

Structural fog, semantic fog and legislative fog

By Johan Kotze

Structural fog, semantic fog and legislative fog are, variously, relevant to host of, almost invariably, foggy tax matters.

In his September 1 speech introducing the Taxation Laws Amendment Bills, Pravin Gordhan, the new Minister of Finance, said that recognisable improvements in tax compliance and morality were encouragingly evident when times were good. The economic downturn, however, had tempted some to regard tax as just another expense to be minimised.

He went on to say that now, more than ever, tax compliance and morality were vital ingredients for a strong and functioning democracy. The spinoff from the temptation to ignore compliance and morality was, regrettably, glaringly evident. In the large corporate space and in international transactions structures had been used to minimise income, maximise expenses, or otherwise manufacture inappropriate tax benefits.

The Minister said that taxpayers' use of 'structural fog', limited disclosure or even non-disclosure seemed to reflect many attempts to secure inappropriate tax benefits.

Ultimately, it is difficult to avoid the observation that tax is more a factor of the economy than a factor of the tax authority's collection efforts, of tax compliance or of tax morality. There are many theories as to what this factor might be; but from a simplistic perspective, where the tax rate exceeds a certain level, relatively less tax would be collected.

In short, the higher the rate, the bigger is the incentive to structure one's affairs in such a way as to avoid and, even, evade the tax.

The Minister spoke of tax compliance and morality being vital ingredients for a strong and functioning democracy. Clearly the vital ingredients are not tax compliance and morality but the tax itself. Tax is a quantifiable amount, given certain assumptions, whereas tax compliance and morality are 'semantic fog'.

If structuring a transaction one way results in a lesser tax burden than if structured in another way, and the former approach complies with legislation, it surely cannot be faulted. On the contrary, economists, in concert with every sensible citizen, will tell you it is better for the money to be in business than in inefficient government.

The Minister has always disliked tax lawyers and tax advisors, and has often blamed them for alleged 'inappropriate' tax benefits. Perhaps these tax lawyers then do fulfill a noble function for the economy.

In such a context, we, along with the Minister, should appreciate that tax lawyers are used by taxpayers in order to ensure certainty as to a specific transaction's tax implications; that the transaction is effectively structured from a tax perspective.

These tax lawyers must often work through volumes of 'legislative fog' in order to ensure certainty. 'Correctness' is obviously a relative concept, as law is not a science but an interpretation and application of legislation, regulations, interpretation notes, case law, guides and rulings.

Ironically, 'certainty' comes at a price. A taxpayer seeking certainty as to SARS's interpretation of the tax implications of a specific transaction can approach SARS for a ruling. This is surely the minimum one would expect from a tax authority.

Yet, inequitably, it comes at a price. A taxpayer has to actually pay SARS for a ruling – between R400 and R500 an hour, and starting at R5 000 a ruling, going up to R75 000 a ruling, and even beyond. The thinking mind boggles.

Perhaps the Minister should rule that the tax, being the key ingredient, comes at a price; a price that is a visible strong and functioning democracy, on all levels of government and in all departments.

The healthier this strong and functioning democracy, the higher the level of tax that may be extracted from the economy. Bear also in mind the corollary that there is a level where the taxes result in no more than a fatter democracy, rather than a stronger one.

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