

New tax avoidance Bill to stem flow of illicit funds

It now seems inevitable that the Minister of Finance will be tabling a General Anti Tax-avoidance (GATA) Bill by July 2019 as part of National Treasury's plan to protect the tax base, aimed at "knocking profit shifting on the head", as one MP put it. Changes to the Companies Act are also to be introduced.

One of the last parliamentary meetings before Parliament closed was the annual briefing to a joint meeting of the Finance Standing Committee and the Portfolio Committee on Trade and Industry on the flow of illicit funds.



From this meeting it appears that a turnaround in the detection and combating of illicit financial flows is taking place.

Perceptions at play

At question time, it appeared that there are two schools of thought amongst MPs on the issue of more controls; one side perceiving profit shifting, for example, to be a crime against the poor and the other side calling for more detection and no more controls in the fight against red tape.

Outright rejection in some banking circles has been expressed to Parliament that too many bureaucratic controls will endanger SA's own interests as a normal trading nation and that unrestricted money movements are a normal practice of free trade providing that they are within current parameters.



Overview

In general, however, during debate, the efforts by SARS and FIC coupled with a changed attitude within the Hawks and the NPA in chasing down the criminal element, were welcomed across party lines.

What worried many MPs, however, was the fact that the deeper the investigations went into the area of busting illegitimate money transfers, the more it seemed that a culture of non-adherence to the rules was taking place amongst quite reputable local and international businesses.

SA Reserve Bank contributed to this opinion by saying that many movements were borderline and not necessarily outright and perhaps syndicated crime. In supporting a call for the GATA Bill to be tabled, SARB said "they had made a judgement call" to endorse the proposals.



Common voices

The high-powered meeting, chaired jointly by Yunus Carrim of the Standing Committee on Finance and Joan Fubbs of the Portfolio Committee on Trade and Industry, listened to report-backs which came from National Treasury, the Hawks and the National Prosecuting Authority (NPA).



Also attending were the South African Reserve Bank (SARB), through its subsidiary the Financial Surveillance Department (FinSurv), Department of Trade and Industry (DTI), the Financial Intelligence Centre (FIC) and the South African Revenue Service (SARS). Present also was the Alternative Information and Development Centre (AIDC), a social justice and activist group.

How they reported

AIDC's primary focus, in the light of their trade union associations, seemed to be tracking down transfer pricing illegalities in mining transactions alone. The board of AIDC is comprised primarily of academics and includes well-known Mark Weinberg, National Co-ordinator of Right2Know. AIDC seemed to have been invited to attend by joint chairperson Yunus Carrim and who appeared to be lobbying for a unitary tax system.

Common thoughts

All attendees were agreed in their presentations that in the context of the country's growing debt burden, with increasing budget deficit, stagnant economic growth and South Africa's desperate need to increase the tax base, the elimination of the current illicit flow of funds, forms of base erosion and malevolent profit shifting were critical objectives.



On the basis of this assumption, the meeting (which is an annual event but which in the light of state capture had assumed far greater interest) started with explanations from the government bodies on the new structures that had been developed to dig deeper into the detection of illegal and criminal transfers of money.

Treasury opinion

Ismail Momoniat, DDG: Tax and Financial Sector, National Treasury, gave a brief overview of Treasury views. He told the joint meeting, that government was now at last making real progress on the issue of the illegal flow of funds in the light of new leadership in the Hawks, the NPA and SARS.



All of this, he said, was coupled to change in the political climate. Speaking in frank terms, he said that state capture, a term which was now quite openly referred to in Treasury, had stymied efforts to combat illicit financial flows (IFFs) for years.

He said, "It had been impossible for Treasury to talk to politicians at the top about state capture before a certain date in February 2018".

Free at last

He said, "One got one's head chopped off if it came up in a discussion" since it was generally known by Treasury officials that the Hawks and the NPA "would do absolutely sweet nothing if anything was reported to them other than covering up for the wrong people."

He added that the dismantling by the former SARS Commissioner of the Large Business Illicit Economy Unit was a deliberate act undertaken in order to facilitate IFFs and other similar devious financial movements for personal gain which had seriously eroded the tax base.



Turnaround time

Ismail Momoniat said Treasury units were being restored and professionals taken on or re-hired. It was an expensive process, but this had to be done. He said the "mind-set change now being experienced within the Hawks and the NPA has led to a new belief within Treasury that there are now grounds for hope".

Momoniat told parliamentarians that SARS was now being re-built and it's customs and excise regime restored in order to implement the spirit and letter of the FIC Act. He concluded that Treasury were encouraging the re-establishment of the various agencies dealing with illicit funds and asking them to share information.

The Police

Lt-Gen Godfrey Lebeya of the Directorate for Priority Crimes Investigation (DPCI) updated the joint meeting on the work done by the Hawks in partnership with the overall Inter-Agency Working Group (IAWG) on IFFs.



He described two groups within the Hawks that had been established; firstly, one to direct and co-ordinate effort within and inside the Hawks on criminal matters and the second a Task Working Group responsible for the “receipt and selection of criminal cases requiring an external multi-agency approach to investigation.”

The DPCI had dedicated members that dealt with the IFF cases and a high-level cooperation existed between all agencies reported under the umbrella of IFFs. He said the Financial Investigation Unit (FIC) played a major support role, with DPIC using evidential support established by the Hawks who then presented all IFF cases to the NPA.

The bad guys

Lt-Gen Lebeya said currently, in a pending case, R70m had just been seized and in a further case of a Ponzi scheme, where funds were transferred from SA to both Dubai (US\$5m) and London (EU5m) where in the case of Dubai an order was being sought and in London where the funds had been preserved by a successful order.



The 450 investors involved in the Ponzi scheme were all SA citizens, the Lt-General said, and for prosecution purposes, 41 statements had been obtained and 30 witnesses lined up. In his view, Ponzi schemes were a particularly vicious form of financial crime which was inflicted on an unsuspecting public for personal greed.

Getting it together

Co-operation between agencies was now working, Lt-Gen Lebeya said. Recently, an individual operating a number of companies, all trading as separate importation units, was arrested for offering a Reserve Bank official R20m not to pursue matters involving IFFs. She was arrested for corruption and is now serving a 10-year prison sentence.



In Durban North, twelve persons were recently convicted in terms of a case reported by SARS involving exchange controls, this being fraudulent declarations on goods to the value of R16m.

The guilty were sentenced to fines of R5,000 each, with imprisonment terms of between six months and five years, suspended on each party for five years.

The new NPA

Adv. Mpho Doubada, Deputy Director of Public Prosecutions, NPA (brought back by NPA Director Shamila Batohi) said the NPA was reliant on SARS and SARB to identify criminality in respect of IFFs, with the referrals coming from the police (DPIC).

They were worked closely in the forum of agencies, the IAWG, in their new role and were “spearheaded” by FIC, who had a lead role in information dissemination and identification of probable cases. At present, sixteen cases were being prepared by the NPA with eight cases already on the court roll, parliamentarians were told

Action men

Adv Doubada said before the advent of this new arrangement, the NPA and the DPCI had worked alone dealing with IFFs on the basis of a criminal element known to exist, but they were now receiving cases from the Hawks as a result of suspicious activity being circulated.

Consequently, NPA were dealing with additional matters relating to tax evasion, exchange controls and fraudulent activities such as Ponzi schemes referred by SARS and SARB to the police. The total number of IFFs related cases the NPA had concluded was sixteen, with eight cases currently on the court roll.



Down the line

Adv Doubada said the NPA now had dedicated prosecutors in the major provinces with contacts in localised financial banking structures to deal with IFFs. NPA was now working with the SAPS-established Special Commercial Crimes Unit. Recently, he said, NPA had also started working with SA Reserve Bank on repatriation of funds frozen in the UK, “speared-headed”, as he put it, by the South African Banking Risk Information Centre

This particular involvement dealt with the growing scourge of debit order scams, he said, where the banking structures and financial infrastructures were being used for repeated illegal high-figure transfers. Most of these were occurring in Gauteng and KZN.

Wrong concepts

When asked by MPs for the number of cases being investigated by NPA on a comparative year by year basis and the values involved, Adv Doubada said he would not talk about cases in hand as this was sensitive, but he stated that any numbers as statistics and total values represented absolutely nothing to the NPA.



Their sole interest was in preparing a case that had substance. He said that getting to the systemic root of crimes where laws had been broken was the issue and not the amount stolen, although they acknowledged that the sum total might have a value to the fiscus in a national sense and may be prioritised.

However, NPA was primarily interested in getting a conviction.

Adv Doubada told MPs that “a crime is a crime” and the NPA was not the body to report on the kind of statistical information wanted.

FIC as the hub

Ms Xolisile Khanyile of the Financial Intelligence Centre (FIC) reported that their agency had developed a centralised mechanism to coordinate feedback to agencies who were dealing with IFFs. FIC spent much time continually encouraging inter-departmental government communication as part of their mandate to locate financial criminal behaviour.



She called for more funds for this process, led by the National Intelligence Coordinating Committee (NICOC) who were undertaking a risk assessment on IFFs to quantify the risk factor figure for South Africa for Treasury analysts and planners.

Connecting the dots

The FIC recommended strongly that additional resources be made available NICOC in capacitating financial intelligence units (FIUs) and law enforcement agencies, she said, so that they could be more effective in tracking, disrupting and repatriating illegally exported funds.

On the way forward, the FIC would continue to explore new ways or opportunities in the development of better technology and systems involving “big data” analysis which was necessary for FIU units such as South African Anti-Money Laundering Integrated Taskforce and the FIC to disseminate financial intelligence from major-sized databases.

Ms Khanyile concluded that the FIC would be looking for further MOUs to be established, with particular reference to stakeholders in government law enforcement agencies to improve the quality of financial intelligence produced and create more partnerships with the private sector.

Receivers of revenue

SARS, because of its nature said it was not a “crime buster” as such but the entity had “upped” the factor of private cooperation with business and professional industry bodies on tax evasion.

They had increased their participation with such structures as the International Monetary Fund, the World Bank, Interpol and SADC amongst others. Their emphasis, the spokesperson said, was to re-build capacity-building on SARS core disciplines in tax and customs & excise critical skills such as transfer pricing and base erosion and the curtailing of trade “mis-invoicing”



Emphasis was currently, she said, on ‘track & trace’ cigarette marker systems, the physical presence of customs & excise personnel in the manufacturing industry and the re-skilling of personnel involved in intrusive and non-intrusive customs systems.

SA reserve Bank speaks

Elijah Mazibuko, as the head of financial surveillance at SARB, said the Reserve Bank had its own financial surveillance unit, abbreviated as FinSurv, which investigated illicit foreign currency transactions and dealt with blocked funds. They also dealt with matters involving forfeiture of funds.



FinSurv also referred instances to law enforcement agencies “where it was expected that matters might escalate into a criminal case”.

He told the Joint Committee that FinSurv was using what was referred by him as “set-off schemes” which operated hand-in-hand with overseas entities as simple debit/credit arrangements instead of actual money movements. These arrangements had successfully blocked R74m in funds in just under two years and prevented IFFs of to the value of R2bn over the same period.

Private robbers

As had been stated earlier in the meeting by DPIC, SA Reserve Bank had re-structured its “detection and deterrence systems” on debit/credit card abuse and Ponzi schemes, for which criminal cases were pending or had been opened. SARB’s Mazibuko also said that their own investigations had resulted in an ongoing criminal investigation into unauthorised export and sale of aircraft (*presumably referring to the Denel issue*) and R19m had been ‘blocked’ in that transaction.

Civil anti-profiteering

The Alternative Information and Development Centre (AIDC) told chairperson Yunus Carrim and parliamentarians that government’s main priorities should be, other than the obvious need to rebuild SARS, to implement a General Anti-Tax Avoidance (GATA) Bill in order to reduce the space for profit shifting; to enhance transparency as a tool for anti-money laundering and locate illegal financial transfers.



Dominic Brown, the AIDC justice programme coordinator, said moves toward a unitary tax system were necessary with specific reference to the mining and the digital economy. He said that in recent years, AIDC had completed their own “case studies” into Lonmin, Total, Barplats and Robertson Winery; having just completed another investigation into “a further mining company”, Brown said, “where we have just uncovered pricing arrangements and fraud.”

He said AIDC would not name this company at this stage, but litigation should start shortly. AIDC said they considered state capture as only partly explaining declining revenue collections and that profit shifting and base erosion remained a core issue.

A move towards move towards GATA would allow SARS to prosecute more companies involved in tax evasion, Brown said.

Old laundry

DA’s comment from (Amanda) Gwen Ngwenya, previously head of policy for the DA and now on the Standing Committee on Finance, said that AIDC was merely “hashing up” old arguments and contributing little to the discussion but ideology. It was her submission that the situation had moved way beyond that of the findings on tax by the Davis Commission and the state could not fight crime with such outdated ideas as a unitary tax.



Ms Ngwenya said that any such unitary system on tax, however devised, was deeply problematic for investors. She expressed concern that joint debate had been hi-jacked into “past conversations” on tax matters. “What we are interested in here is the invasion of our banking systems of corrupt practices by those interested in self-enrichment.”

Companies Act changes

In the last presentation, the Department of Trade and Industry (DTI) outlined proposed changes to the Companies Act designed to counter IFFs and money laundering in all its different guises.

Desmond Ramabulana, DTI’s DG on commercial law, confirmed that DTI, with the advice of the FIC, was in the process of amending the Companies Act to include an obligation to disclose beneficial owners of shares when filing annual returns. This was in alignment, Ramabulana said, with most other G20 countries.



Another register

Each and every company, he noted for the benefit of MPs, whether they were regulated or not, will have to maintain a register of “beneficial owners”. The draft Bill amending the Companies Act was circulating for public consultation, with comments closing at the end of December 2018.

Ramabulana said the DTI was now looking at these comments and will make a number of changes and DTI was targeting the end of July 2019 for Cabinet approval and the tabling of the necessary Bill in Parliament.

He added that DTI’s view was that IFFs often were designed to avoid or cut out various regulators. DTI were also to collaborate on various coordination efforts to address the impacted on the economy with illicit money transfers,

Inquiries galore

Finally, joint chair Joan Fubbs of the Trade and Industry Committee noted rather sourly that in her opinion there seemed to be more emphasis on historic post-mortems and inquiries at the present in the country, rather than early detection plans being made.



Nevertheless, she said that on behalf of the Trade and Industry parliamentarians at the joint meeting, she welcomed any changes to the Companies Act that were in the interests of transparency.