

Asset Protection: Is It Worth Going Offshore?

Article By:

John P. Dedon

Asset Protection continues to be a major concern for professionals, board members, business owners and others in this litigious society. Professionals, such as doctors, lawyers, and architects, should be concerned about asset protection. In recent years, a proliferation of lawsuits against directors and officers also has caused concern. Business owners are worried creditors will "pierce the corporate veil" and sue them personally. These threats to assets are as concerning as a 50% income tax liability or a 40% estate tax liability.

For some, traditional asset protection tools, such as holding property tenants by the entirety, self-settled trusts in jurisdiction such as Delaware, Alaska or Nevada, and charging order protection under LLCs, is not enough. They have looked to more favorable asset protection jurisdictions outside of the United States, such as the laws of the Cayman Islands, Cook Islands, or Nevis. The question, however, is whether going offshore, particularly in today's environment of increased tax scrutiny and compliance, is worth the perceived benefit? Moreover, is there even a benefit?

In several cases, U.S. courts have held that the U.S. taxpayer was in contempt of court for relying on laws of foreign jurisdictions. In such contempt of court cases, taxpayers have been jailed for failing to comply with a U.S. judge's order.

The leading case is a 1999 Ninth Circuit case, ***FTC v. Affordable Media, LLC*** (the "Anderson" case). Other cases also illustrate a court's contempt powers. E.g., ***U.S. v. Bilzerian*** a 1991 Second Circuit case, and *In re Lawrence*, a 2000 Florida bankruptcy case. However, those utilizing foreign trusts and foreign asset protection strategies argue contempt is only a concern if the protective measures are taken on the eve of a court order. See Barry Engle's Asset Protection Planning Guide, published in 2013.

My experience is that, for virtually all clients concerned with asset protection, domestic asset protection strategies are effective and far less costly and complicated than relying on offshore planning. And for those clients who would be vulnerable to fraudulent conveyance claims in the U.S., the same clients would be vulnerable relying on offshore asset protection planning (not to mention contempt of court).

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