But as it is a question of fact, no single test can produce the answer. In particular, the stated intention of the taxpayer cannot be decisive and the actual intention can only be determined upon the whole of the evidence. Indeed, decisions upon a person’s intention are commonplace in the law. It is probably the most litigated issue of all. It is trite to say that intention can only be judged by considering the whole of the surrounding circumstances, including things said and things done. Things said at the time, before and after, and things done at the time, before and after. Often it is rightly said that actions speak louder than words.’*

15. This is echoed by the Court of Final Appeal decision in Lee Yee Shing where Bokhary and Chan PJJ ruled that the question whether something amounts to the carrying of

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a trade (or business) *'is a question of fact and degree to be determined by the fact-finding body upon a consideration of all the circumstances.'* In the words of McHugh NPJ, it requires an examination of the circumstances to see whether the 'badges of trade' are present. Specifically, they are whether the taxpayer:

- (a) has frequently engaged in similar transactions?
- (b) has held the asset or commodity for a lengthy period
- (c) has acquired an asset or commodity that is normally the subject of trading rather than investment
- (d) has bought large quantities or numbers of the commodity or asset
- (e) has sold the commodity or asset for reasons that would not exist if the taxpayer had an intention to resell at the time of acquisition
- (f) has sought to add re-sale value to the asset by additions or repair
- (g) has expended time, money or effort in selling the asset or commodity that goes beyond what might be expected of a non-trader seeking to sell and asset of that class
- (h) has conceded an actual intention to resell at a profit when the asset or commodity was acquired
- (i) has purchased the asset or commodity for personal use or pleasure or for income.

16. This list coincides much with a similar list in Marson v Morton [1986] STC 463. Sir Nicolas Browne-Wilkinson V-C held that *'the question whether or not there has been an adventure in the nature of trade depends on all the facts and circumstances of each particular case and depends on the interaction between the various factors that are present in any given case.'* He also indicated that the list of factors was in no sense comprehensive, nor was any one of those decisive in all cases. They would provide common sense guidance to an appropriate conclusion. The matters which are apparently treated as a badge of trade consists of:

- (a) That the transaction was a one-off transaction although a one-off transaction is in law capable of being an adventure in the nature of trade.
- (b) Is the transaction in some way related to the trade which the taxpayer otherwise carries on?

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- (c) Was the transaction in a commodity of a kind which is normally the subject matter of trade and which can only be turned to advantage by realization?
- (d) Was the transaction carried through in a way typical of the trade in a commodity of that nature?
- (e) What was the source of finance of the transaction?
- (f) Was the item which was purchased resold as it stood or was work done on it or relating to it for the purposes of resale?
- (g) Was the item purchased resold in one lot as it was bought, or was it broken down into saleable lots?
- (h) What were the purchasers' intentions as to resale at the time of purchase?
- (i) Did the item purchased either provide enjoyment for the purchaser or pride of possession or produce income pending resale?

17. In Real Estate Investments (NT) Limited, Bokhary and Chan PJJ opined that the list offered in Marson v Morton is no less helpful in Hong Kong than it is in the United Kingdom and held that the question of whether property is trading stock or capital asset is always to be answered upon a holistic consideration of the circumstances of each particular case.

Our analysis

18. It is clear from the law that trading requires an intention to trade, normally referable to that at the time of acquisition, but also to that during the time when the taxpayer is holding the relevant asset. Taking into consideration words spoken by and actions of the taxpayer is inevitable and in accordance with the legal principles set out above.

19. This is not a clear-cut case. It does not fall into either of the extremes of circumstances. The subject matter of the transaction can be used for trading, investment or personal enjoyment. The sale was not one by a property developer or a confirmor. The terms of the Loan to finance the acquisition were not extraordinary. Although the Appellant did engage in similar transactions before, he offered some explanation to those sales which the Respondent did not challenge. Nevertheless, a single transaction can still be an adventure in the nature of trade. He did carry out renovation work but not to such an extravagant scale which might point towards trading. He did retain at least one estate agency, if not more, but his instructions were no better than equivocal, looking for at the same time a suitable tenant and a potential purchaser who would make a good offer. In our view, Mr A is a credible witness but his evidence does not offer much help in determining

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the objective intention of the Appellant. The most unfavourable factor to the Appellant appears that he held the Subject Property for a very short period of time during which he had never resided in it nor rented it out. However, he also put forward some explanation for that as well as the final disposal.

20. The lists of factors in Lee Yee Shing and Marson v Morton are by no means comprehensive and exhaustive. They must also be considered in light of and together with all circumstances of the case before us.

21. Under his employment contract, the Appellant is entitled to a rental reimbursement scheme, pursuant to which he can enjoy a tax-effective benefit from his employer so long as he rents a flat and has paid the rent. During his negotiation for a renewal of tenancy with his previous landlord, he could have explored a tenancy of another property in the Estate and that the scheme would continue to be applicable to him. From the order of events, it appears that the Appellant should have, or at least could have, enquired if the Aunt's Property might be leased to him when he was in that desperate period of time. What we gathered from the Appellant from his reply was that he considered the Aunt's Property as a back-up. We noted that indeed he had to pay a higher rent, both in terms of the absolute amount and indeed the rent per square feet, for the Aunt's Property than the offered new rent for the Former Residence but the Appellant explained that the Aunt's Property was of larger gross area with an additional bedroom and that the level of monthly rent was adjusted downwards later on to the lowest at \$11,000. With the Aunt's Property as a fall-back, we do not see any need for the Appellant to have purchased the Subject Property in the very first place with the risk that if he resided there he would lose his entitlement under the scheme and would be in a worse-off tax position. On the other hand, if he is not concerned with the benefit under the scheme at all, he could have terminated the tenancy of the Block 24 Property and use it as his own residence.

22. It is the Appellant's case that as soon as he realized that it was too difficult and hard for him to move into the Subject Property, he 'changed' his intention and looked for a suitable tenant to the Subject Property. His instructions to and subsequent conduct with Property Agency B were, however, equivocal. We do appreciate the Appellant's saying that he entered into the agency agreement not without reluctance but he could have resisted, or at least, delayed his instructions to sell. The Appellant asked for monthly rent at \$13,000. An offer was made at \$12,500, that is, already over \$20 per square feet, higher both in absolute amount and rent per square feet than the proposed rent for his Former Residence. It was also more than sufficient to cover the monthly instalment repayment of the Loan. The Appellant did not accept straightaway. He said to this Board in reply that he did not accept because the Subject Property would be rented out with nice renovation work done. If this had been the case, he should have asked for an even higher rent at the first place. Even worse, in our view, is that he asked for only a short-term lease.

23. On that same date, an offer to purchase the Subject Property at \$3,210,000 was made but the Appellant insisted on \$3,270,000 which was less than a week later increased to \$3,400,000. The increase in the asking price, as said by the Appellant, was made after his

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consulting a few other agents. Even though he might not have had an agreement with those other agents, the Appellant did consult their views on the asking price. From the documentary record of those other agents, which the Appellant did not dispute over their authenticity during the hearing, it also tends to show that the Appellant's intention was equivocal. However, his overall way of conduct, in our view, is inconsistent with his claimed intention.

24. We also understand that it is the Appellant's case that he eventually decided to sell the Subject Property because he would like to reduce his liability in light of the unstable world economy. He referred to the financial tsunami specifically in his grounds of appeal and repeated the same in his reply. However, we accept the Respondent's submission that even if we took that the Appellant changed his intention during the period of 4 to 29 December 2007, nothing seems to have happened during those days to prompt such a change. The Respondent also pointed out that in the Appellant's previous correspondence, he only referred to his workload and physical condition. The point of financial tsunami was brought up for the first time in his grounds of appeal. Indeed. When we put to the Appellant that to our knowledge and understanding, the Lehman Brothers mini-bonds incident leading to the financial tsunami did not break out until a later date in 2008, he said that because he had run into loss in investment before he would rather be cautious. If this had really been the case, he would have looked for other opportunities for a tenancy or repossessed the Block 24 Property for himself, rather than acquiring another flat. These lead to our view that the Appellant has been shifting his stand from time to time. However, the more times he attempted to find another reason to justify his sale, the more we are not convinced.

25. Based on the analysis above, we find that the Appellant's objective intention as ascertained in accordance with the law is to acquire the Subject Property with an intention to trade. Further or alternatively, the Appellant fails to satisfy the burden of proof under section 68(4) of the IRO in showing the assessment is excessive or incorrect.

26. Accordingly, we dismiss the appeal of the Appellant and confirm the assessment as mentioned in paragraph 5(h).