

August 25, 2011

Ms. Cecile deJongh
Financial Trust Company, Inc.
6100 Red Hook Quarter Suite 3B
St. Thomas, VI 00802

Ms. Jeanne Brennan
Financial Trust Company, Inc.
6100 Red Hook Quarter Suite 3B
St. Thomas, VI 00802

Re: EDC Residency Requirements for Employees

Dear Cecile & Jeanne:

I wanted to confirm in writing the discussions we had in connection with your preparation of the EDC affidavits for the periods ending March 31, 2010 through March 31, 2011. Title 29, chapter 12, section 708 requires that each beneficiary of the EDC employ at least ten (10) persons on a full time basis in such enterprise; and all employees in such enterprise shall...be residents of the United States Virgin Islands (as defined in section 703(e) of this chapter). Section 703(e) of Title 29, chapter 12, defines a resident of the Virgin Islands as "any United States citizen currently domiciled in the Virgin Islands for one year or more."

As we discussed, you noted on the affidavit that Mr. Epstein was a resident employee of Financial Trust Company, Inc. ("FTC"). Mr. Epstein was domicile in the USVI during the period 2010 through 2011 and during the prior years as well.

United States Supreme Court Justice Holmes defined domicile as "the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined."¹ Most, however, simply define domicile as a person's home.² Mr. Epstein has made the U.S. Virgin Islands, specifically the island of Little Saint James, his home since 1999.

That being said, mere residence is not enough to constitute domicile.³ Domicile requires both a physical and mental element. To establish a domicile in a particular state an individual must reside within that state at some

¹ Williamson v. Osenton, 232 U.S. 619, 625 (1914).

² See, e.g., Mitchell v. United States, 88 U.S. 350, 352 (1874). See also John C. Hogan, *Joseph Story's Essay on "Domicil,"* 35 B.U. L. REV. 215, 217 (1955). ("[T]hat is properly the domicile of a person, where he has fixed his true, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning (*animus revertendi*).")

³ See, e.g., Mas v. Perry, 489 F.2d 1396, 1399 (5th Cir. 1974). "Residence" itself can be a deceptive term. The confusion exists because sometimes the term "residence" is used to mean "actual residence," and sometimes it used to mean "domicile." See generally Joseph H. Beale, *Residence and Domicil*, 4 IOWA L. BULL. 3 (1918); Willis L. M. Reese & Robert S. Green, *That Elusive Word, "Residence,"* 6 VAND. L. REV.

point (physical element) and possess an intent to remain there indefinitely (mental element).⁴ Once those two elements have been met, domicile is instantly acquired.⁵ There is no minimum residency requirement.

Mr. Epstein's incarceration from the period July 2008 through July 2010 does not impact his domicile for purposes of meeting the EDC requirements under section 703(e), because Mr. Epstein had no choice (and therefore, no mental element) in his location during the years in question. The federal courts have long accepted this principle of "freedom of choice" when determining a party's domicile⁶. The rule with respect to prisoners has been that "a prisoner retains the domicile he had at the time of incarceration." In *Shaffer v. Tepper*⁷, for example, the defendant, an inmate in a Kentucky penitentiary, sought dismissal of the plaintiff's action in federal court because of a lack of diversity of citizenship of the litigants.⁸ The plaintiff contended diversity of citizenship between the litigants existed because the plaintiff was a citizen of Kentucky and that the defendant was an Ohio citizen, his place of domicile prior to his incarceration.⁹ The defendant argued that, notwithstanding his previous citizenship in Ohio, his incarceration in Kentucky caused his citizenship to be transferred to Kentucky.¹⁰ Thus, at the time the suit was filed, the defendant argued, there was no diversity of citizenship between the parties.¹¹ The court rejected the defendant's argument and held that incarceration in another state did not bring about a change in domicile, and that a prisoner's citizenship remains the same as it was before his incarceration.¹²

USVI law states that whenever an issue is not addressed by a USVI statute, the rule in the Restatements of Law shall apply. The Restatement (Second) of Conflict of Laws states that "it is impossible for a person to acquire a domicile in the jail in which he is incarcerated."¹³ The reason for the inability of a prisoner to acquire a domicile at the place in which he is incarcerated is due to his being legally confined there against his will. As the Restatement (Second) puts it, the prisoner has lost all "power of choice."¹⁴ "Acquisition of a domicile of choice requires some free exercise of the will on the part of the person involved. An act done by him under physical compulsion or because of criminal or comparable sanctions will be legally ineffective for this purpose."¹⁵ A person does not acquire a domicile of choice by his presence in a place under physical or legal compulsion.

To enter jail, one must first be legally committed and thereby lose all power of choice over the place of one's

⁴ See, e.g., *Paudler v. Paudler*, 185 F.2d 901, 902 (5th Cir. 1950).

⁵ See, e.g., *Janzen v. Goos*, 302 F.2d 421, 425 (8th Cir. 1962).

⁶ See, e.g., *United States v. Stabler*, 169 F.2d 995, 998 (3d Cir. 1948); *Neuberger v. United States*, 13 F.2d 541, 542 (2d Cir. 1926); *Shaffer v. Tepper*, 127 F. Supp. 892, 894 (Ky. 1955); *Hiramatsu v. Phillips*, 50 F. Supp. 167, 168 (Cal. 1943); *Wendel v. Hoffman*, 24 F. Supp. 63, 64-65 (Ky. 1938).

⁷ 127 F. Supp. 892 (Ky. 1955).

⁸ See *id.* at 893.

⁹ See *id.*

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.* at 895. See also *United States v. Gronich*, 211 F. 548, 550 (Wash. 1914), where the court, in interpreting the meaning of the word "reside" in a venue statute as it related to the circumstances of a prisoner, stated:

But, whether the word 'reside,' as used in section 15, be taken to require a domicile, or merely an abode, it contemplates choice upon the part of the naturalized citizen, a voluntary sojourning upon his part, and can in no sense be held to apply to an imprisoned convict, who is incarcerated wholly without his consent, or choice.

¹³ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 17 cmt. c (1971). See also BEALE, *supra* note 1, § 21.3, at 158 ("A prisoner, being under legal restraint, cannot acquire a domicile in his prison; and his former domicil continues during his imprisonment.")

¹⁴ "[I]t is impossible for a person to acquire a domicil in the jail in which he is incarcerated. To enter jail, one must first be legally committed and thereby lose all power of choice over the place of one's abode." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 17 cmt. c (1971).

¹⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 17 cmt. a (1969).

abode. This is akin to the plight of a soldier or sailor. If a soldier or sailor is ordered to a station to which he must go and live in quarters assigned to him, will probably not acquire a domicile there though he lives in the assigned quarters with his family. He must obey orders and cannot choose to go elsewhere. On the other hand, if he is allowed to live with his family where he pleases provided it is near enough to his post to enable him to perform his duties, he retains some power of choice over the place of his abode and may acquire a domicile. To do so, however, he must regard the place where he lives as his home. Such an attitude on his part may be difficult to establish in view of the nomadic character of military life and particularly if he intends, upon the termination of his service, to move to some other place.

Mr. Epstein clearly remained a domiciliary of the U.S. Virgin Islands as he did not relinquish his domicile upon his incarceration. Nor did he relinquish his domicile upon service of his home detention in Florida. Mr. Epstein and his counsel requested that he be able to serve out his home confinement in the U.S. Virgin Islands, a request which was denied. Therefore he was compelled to complete his home detention in Florida.

Therefore, you correctly categorized Mr. Epstein as a resident employee for purposes of the EDC residency affidavit for the years 2010 and 2011, as he had retained his domicile from 1999 through 2011.

It should also be noted that as a result of our discussions regarding the preparation of the affidavits and after further research, I had communicated our position to the Economic Development Authority with respect to Mr. Epstein's domicile and residence.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

Erika Kellerhals