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## What do we have against foreign countries?

By: Eric E. Kalnins

We are told as Americans to be global thinkers and to reach out to the rest of the world with our time, efforts and charity. Unfortunately, once we attempt to do so we are accused of outsourcing jobs and trying to hide money in "secret" offshore accounts. Why does there exist the expectation that everyone else in the world is supposed to bring their money to the United States while we are to be shunned for taking out money and business offshore?

As an attorney that assists clients with their offshore matters ranging from the establishment of an Anguilla international business company to a Nevis offshore trust, it always surprises me to hear the comments from people when offshore matters are discussed. From the client that states that "I could never go offshore" to the bystander that quips that all offshore money is hidden in secret Swiss bank accounts, the legitimate business opportunities of the world are being overshadowed by the tax cheats, drug smugglers and money launderers that make for good headlines.

I have generally found there to be three types of people that go offshore: (1) tax cheats or scammers looking to hide money (avoid them at all cost); (2) individuals that have no intention to be in violation of the law but are unaware of the disclosure and compliance requirements; and, (3) fully compliant individuals that set-up structures or businesses, or quite simply need to hold funds offshore. Although we occasionally run into the second category of individuals, we prefer to be involved from the beginning of any offshore planning so that the myriad of potential disclosure and compliance traps can be avoided.

The reasons individuals go offshore run the gamut: from offshore business opportunities, estate planning and asset protection, to

individuals who simply have a general distrust of society.

Whatever the reasoning, good offshore planning has nothing to do with secret accounts---good offshore planning is one of the most transparent types of transactions that exist, particularly with regard to the IRS. The IRS has a number of disclosure requirements that must be complied with, and the list keeps growing. One of the major disclosure requirements is IRS Form TD F 90-22.1 Report of Foreign Bank and Financial Accounts. This form must be filed by anyone that has signature authority or a "financial interest" in an offshore account or accounts that aggregate a balance in excess of \$10,000 during the year. If such an account exists, the individual with signature authority, or a financial interest in the account must disclose the account to the IRS by June 30th of the following year. Failure to do so can result in stiff penalties and potential criminal prosecution. Unfortunately, a large number of good law abiding citizens have no idea that this requirement exists and that their lives can be turned upside down by their unintentional failure to disclose an offshore account. There is nothing like seeing the sunken look on a client's face when they mention off-the-cuff that they have an offshore account and you notify them that they are required by law to disclose such account to the IRS each year or be subject to criminal prosecution.

Of course, there are those individuals that believe that they can simply set-up an offshore corporation and never have to pay taxes again. Those are the types of individuals you avoid, though they are no more common in the foreign sector than they are in the domestic sector. Fraudulent individuals recognize no borders. However, while tax evasion is not permitted, tax avoidance and tax deferral opportunities are a

different matter. Tax deferral, through the use of an offshore corporation, can be complicated and requires one to determine whether or not a corporation will be considered a controlled foreign corporation, where the income will be sourced from (U.S. or a foreign country), what kind of income is involved (Sub-Part F income, PFIC, Personal Holding Company Income) and whether or not offshore income can be deferred until a distribution is made to repatriate the money to the U.S. This type of planning can be invaluable to individuals that wish to compile profits in a low tax jurisdiction and defer U.S. taxation until the funds are distributed to the U.S. But, once again, offshore corporate planning has its own tax and disclosure requirements, ranging from the disclosure of the capitalization and transfer of assets to the corporation.

Proper disclosure is probably the most important element to keep in mind when dealing with offshore planning. Nowhere in the offshore world is this more apparent than in dealing with offshore trusts. Once again, many clients are adverse to the idea of offshore trusts because of (1) the negative connotation offshore trusts receive by the general uninformed public; and, (2) the idea that one is relinquishing title to his or her own assets to a foreign trustee. What people do not realize is that transparency is even more prevalent in a properly organized and administrated offshore trust. Clients organize offshore trusts for estate planning, offshore investment and asset protection purposes. Even the U.S. needs to consider and pay respect to the laws of foreign nations.

The laws of these foreign nation can include advantageous provisions concerning the nation's non-recognition of foreign judgments, requirement that lawsuits be tried in the foreign nation pursuant to its laws by attorneys licensed in such nation, more generous statute of fraud provisions, requirement of the posting of a bond to file suit, and tighter statute of limitation time requirements among other things. On the disclosure end, everything about these structures is extremely transparent and disclosure- friendly

to the IRS and potential creditors. The assets are "hiding" in plain sight.

From funding of the trust to the annual tax return and the designation of a domestic agent for the purpose of responding to governmental inquiries, the government and potential creditors know exactly what is in the trust and where the trust is located. However, the foreign laws of the situs of such trust must be respected. Barring any fraudulent conveyance issues, the foreign trust is completely inapposite of a secret offshore account and does not depend on nondisclosure or the hiding of assets.

Offshore opportunities truly are a different world. However, individuals should not limit their business, estate planning and asset protection options simply because it is vogue to accuse people of tax evasion and thievery merely because they dare extend their horizons beyond our borders. The internet and ease of international travel have made the world a much smaller place. Billions of people, potential ideas and potential clients exist beyond our borders. From establishing a holding company in Luxembourg or the Netherlands, to the organization of a Chinese corporation, our world market is changing quickly and clients must be made aware of all of their options.

At the same time, expectations must be set with the client to make them aware that while many advantages can be obtained under the right circumstances, disclosure and strict compliance must be adhered to as a virtue in the offshore planning arena. Your potential dealings with the IRS depend on it.

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***Eric E. Kalnins, J.D., LL.M., is a Partner at the Chicago Boutique Law Firm of Handler Thayer, LLP. Mr. Kalnins focuses his practice in the areas of corporate, tax and estate planning with an emphasis in the family office market and domestic offshore structures.***