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Author(s)	Koo, Franklin (顧偉傑)
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Is Hong Kong’s Special Stamp Duty Constitutional?

Franklin Koo

LW 4635 Independent Research

Supervisor: Dr. Guobin Zhu

This paper seeks to explore the constitutional status of the Special Stamp Duty (SSD) in Hong Kong. While Article 105 of the Basic Law of Hong Kong maintains the right to acquire and dispose property, it has been argued that this right is infringed when the SSD imposes a high rate of taxation of up to 15% in selling the property within two years. This paper will discuss whether this duty infringes on a constitutional right. An examination of this issue will require delving into the constitutional status of SSD through case law. The remainder of the paper will focus the practicality and effectiveness of the SSD and stamp duty.

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I. INTRODUCTION

Hong Kong has a unique status as a Special Administrative Region of China under the principle of ‘One Country, Two Systems’ with the rights and freedoms enshrined under the Basic Law.¹ The right to acquire and dispose property in Hong Kong is provided for by Article 105 of the Basic Law, which states that ‘The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.’

However, a Special Stamp Duty (“SSD”) is charged when a residential property is sold within 24 months of its purchase. The rate depends on the duration of the holding period, and is intended to increase the transaction costs for short-term speculators.²

This exceptional form of taxation has, therefore, raised the recent debate of whether or not this SSD is constitutional and effective. Understanding this issue requires delving into the background of Hong Kong’s property market. The focus of this paper is to first understand the background of the market, and the SSD to determine whether it infringes our right under the Basic Law. It will then examine the arguments for and against SSD to assess the practicality and effectiveness of this special tax and also stamp duty in general. It will finally offer possible suggestions for SSD as a way of improving the current stamp duty scheme.

II. THE BACKGROUND OF THE HONG KONG PROPERTY MARKET

The SSD is a species of stamp duty, so it is important to first understand the background behind stamp duty, its economic role, and why SSD was implemented.

1. Stamp Duty

Stamp duty was first levied in 1694 in the UK during the joint reign of King William III of Orange and Queen Mary II to pay for the war with France. Although initially only planned for four years, it proved that it was an outstanding income generator for the government that it was never repealed. As a British colony, Hong Kong began collecting the duty as early as the 1860s, and is now established statutory law under

¹ The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (adopted 4 April 1990, entered into force 1 July 1997) (Basic Law) Articles 4 and 5.

² Stamp Office Interpretation and Practice Note No. 5.

the Stamp Duty Ordinance.³ The tax, unlike profits tax or income tax, has no bearing on economic output, but is mandatory during a transfer of property.

2. *Economic Role*

Stamp duty accounts for a significant amount of revenue and plays an important role in the economy. This is because Hong Kong property markets and the real estate sector contribute approximately 11.2% of the GDP in 2010.⁴ With income from stamp duty accounting for approximately 16.4% of total Government revenue in 2009 to 2010,⁵ stamp duty is substantial when residential property prices in Hong Kong are one of the highest in the world.⁶ According to the 7th Annual International Housing Affordability Survey, Hong Kong has the world's least affordable housing, with Hong Kong's median home prices in the third quarter of 2010 averaging HK\$2.58 million, about 11.4 times the median household annual income of HK\$225,400.⁷

3. *Curbing of Speculators*

In 2008 and 2009, the US economy was suffering from the Global Financial Crisis. This led to an injection of capital into Hong Kong as a result of quantitative easing and interest rates near zero in the US. This caused an abrupt rise in the Hong Kong property market, so the Hong Kong SAR Government decided to intervene in the market by passing SSD. The Financial Secretary of Hong Kong, John Tsang described the situation:

As a result of global financial conditions, the local property market has become increasingly exuberant of late. This is causing much concern in our community.

³ Stamp Duty (Amendment) (No. 2) Bill 2010 Bills Committee – Responses to follow-up actions arising from the discussions at the meetings on 17 and 21 December 2010 (Part II) (21 Jan 2011) LegCo Paper No.CB(1) 1125/10-11(01), para 18.

⁴ Information Services Department, *HONG KONG: THE FACTS, Trade and Industry* (Hong Kong, January 2012) <<http://www.gov.hk/en/about/abouthk/factsheets/docs/trade&industry.pdf>> accessed 15 January 2012.

⁵ Hong Kong Legislative Council, *FACT SHEET – Major sources of Government Revenue* (Hong Kong, 21 June 2011) <http://www.legco.gov.hk/yr10-11/english/sec/library/1011fs05_20110621-e.pdf> accessed 1 February 2012.

⁶ C Shay, “Hong Kong: The World’s Most Expensive Real Estate?” *Time* (Hong Kong, 24 Sep 2009) <<http://www.time.com/time/world/article/0,8599,1925806,00.html>> accessed 23 January 2012.

⁷ The China Post, “Hong Kong has world’s least affordable housing: survey” *The China Post* (Hong Kong, 26 Jan 2011) <<http://www.chinapost.com.tw/business/asia/hong-kong/2011/01/26/289059/Hong-Kong.htm>> accessed 2 January 2012.

With abundant liquidity worldwide and persistently low, in fact, ultra-low interest rates, there is a huge amount of hot money flooding into our region, including Hong Kong. This has led to hefty increases in asset prices and overheated speculative activities. There is heightened risk of property bubbles forming.⁸

For that reason, the government introduced the SSD on 20 November 2010 with aims to curb short-term property speculation as well as to protect the interests of genuine homebuyers and long-term investors by increasing the transaction costs of property within 24 months from the day the property was acquired.

4. *SSD Mechanism*

The SSD amended the Stamp Duty Ordinance⁹ under two new heads Head 1(1AA) and Head 1(1B) in Schedule 1. SSD charges 15% for properties held for six months or less; 10% for more than six months but less than one year; and 5% for more than one year but less than two years for residential property transactions from the beginning of 20 November 2010. Both the vendor and buyer are jointly and severally liable for SSD and are subject to the same penalties as late stamping and non-stamping under sections 9¹⁰ and 15¹¹.

III. CONSTITUTIONAL STATUS OF SSD

The introduction of the SSD has raised issues of constitutionality. Of course, stamp duty and the power to tax must be constitutional for the government to collect revenue and run the region. Under Article 108 of the Basic Law, it provides that “The Hong Kong Special Administrative Region shall, taking the low tax policy previously

⁸ Inland Revenue Department, *Opening remarks by FS at press conference on new anti-property speculation measures* (Hong Kong, 19 Nov 2010) <<http://www.ird.gov.hk/eng/ppr/archives/10111901.htm>> accessed 3 February 2012.

⁹ Cap 117

¹⁰ (1) (a) if the instrument is so stamped not later than 1 month after the time for stamping, the penalty shall be double the amount of the stamp duty;
(b) if the instrument is so stamped later than 1 month but not later than 2 months after the time for stamping, the penalty shall be 4 times the amount of the stamp duty;
(c) in any other case, the penalty shall be 10 times the amount of the stamp duty.

¹¹ (1) Subject to subsection (1A), no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever except-

- (a) criminal proceedings;
- (b) civil proceedings by the Collector to recover stamp duty or any penalty payable under this Ordinance,

or be available for any other purpose whatsoever, unless such instrument is duly stamped.

pursued in Hong Kong as reference, enact laws on its own concerning types of taxes, tax rates, tax reductions, allowances and exemptions, and other matters of taxation.” In addition, Article 73(3)¹² of the Basic Law confers power to the legislature to approve taxation, and in this case by passing the SSD through an amendment of the Stamp Duty Ordinance (Cap 117).

Clearly, Article 108 is a right of the HKSAR Government. Thus begs the question whether Article 108 can infringe on Article 105, the right to acquire and dispose property, making SSD unconstitutional?

The government responded to that question with the Court of Appeal’s decision in *Weson Investment Ltd v Commissioner of Inland Revenue*¹³ and argued:

...legitimate taxation is governed by BL 108 (not BL 105) and is not subject to an overriding requirement of proportionality stemming from BL 105.¹⁴

One might disagree with this statement, and argue that with the Basic Law, enacted in 1997 after the handover, is very much in its infancy, and that neither the government or the court is able to clearly define which Basic Law rights are absolute rights and which ones can be restricted. Whatever it may be, constitutional rights ought to be given a generous approach, *Ng Ka Ling & Others v Director of Immigration*.¹⁵ Even if Article 105 is not a Chapter III right in the Basic Law, Young believes that “any approach that artificially holds back the development and growth of Basic Law rights should be strongly avoided.”¹⁶ Since all power bestowed on Hong Kong’s Government under the Basic Law has legal limits, the judiciary may define those limits in a way that strikes the most suitable balance between economic efficiency and the legal protection of the citizen.¹⁷

1. *Weson Investment Ltd v Commissioner of Inland Revenue*

¹² The Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions; ...

(3) To approve taxation and public expenditure;

¹³ [2007] 2 HKLRD 567.

¹⁴ LegCo Paper (n 3), para 17.

¹⁵ [1999] 1 HKLRD 315, referring to Chapter III rights in the Basic Law.

¹⁶ SNM Young, “Restricting Basic Law Rights in Hong Kong” (2003) 34 *Hong Kong Law Journal* 109, 132.

¹⁷ BF-C Hsu, *Laws of taxation in the Hong Kong SAR* (Open University of Hong Kong Press : Hong Kong University Press 2001).

The government cites *Weson* as the case that SSD does not infringe Article 105, although the case itself was quite different. In *Weson*, the plaintiff purchased land in the New Territories, and after redevelopment, part of the land was sold for a substantial profit. After a submission of the profits tax return, the Commissioner of Inland Revenue considered that the profit generated from the sale of land was taxable. The plaintiff objected to the assessment. Under section 71(2)¹⁸ of the Inland Revenue Ordinance¹⁹, it required that the amount in a Tax Reserve Certificate (TRC) be purchased. The plaintiff did not purchase the certificate, but did eventually pay. An appeal to the profits tax assessment was launched to the Board of Review. The Board of Review found in favour of the plaintiff, so the additional assessment of profits tax on the sale of land was refunded back. However, since the plaintiff did not purchase a Tax Reserve Certificate in lieu of paying the tax, the tax could not be refunded with interest. This makes sense because the primary purpose of the TRC was to prevent the delayed payment of taxes simply by appealing a tax assessment. The plaintiff initially had an option to purchase a TRC under the Inland Revenue Ordinance, and thus had the option for being compensated for the tax withheld.

Having determined that the decision in *Weson* is different from a constitutional challenge of SSD, the decision is still relevant and warrants extensive discussion. Johnny SL Mok SC mounted an appeal in January 2007 on the grounds that both Article 6²⁰ and 105 of the Basic Law had been infringed through the deprivation of capital in between the time the taxes were paid and refunded without taking into the account of interest. However, Tang VP held at paragraph 79 that under Article 105, genuine action taken to enforce payment of tax or to recover a penalty or a fine does not come within the scope of lawful expropriation of property. This is certainly correct, since if legitimate taxes were classified as a “deprivation of property”, taxes would never be constitutional. He observed at paragraph 85:

¹⁸ (2) Tax shall be paid notwithstanding any notice of objection or appeal, unless the Commissioner orders that payment of tax or any part thereof be held over pending the result of such objection or appeal: (Amended 7 of 1985 s. 2) □ Provided that where the Commissioner so orders he may do so conditionally upon the person who or on whose behalf the objection or appeal is made providing security for the payment of the amount of tax or any part thereof the payment of which is held over either-

(a) by purchasing a certificate issued under the Tax Reserve Certificates Ordinance (Cap 289);

¹⁹ Cap 112

²⁰ “The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law.”

...I am of the view that unless the taxation scheme cannot be regarded as genuine, but was in fact a disguised expropriation of property, BL 105 has no application. And the court has no power to interfere.

From Tang's judgment, it would seem quite difficult for a judge to adjudicate any taxation scheme against Article 105, unless it could be found as a disguised expropriation of property.

Rogers VP takes a more softened stance than VP Tang. He stated that, "... Article 105 of the Basic Law has no application to legitimate taxation...When the Government imposes tax on the individual, of necessity it deprives the individual of his property without any right to compensation."²¹ An Australian case is cited to illustrate his viewpoint. *Australian Tape Manufacturers Association Ltd and others v The Commonwealth of Australia*²² was a case concerning the constitutional validity of Part VC of the Copyright Act 1968 that imposed a royalty duty on blank tape manufacturers as deterrence against the widespread and unauthorized copying of copyright sound recordings. The slim majority in a 4-3 decision held that:

A law which is in truth the law imposing taxation escapes the requirement of s. 51(xxxi)²³ of the Constitution that an "acquisition of property... for any purpose in respect of which the Parliament has power to make laws" be "on just terms"... The reason that this is so is that the relationship between the legislative powers conferred by s. 51(ii)²⁴ and s. 51(xxxi) of the Constitution necessarily involves antinomy between what constitutes "taxation" (for the purposes of s. 51(ii)) and what constitutes an "acquisition of the property" (for the purposes of s. 51(xxxi)): of its nature, "taxation" presupposes the absence of the kind of direct quid pro quo involved in the "just terms".²⁵

This would seem analogous to the SSD in its comparison of s. 51(xxxi) and (ii) to Article 105 and 108, pointing to the fact that tax legislation such as SSD falls outside the ambit of Article 105. The dissenting judges on the other hand, paid close attention

²¹ (n 13) para 18.

²² (1993) 176 CLR 480.

²³ The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxx) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

²⁴ The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(ii) taxation; but so as not to discriminate between States or parts of States;

²⁵ *Australian Tape Manufacturers Association Ltd and others v The Commonwealth of Australia* (n 22) 508.

to the purpose of the royalty and whether it was involved with raising revenue for the Government. It asserted:

The actual purpose of the royalty shows that it is part of a scheme, designed to compensate copyright owners for the use of their copyright material, which does not involve the raising of government revenue. Rights and obligations are imposed by statute as part of the scheme and in that sense the scheme is a public one. But it is not sufficient in our view to constitute the moneys raised by way of royalty under the legislation public moneys, which they would of necessity be if the royalty were a tax.²⁶

This is significant because this supports the fact that the purpose of a royalty or scheme is a critical issue. As mentioned, the SSD's purpose was not to raise revenue, but to "curb short-term speculative activities by substantially increasing the costs to speculators, reduce the risk of the development of an asset bubble and ensure the healthy and stable operation of the property market." It also believes that, "At the same time, genuine home buyers and long term investors should not be affected by those measures."²⁷

This final statement is controversial, since SSD is not dependent on any subjective intentions of the seller. SSD solely takes into consideration the length of the holding period ignoring the intention of the subsequent disposal except to a handful of exceptions under section 29CA (9) and (10)²⁸. These exceptions do not protect genuine homebuyers who may need to sell their homes within the 24-month period for legitimate reasons.

²⁶ Ibid (n 22) 524.

²⁷ Legislative Council Brief, Stamp Duty (Amendment) (No. 2) Bill 2010 (1 Dec 2010) LegCo Paper No.HD(CR)5/50/1/177, para 3.

²⁸ (10) Head 1(1B) in the First Schedule does not apply to a chargeable agreement for sale if the purchaser under the agreement is a parent, spouse, child, brother or sister of the vendor under the agreement.

(11) Head 1(1B) in the First Schedule does not apply to a chargeable agreement for sale if—

- (a) the agreement is made pursuant to any decree or order of any court; or
- (b) the residential property in respect of which the agreement is made—
 - (i) was transferred to or vested in the vendor by or pursuant to any decree or order of any court;
 - (ii) relates solely to the estate of a deceased person;
 - (iii) was devised by or otherwise passed on the death of the deceased person under a will, the law of intestacy or right of survivorship to the vendor;
 - (iv) relates solely to a bankrupt's estate;
 - (v) relates solely to the property of a company being wound up under section 177(1)(d) of the Companies Ordinance (Cap 32); or
 - (vi) is the subject of a sale by a mortgagee (being a financial institution within the meaning of section 2 of the Inland Revenue Ordinance (Cap 112)) or a receiver appointed by such a mortgagee.

This is concerning since there is no possibility in the Ordinance to appeal on the applicability of SSD. There is no means for the decision to be reviewed based on individual or personal circumstances such as financial hardship due to a sudden loss of employment.

2. *Tax or Disguised Penalty?*

The classification of the SSD as a tax or a penalty is crucial, since only under taxation would Article 108 have a constitutional effect. In *R v Barger*,²⁹ Issacs J defines penalty as “a penalty for an unlawful act or omission” while a tax is “a contribution to revenue irrespective of any legality or illegality in the circumstances upon which the liability depends.”³⁰

On the face of it, it would seem that since SSD is a “special” extension to regular stamp duty under the same ordinance, it falls under taxation and Article 108. However, on closer review, SSD seems to be imposing a penalty on all residential property transactions resold within a 24-month period. Even if SSD does contribute to the revenue, the purpose is unlike stamp duty and other taxes since it is a behavior modifying tax rather than an income generator. Hence, it may seem more like a disguised penalty that is not based on empirical evidence. For instance, there are two aspects in which SSD may unfairly penalize the purchaser.

Firstly, the Collector of Stamp Revenue may demand additional SSD in the future if SSD stated in the agreement for sale and purchase is considered to be an inadequate consideration. Both the vendor and the purchaser are made jointly and severally liable for any additional SSD, but it is highly possible that the purchaser will be unable to locate the vendor after the transaction, and thus, will need to bear the additional SSD by himself or herself.

Secondly, another problem with SSD is it may force the payment of SSD on the purchaser to protect their priority in their property interest. If the agreement requires the SSD to be settled by the vendor but the vendor fails to pay it, the purchaser would be unable to register the agreement to preserve the priority of his or

²⁹ (1908) 6 CLR 41.

³⁰ *Ibid*, 99.

her interest. In that case, the purchaser would then have no choice but be forced to pay the SSD or run the risk of losing priority of interest in the property.³¹

These two scenarios are unsatisfactory and unjust since it affects not only the speculators SSD was intended for, and the purchasers in the case of SSD is a genuine buyer. This is compounded by the fact that under the current conveyancing practice in Hong Kong, the legally binding Provisional Agreement for Sale and Purchase often includes a usual term that the stamp duty is borne solely by the purchaser. These various factors support the argument that SSD does not fall within the protection of Article 108.

3. Article 1 of Protocol No 1 of the European Convention on Human Rights

Human rights limit what governments can do to their citizens, so it would seem that taxation and human rights contradict one another. In the context of human rights limitations, Hong Kong's Court of Final Appeal has referred to proportionality based on the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the European Court of Human Rights (ECtHR). Keller describes the ECHR is a type of constitutional jurisprudence, helping to define the rights and fill in constitutional gaps, acting as a shadow Constitution.³² Article 1 of Protocol No 1 of the European Convention on Human Rights provides:

- (1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
- (2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Thus, the ECHR outlines the State's right to charge taxes. There is an exception to the rights to property under subsection 2 by granting States the right to levy taxes.

The HKSAR government contended that the SSD would be a proportionate measure under ECHR case law in a written response stating:

³¹ ONC Lawyers "The Proposed Special Stamp Duty for Residential Properties and Other Related Measures" *ONC Lawyers* (Hong Kong, February 2011).

³² H Keller, A Stone Sweet and Oxford University Press., *A Europe of Rights : The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008).

...[T]he collection of SSD is likely to be a proportionate measure in view of the case law developed under Article 1 of Protocol No 1 of the European Convention on Human Rights. Under such case law, states have been given a very considerable **margin of appreciation** in taxation matters and the court will not intervene unless the legislation amounts to an “arbitrary confiscation” or is “devoid of reasonable foundation”.³³ (emphasis added)

Although ECHR does not have jurisdiction over Hong Kong, it is regarded highly and in *Lam v Commissioner of Police*,³⁴ the Court favoured the ECtHR interpretation over other conflicting sources of international law. Thus, Chen argues that ECHR has a great influence on Hong Kong jurisprudence.³⁵ Central to the argument was the notion margin of appreciation that is relevant in the scope of this paper.

4. *European Margin of Appreciation*

The margin of appreciation doctrine allows the ECtHR to balance State sovereignty with the need to protect Convention rights against the general interest. In taxation, the Court has granted taxation cases varying degrees in the margin of appreciation. Such is the case in *Imbert de Tremiolles v France*,³⁶ where the payable amount exceeded the net income obtained from the property, but the ECtHR concluded in favour of a wide State's margin of appreciation.³⁷ For this reason, the HKSAR Government believes the SSD does not interfere with Article 105 rights.

However, margin of appreciation does not grant immunity to a State's right to tax. There are instances of ECtHR cases where an excessive tax burden does violate the ECHR. The European Court of Human Rights has intervened and delivered rulings that had significantly curtailed the right of a State to levy taxes.

In the ECtHR case of *Mamidakis v Greece*,³⁸ it held that disproportionate tax penalties amounted to a violation of the right to property. Having relied on Article 1 of Protocol No. 1 of the ECHR, the Court considered that the fine imposed by the Government of Greece had dealt such a blow to the applicant's financial situation that

³³ Stamp Duty (Amendment) (No. 2) Bill 2010 Bills Committee, (n 3) para 17.

³⁴ [2009] 4 HKLRD 575.

³⁵ AHY Chen, “International Human Rights Law and Domestic Constitutional Law: Internationalisation of Constitutional Law in Hong Kong” (Dec 22, 2009). <<http://ssrn.com/abstract=1527076>> accessed 19 Dec 2011.

³⁶ Application numbers 25834/05 and 27815/05.

³⁷ M Grau Ruiz, “Decisions of the ECHR Affecting Domestic Laws in the Financial and Tax Field” (2011) XVIII *LEX ET SCIENTIA International Journal* 1.

³⁸ Application number 35533/04.

it amounted to a disproportionate measure in relation to the legitimate aim pursued. It therefore concluded, unanimously, that there had been a violation of Article 1 of Protocol No. 1.

In October 2010, the ECtHR delivered a decision on tax in the case of *Shchokin v Ukraine*.³⁹ It held that the Ukrainian tax authorities' application of a rate of tax, which was higher than that contemplated in the law, amounted to a violation of the right to property. In other words, if an obligation to discharge a tax is imposed by a law that does not satisfy the condition of precision and clarity, the payment of such a tax is contrary to Article 1 of Protocol No. 1.

In the case of *Di Belmonte v Italy*,⁴⁰ a delay in payment of compensation meant that the payment was subject to a withholding tax which would not have been the case if the payment was promptly made. The ECtHR held that a tax that had been implemented in a manner which created an excessive burden on a citizen, was incompatible with the right to property.

Even if the ECtHR reiterated that States had a wide discretion in determining the types of taxes or contributions to be levied and they alone were competent to assess the political, economic, and social issues to be taken into account in this regard, this does not prevent interference from ECtHR. In all the cases, the Court took into consideration the existence of alternative solutions when ruling whether the interference had been proportionate to the aim sought to be achieved.

5. *Domestic Margin of Appreciation*

English courts have since adopted the margin of appreciation doctrine, *R v DPP, ex p Kebilene*.⁴¹ Lord Hope held:

In this area difficult choices may have to be made by the executive or the legislature between the right of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognize that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the [ECHR].

³⁹ Application numbers 23759/03 and 37943/06.

⁴⁰ Application number 72638/01.

⁴¹ [2000] 2 AC 326.

This demonstrates that domestic courts will also give a degree of appreciation to its legislature or the executive and this was followed similarly in the Hong Kong case of *Lau Cheong & Another v HKSAR*.⁴² The CFA case debated on the question of constitutionality in the mandatory life sentence for murder stating, “It is also established that when deciding constitutional issues, the context in which such issues arise may make it appropriate for the courts to give particular weight to the views and policies adopted by the legislature.” Could this mean that there is a presumption of constitutionality? This is unlikely as Lavender points out that the limits of the margin of appreciation are incapable of an abstract definition.⁴³

As Wacks writes, "Judicial views on 'morals' contain an element of contradiction...by incorporating the doctrine of the margin of appreciation, the courts recognize that notions of morality vary from time to time and from community to community, suggesting that community acceptance of particular views or behaviour might be decisive."⁴⁴ A State's interest may not always be a conclusive justification. For instance in *Dudgeon v United Kingdom*,⁴⁵ the ECtHR said that the protection of morals was an inadequate justification for criminalizing homosexual activity, and it noted that the margin of appreciation depended on the nature of the particular interference and not only on advancing the State's interest.

The doctrine is thus “context dependent” and its limits can be drawn only within a specific case. In any case, some commentators such as Barnett, Van Dijk, and Van Hoof have criticised that the doctrine is a concept capable of significantly undermining the protection given by the Convention.⁴⁶ Therefore, due to the unpredictable nature of the doctrine of margin of appreciation, it is not a strong justification to support SSD.

6. *Necessity, Proportionality, and Fair Balance*

A condition on restrictions requires that they are necessary for the purposes imposed. As SSD interferes with Article 105, it must have a legitimate aim on the grounds of

⁴² [2002] 2 HKLRD 612.

⁴³ N Lavender, “The Problem of the Margin of Appreciation” (1997) *European Human Rights Law Review* 4, 382.

⁴⁴ R Wacks, *Human rights in Hong Kong* (Oxford University Press 1992) 391.

⁴⁵ Application number 7525/76.

⁴⁶ H Barnett, *Constitutional & administrative law* (6th edn, Routledge-Cavendish 2006) 496; P v Dijk, GJHv Hoof and AW Heringa, *Theory and practice of the European Convention on Human Rights* (3rd edn, Kluwer Law International 1998) 604.

necessity and proportionality. Necessity is interpreted as 'indispensable', not with the looser test of 'reasonable' or 'desirable'.⁴⁷ "Necessary" in this test should be given its ordinary meaning and that no assistance is to be gained by substituting for "necessary" a phrase such as "pressing social need", *HKSAR v Ng Kung Siu & Another*.⁴⁸

The principle of proportionality is introduced by the notion of 'necessary.' The court believed that for a restriction on the freedom of expression, it would require that every formality, condition, restriction, or penalty must be proportionate to the legitimate aim pursued, *Handyside v United Kingdom*.⁴⁹ It would not be far-fetched to say that Article 105 and the right to property should be judged under the very same standard.

In the case of *Gurung Kesh Bahadur v Director of Immigration*,⁵⁰ the Court of Final Appeal was confronted with the issue of protecting human rights and outlining the conditions where restrictions were justifiable. The court ruled that the principle of proportionality should apply to restrictions and found:

The question of whether rights found only in the Basic Law can be restricted and if so the test for judging permissible restrictions would depend on the nature and subject matter of the rights in issue. This would turn on the proper interpretation of the Basic Law and is ultimately a matter for the courts.⁵¹

This suggests that any restriction on fundamental rights has to be prescribed by law and at the same time be necessary for the protection of some legitimate interests. As a result, the legislative objective has to be sufficiently important to justify limiting a right, the measures have to be rationally connected to it, and the restriction has to be no more than necessary to accomplish the objective.

In the flag desecration case, *HKSAR v Ng Kung Siu & Another*,⁵² the court had accepted that the constitutional requirement of necessity involves the application of a proportionality test. It considered the constitutionality of the statutory prohibition in the desecration of the national and regional flags with criminal sanctions. In applying the proportionality test, it examined whether a limitation on a constitutional right

⁴⁷ R Wacks (n 44) 394.

⁴⁸ [1999] 3 HKLRD 907.

⁴⁹ Application number: 5493/72, para 49

⁵⁰ (2002) 5 HKCFAR 480

⁵¹ *Ibid*, para 28.

⁵² [1999] 3 HKLRD 907.

prohibiting the right to freedom of expression is proportionate to the aims sought to be achieved.

In *Leung Kwok Hung v HKSAR*,⁵³ the court stated the importance of a generous interpretation of fundamental rights⁵⁴ and held that the proportionality test should be formulated in these terms:

- (1) The restriction must be rationally connected with one or more of the legitimate purposes; and
- (2) the means used to impair the right... must be no more than is necessary to accomplish the purpose in question.

The restriction must be proportionally justified, when it is connected to a legitimate purpose, and when it does not intervene in the right more than necessary to accomplish that purpose.

Under European jurisprudence, there is the question of whether a “fair balance test” for cases of interference with property rights. The test demands that any interference with property rights would need to strike a fair balance between the demands of society and its general interest with the requirements in protecting an individual’s rights. This was reflected in the judgment of the European Court of Human Rights in the case of *The National & Provincial Building Society, The Leeds Permanent Building Society and The Yorkshire Building Society v United Kingdom*.⁵⁵ It read:

According to the Court’s well-established case law, an interference, including one resulting from the measure to secure the payment of taxes, must strike a “**fair balance**” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, including the second paragraph: there must therefore be a **reasonable relationship of proportionality** between the means employed and the aims pursued.⁵⁶ (emphasis added)

There must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized even if it is not expressed in ECHR. John Joseph Cremona, vice-president of the ECtHR at the time, addressed the issue of proportionality as follows in 1995:

⁵³ [2005] 8 H.K.C.F.A.R. 229.

⁵⁴ Ibid, para 16.

⁵⁵ 25 EHRR 127.

⁵⁶ Ibid, para 80.

An important principle, which, though nowhere in the European Convention on Human Rights mentioned in express terms, permeates the whole of its fabric is that of proportionality. Essentially this is but another facet of the **concept of balance**, and **balance is very much at the centre of the whole subject of the protection of human rights**, there being a sort of inbuilt balancing mechanism in the whole of the structure of the Convention.⁵⁷ (emphasis added)

This view was also reflected in the case of *Travers v Italy*,⁵⁸ where the court held that:

...The interference in question should strike a **'fair balance'** between 'the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights...there must be a reasonable relationship of **proportionality** between the means employed and the aims sought to be realised'. Consequently, the financial liability arising out of the raising of tax or contributions may adversely affect the guarantee secured under this provision if it places an **excessive burden** on the person or the entity concerned or fundamentally interferes with his or its financial position.⁵⁹ (emphasis added)

The SSD interferes with Article 105 for the purpose of increasing the frictional costs of speculative activities. It is doubtful that curbing speculators is a legitimate purpose, since it does not adequately define the harm caused by speculators against society. In addition, the SSD does not manage to have a mechanism to separate speculators from genuine buyers. Taken in contrast, Singapore's Additional Buyer's Stamp Duty (ABSD) is only applicable for purchasers holding one property and then buying second and subsequent properties. The SSD does not have this distinction, placing an increased burden on genuine first-time purchasers amidst record high housing prices.⁶⁰

Some people share the view that SSD is not necessary, since there are other means of controlling the market, such as tightening on mortgage lending by reducing

⁵⁷ JJ Cremona, "The Proportionality Principle in the Jurisprudence of the European Court of Human Rights" in U Beyerlin (eds), *Recht zwischen Umbruch und Bewahrung* (Springer-Verlag, Berlin 1995) 323.

⁵⁸ Application number 15117/89.

⁵⁹ R Attard, "The European Convention on Human Rights (ECHR) Tax Controversy and Tax Policy" (2011) *EU Direct Tax News, A bimonthly Review of EU Direct Tax Developments Affecting Business in Europe* 41.

⁶⁰ Property Wire, "Hong Kong Property Bubble Looms" *NuWire Investor* (Hong Kong, 12 Apr 2012) <<http://www.nuwireinvestor.com/articles/hong-kong-property-bubble-looms-59050.aspx>> accessed 12 Apr 2012.

the maximum loan-to-value ratio. The Hong Kong Monetary Authority had limited the maximum loan-to-value ratio for transactions above HK\$12 million from 60% to 50%, and from HK\$8-12 million down from 70% to 60% in November 2010 alongside the SSD.⁶¹ Poon, Colliers International's Residential Sales Executive Director does not believe SSD had any impact:

...I don't see that the [SSD] duty has helped cool down the market. The fall in the number of transactions was rather the result of banks' mortgage rate hikes, as well as restrictions on the loan-to-value ratio by the Hong Kong Monetary Authority.⁶²

This points to the fact that SSD is not necessary to accomplish the purpose in question, where the legitimate purpose itself is unclear. Without a clear purpose, it cannot strike a fair balance, as the demands of the general interest of the community cannot be ascertained as just deterring "speculators". It will be the government's responsibility to clearly identify the SSD's definitive purpose in order to satisfy the proportionality principle.

7. *Excessive Burden*

The ECtHR have mentioned on several occasions that the imposition of an excessive and individual burden of tax on a person, such that it fundamentally interferes with that person's financial position, may constitute an infringement of the right to enjoy one's possessions. Could it then be argued that the SSD would create an excessive burden on a citizen? Webb believes so, arguing that the HKSAR Government has already levied a possible 19.25% tax due to a maximum rate of 4.25% *ad valorem* stamp duty in addition to a 15% profits tax rate.⁶³ With the addition of SSD, this can reach a maximum of 34.25% if the property is resold within 6 months of acquisition.⁶⁴ This can be an excessive burden on a citizen when we are concerned with residential property at values of over millions of dollars.

⁶¹ D Yam, "New Property Measures to Dampen Speculation, but Not Prices" *Morgan Stanley* (Hong Kong, 23 Nov 2010) <<http://www.morganstanley.com/views/gef/archive/2010/20101123-Tue.html>> accessed 1 Dec 2010.

⁶² K Ha (n 80).

⁶³ Unlike stamp duty which is levied on the price of the property, the profits tax rate requires that there is a profit made between the purchase price and the selling price for the amount to be levied.

⁶⁴ D Webb "Government criticises Stamp Duty proposal" *Webb-site.com* (Hong Kong, 26 Nov 2010) <<http://webb-site.com/articles/stampmad.asp>> accessed September 22, 2011.

Ironically, the Government's Secretary for Transport and Housing would agree with its excessive burden in a LegCo debate 5 months before the announcement of SSD as:

In reality, the vendor may transfer the liability on the additional stamp duty to the purchaser, thereby defeating the objective of introducing the additional stamp duty on speculators. The proposal is *unfair to those who have genuine needs to sell their properties within the specified period of time*, and will cause additional hardship to those in financial difficulties. In fact, not all property transactions generate profits. Those gaining profits from property speculation are already subject to profits tax. The additional stamp duty will be considered as a kind of **double taxation**.⁶⁵ (emphasis added)

The combined effect of both SSD and stamp duty tax, with the absence of effective measures or a case-by-case review to relieve double taxation, will create an excessive burden.

Because of SSD, new purchasers may be forced to wait for the full two years before they consider reselling their units. This will reduce the number of homes available on the market, reducing the supply available, pushing the demand for houses even higher. This places not only hardship on the freedom of the purchaser, but also hardship on the public due to the soaring housing prices.⁶⁶ In the event of a sharp economic downturn, the SSD would create a "lock-in" effect, with new owners unable to pay off the mortgage yet it would not be economically feasible to immediately sell due to the additional cost created by SSD.

IV. EFFECTIVENESS OF SSD

The Government's aim for SSD is to contain short-term property speculation and reduce the risk of asset bubbles.⁶⁷ This is ultimately to lower housing prices, and thus increasing affordability for the residents of Hong Kong, since that the direct effect of speculators is driving housing prices up. However, it is unclear whether the SSD is having this desired effect, especially when Hong Kong's tax system has often been

⁶⁵ Letter by the Secretary for Transport and Housing, Eugene Fung, to the Bills Committee addressing the possible implementation of SSD. *Transport and Housing Bureau* (Hong Kong, 7 June 2010) <<http://www.legco.gov.hk/yr09-10/english/bc/bc07/papers/bc070608cb1-2172-2-e.pdf>> accessed 14 October 2011.

⁶⁶ Property Wire (n 60).

⁶⁷ K Ha, "Property prices play on John Tsang's mind" *The Standard* (Hong Kong, 22 Nov 2011).

described as deficient. Littlewood gave strong opinions on the matter because tax avoidance could be accomplished so easily:

Hong Kong's tax system is grossly flawed: it is inherently inequitable and it permits avoidance and evasion of kinds and on a scale which in other developed jurisdictions would be considered scandalous.⁶⁸

In first determining the effectiveness of the SSD from a theoretical perspective, it would be helpful to cite Adam Smith. According to Smith, his four principles of a proper tax system are (1) canon of equality, meaning proportionality; (2) canon of certainty; (3) canon of convenience for payment; and (4) canon of economy implying that it should be proportional and not excessive.⁶⁹ The paper will discuss three of these principles – equality, certainty, and economy, to seek whether or not SSD is fundamentally sound. It will then discuss the actual practical impacts SSD has had since its inception in 2010.

1. Canon of Equality - Avoidance of Stamp Duty and SSD

The onerous burden of stamp duty and SSD encourages people to find alternative means of avoiding the tax, making SSD ineffective. There are two popular methods to avoid stamp duty. One is a separate payment for chattels such as fixtures and fittings, lowering the cost of the actual property, thus lowering the stamp duty. This is mitigated somewhat since the Collector of Stamp Revenue may demand additional SSD in the future if the SSD stated in the agreement for sale and purchase is considered to be an inadequate consideration, where the amount would mostly fall on the purchaser.

The second is by setting up a limited liability company in Hong Kong, since in the landmark case of *Salomon v A Salomon & Co Ltd*,⁷⁰ all corporations are separate legal entities. The company, set up as a shell company, would buy the residential property instead of an individual. Although the company would initially incur stamp duty, the subsequent selling of the property through shares would bypass SSD

⁶⁸ M Littlewood, *Taxation without representation : the history of Hong Kong's troublingly successful tax system* (Hong Kong University Press 2010) 2.

⁶⁹ A Smith, AS Skinner and ebrary Inc., *The wealth of nations Books IV-V* (Penguin Books 1999), Book V, 416-417.

⁷⁰ [1897] AC 22.

altogether. The savings is substantial, given that the stamp duty on shares is 0.2% and \$5 for the instrument of transfer.⁷¹

As Webb advises, one may bypass stamp duty of both shares and property as well as SSD altogether by setting up an offshore company as opposed to a Hong Kong company, and states that stamp duty “is a middle-class tax which is legally avoidable by the tycoons.”⁷²

The avoidance of stamp duty has become so popular in the UK, there are now online “stamp duty tax planners” that charges a fee amounting to half of that required by which would have been paid in tax that assists in bypassing the duty.⁷³ Since then however, the UK government has plans of taxing 15% and an annual charge for offshore trusts and companies to block the loophole, although it is unknown how effective it will be in its implementation.⁷⁴

2. *Canon of Certainty – Time-based Tax*

Certainty implies that there should be certainty with regard to the amount the taxpayer needs to pay, allowing an adjustment in income and expenditure. SSD is an uncertain tax because it is structured on the transaction price of the property which may fluctuate. Coupled with external factors such as the economy and no appeal or review mechanism of SSD, this creates an immediate disincentive for people to move. The Mirrlees Review, conducted by the Institute for Fiscal Studies in the UK concluded that stamp duty:

There is no sound case for maintaining stamp duty and we believe that it should be abolished...Stamp duty ensures that properties are not held by the people who value them most. It creates a disincentive for people to move house, thereby leading to potential inflexibilities in the labour market and encouraging people to live (and businesses to operate) in properties of a size and in a location that they may well not otherwise have chosen.⁷⁵

⁷¹ Stamp Duty Ordinance (Cap. 117), Schedule 1, Head 2.

⁷² D Webb “HK’s stamp duty addiction” *Webb-site.com* (Hong Kong, 2 Mar 2010) <<http://webb-site.com/articles/stampout.asp>> accessed 22 Sep 2011.

⁷³ N Pearson, ‘Worries over stamp duties avoidance’, *BBC News* (London, 28 Oct 2011) <<http://www.bbc.co.uk/news/business-15479321>> accessed 3 Jan 2012.

⁷⁴ I Cowie, “‘Squatters could gain from millionaires’ attempts to beat Stamp Duty as house prices fall” *Telegraph* (London, 10 Apr 2012)

<<http://blogs.telegraph.co.uk/finance/ianmcowie/100016096/squatters-could-gain-from-millionaires-attempts-to-beat-stamp-duty-but-house-prices-will-fall/>> accessed 11 Apr 2012.

⁷⁵ Trethowans Solicitors, “‘There is no case for maintaining stamp duty and we believe it should be abolished’ says top think tank” *Trethowans Solicitors* (London, 16 Sep 2011)

Given the high rate of duty involved, SSD would have an even more dramatic effect during the 24 months against people with a legitimate intention to move. The certainty is further complicated since both the vendor and purchaser are jointly liable for SSD.

3. *Canon of Economy - Loss of Employment and Indirect Costs*

SSD creates economic distortions might obstruct the industry and fails economically. The negative impact on liquidity had an effect on property transactions. As Webb describes, this reduced liquidity in the property market would mean that there would be less work for estate agents, conveyancing lawyers, and any related jobs that are linked to the volume of the secondary property market.⁷⁶

In Macau, where there was a similar SSD legislation passed there⁷⁷, there have already been a lost of jobs in the real estate agent sector. There was a 55 percent decrease in the number of residential transaction in one year from December 2011 to 2012. The drastic decrease has already led around 10 percent of the real estate agents to lose their jobs.⁷⁸ This has caused an outcry to abolish the SSD altogether.

It would also affect an industry of property re-developers, who specialize in purchasing property, renovating it, and then selling the property for profit in the short-term. As a result of SSD, this severely penalizes the people who arguably are making the land better with property improvements.

Indirect costs that arise from SSD may further drive higher prices on consumers. A developer may incur SSD when it sells a piece of undeveloped land to another developer within 24 months. This may not be due to speculation, but often because of insufficient capital for the development. The additional cost of SSD incurred will inevitably be transferred to consumers.⁷⁹ In order to exclude the application of SSD, the selling developer must then improve the land to avoid SSD.

<http://www.trethowans.com/news_resources/news/there_is_no_case_for_maintaining_stamp_duty_4088/> accessed 14 Nov 2011.

⁷⁶ D Webb (n 64).

⁷⁷ Law 6/2011.

⁷⁸ Macau Business, "End special stamp duty, real estate leader asks" *Macau Business* (Macau SAR, 7 Feb 2012) <<http://www.macaubusiness.com/news/real-estate-leader-asks-for-end-of-special-stamp-duty/13937/>> accessed 30 Jan 2012.

⁷⁹ E Tsao et al, "The Law on Hong Kong Special Stamp Duty (SSD) is Finally Passed – Impacts and Pitfalls" *Mayer Brown JSM* (Hong Kong, 7 Jul 2011) <<http://www.mayerbrown.com/publications/article.asp?id=11242&nid=6>> accessed 20 Dec 2011.

4. *Effective in Lowering Transactions*

After the implementation of SSD in November 2010, Hong Kong saw an immediate slowdown in its residential transaction volume. In the first year, Inland Revenue Department recorded just 55 transactions that paid SSD, down from 68,500 transactions in the first 10 months of 2010.⁸⁰ Total duty paid amounts to HK\$1.7 million. Of these 55 properties, 28 had been resold within six months, and 27 between six and 12 months.⁸¹

Recently, Hong Kong's Secretary for Transport and Housing, Eva Cheng, has said that the SSD has been effective in curbing short-term property speculative activities. She cites that since the special stamp duty's introduction, the number of monthly sub sale cases fell from 320 to 80, a 75% drop.⁸²

Cheng reported to the Legislative Council that since the SSD came into effect until February 2012, 98 transactions have been charged with special stamp duty, involving a total of HKD29.6m (USD3.8m). In 10 cases, the properties sold for less than their purchase price. In addition, a total of 200 cases were exempted from duty, including, for example, the sale or transfer between close relatives and of residential property through inheritance from a deceased person's estate. The Government's believes that it has no reason to review the SSD at this stage based on the numbers, but does SSD have a real effect on the current problem of high housing prices?⁸³

5. *Ineffective Against Housing Prices*

In Hong Kong, the residential prices in the high-end and medium segments recorded growth rates of 8.3% in 2010's last quarter and 5.7% in 2011's first quarter.⁸⁴ Ku, Jones Lang LaSalle's Managing Director of Macau, views this phenomenon as:

⁸⁰ K Ha, "Falling Short" *The Standard* (Hong Kong, 24 Nov 2011).

⁸¹ Ibid.

⁸² M Swire, "Hong Kong Lauds Effectiveness Of Special Stamp Duty" *Tax-News.com* (Hong Kong, 2 March 2012)

<http://www.tax-news.com/news/Hong_Kong_Lauds_Effectiveness_Of_Special_Stamp_Duty____54265.html> accessed 3 March 2012.

⁸³ M Swire (n 82).

⁸⁴ Jones Lang LaSalle, "The Newly Announced Special Stamp Duty an Impact to Macau's Housing Sector?" *Jones Lang LaSalle* (Hong Kong, 6 July 2011).

<<http://www.joneslanglasalle.com.hk/HongKong/en-gb/pages/NewsDetail.aspx?ItemID=22347>> accessed 8 November 2011.

One of the most important reasons for transaction volume coming down but prices holding firm is the low holding costs attributed to low interest rates. Low holding costs are not there only to reduce the direct financial burden of home purchasers but also contribute to “positive carry” investments as yields are higher than mortgage rates that leads to positive spreads. The properties are paying for themselves; as long as you have a tenant in your property, the rents from the tenancy is more than enough to offset the interest payments to the banks. As such, there’s no reason for owners to sell their properties even though transaction volume has come down—they really have no pressure to sell.⁸⁵

Simply put, SSD is not a practical deterrent against housing prices and seems to be counter-intuitive by reducing the supply of newly purchased properties. Even if the Government proves that SSD is effective by simply stating the drop in transactions, this number fails to take into account transactions of property via holding companies through the sale of shares exchanges that escape SSD.

V. POSSIBLE SUGGESTIONS FOR SSD

Having described the SSD as an ineffective tax, it is important to discuss whether there are alternatives that are possible for the government to consider. Already in Australia, their Future Tax System Review (The Henry tax review) found that, “Stamp duties are a highly inefficient tax on land, while land tax could provide an alternative and more stable source of revenue for the States.”⁸⁶ It reported that, “[I]deally there is no place for stamp duty in a modern tax system since it discourages property turnover and penalises property improvements. The only positive feature of stamp duty - its relative simplicity - has long since ceased to justify its continued use in the face of the costs it imposes on Australian society,” recommending they be replaced by a broad land tax. Their close neighbour, New Zealand, had abolished stamp duty altogether by passing the Stamp Duty Abolition Act 1999,⁸⁷ while Switzerland has adopted a bill towards abolishing its stamp duty in 2012.⁸⁸ It is

⁸⁵ Jones Lang Lasalle (n 84).

⁸⁶ Australia’s future tax system, ‘Part 1: Overview – Chapter 6: Land and resource taxes –Australia’s Future Tax System: Final Report’ (Australia, 2 May 2010) <http://taxreview.treasury.gov.au/content/FinalReport.aspx?doc=html/publications/papers/Final_Report_Part_1/chapter_6.htm> accessed 10 Sep 2011.

⁸⁷ No. 6.

⁸⁸ U Lomas, “Switzerland Steps Up Plans to Abolish Stamp Duty” *Tax-News.com* (Brussels, 13 February 2012)

therefore questionable as to why stamp duty in Hong Kong is given so much credence by the Government. In light of its constitutional status, this paper will discuss some possible amendments to SSD.

1. Foreigners Not Speculators?

With “a huge amount of hot money flooding into [Hong Kong]”⁸⁹, Hong Kong is driven by a lot of foreign investment. The current SSD does not differentiate between foreigners and permanent residents, but it may help to further define and target speculators by increasing the frictional costs for non-residents.

Singapore introduced an Additional Buyer’s Stamp Duty (ABSD) in December 2011 targeting foreigners with ABSD of 10 per cent, 3 per cent for permanent residents owning one and buying second and subsequent properties, and 3 per cent for Singaporeans owning two properties and purchasing third and subsequent properties.⁹⁰

This is also not optimal, since in Singapore, developers have been offering reimbursements as a marketing tactic to foreigners to bypass the ABSD. One person said, “We can't do anything...as that's a result of market forces. But it totally defeats the purpose of a tax, so I think it's pointless.”⁹¹ It would not be surprising if Hong Kong developers used the same marketing if the SSD was implemented in this form, thus making this amendment ineffective.

2. Sellers Responsible for SSD

The vendor should be liable to pay the SSD instead of being jointly liable between both the buyer and vendor. While this may mean that the vendor would add the cost of the SSD to the price of the property thus pushing it up, it ignores the fact that by making the vendor pay SSD, it is actually an incentive not to push prices up as far as

< http://www.tax-news.com/news/Switzerland_Steps_Up_Plans_To_Abolish_Stamp_Duty___53914.html> accessed 3 March 2012.

⁸⁹ Inland Revenue Department (n 8).

⁹⁰ J Chan, “Additional buyer’s stamp duty for private property from Dec 8” *Channel News Asia* (Singapore, 7 Dec 2011)

<<http://www.channelnewsasia.com/stories/singaporebusinessnews/view/1170002/1/.html>> accessed 5 Nov 2011.

⁹¹ *Yahoo*, “Foreign buyers promised stamp duty reimbursement” *Yahoo! News Singapore* (Singapore, 9 Feb 2012) <<http://sg.news.yahoo.com/foreign-buyers-promised-stamp-duty-111750222.html>> accessed 12 Feb 2012.

possible since the tax consideration will also be higher.⁹² There is a risk that when the SSD is understated, the government would lose the difference in SSD payable if the vendor is unable to be located after. However, it is also unjust to have the purchaser be solely liable.

3. *Allowing an Exit for SSD During Economic Downturn*

One of the problems with SSD is the rigidity of the tax without considering the possible effects of an economic downturn. Thus, SSD should not apply if the vendor sells the property for the same price or less than originally purchased. This would actually make SSD behave like a profits tax, and thus should not be under the heading of stamp duty. This amendment would satisfy the definition of taxation as an ambit of Article 108 and be a better solution as it would not penalize legitimate vendors that need to sell their property for various reasons.

VI. CONCLUSION

In trying to cope with the society's concern of soaring housing prices, the government has implemented SSD that penalizes potential genuine buyers. The SSD in its current form is unsatisfactory, and there are adequate reasons to argue against its constitutional status as a restriction of Article 105. Taking into account the government's stance, a closer investigation into the *Wesson* case reveals that the facts are quite different to the present debate.

The government would no doubt argue that it was within their margin of appreciation whether to include SSD as a measure for relieving speculation. However, the doctrine is much too unpredictable and the ECtHR has found states in breach of Article 1 of Protocol No 1 of the ECHR through taxation.

When discussing necessity, proportionality, and fair balance, SSD fails to meet the test requirements because it fails to clearly identify and legitimize the purpose of SSD. The excessive burden SSD places on potential genuine buyers do not create a fair balance and instead creates a double taxation of SSD and regular stamp duty.

⁹² S Lambert, "End this Stamp Duty Madness" *This is Money* (London, 10 Jul 2007) <http://anmblog.typepad.com/this_is_money_blog/2007/07/end-this-stamp-.html> accessed 1 Nov 2011.

By failing to identify the true problem and focusing only on halting speculative activities, the SSD has been ineffective, both theoretically and empirically. The effects not only affect the legal right of its citizens under Article 105 but also the economic growth of Hong Kong.

Hong Kong prides itself as a free-market economy. Excessive taxation through poor implementation of the law may influence the most fundamental human rights of individuals, including personal freedom, which is the right to acquire and dispose of our property rights. As discussed, it should be recognized that the power of taxation are limited by the boundaries of the fundamental human rights acknowledged by the ECHR.

In conclusion, it has been shown that SSD has been ineffective as a temporary measure. The government should consider abolishing SSD and find more effective ways of dealing with the housing price problem.

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