Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-397

APRIL TERM, 2007

Anthony J. DeLuca	}	APPEALED FROM:
	}	
	}	
v.	}	Washington Superior Court
	}	
Vermont Department of Taxes	}	
	}	DOCKET NO. 765-12-05 Wncv
		Trial Judge: Helen M. Toor

In the above-entitled cause, the Clerk will enter:

Taxpayer appeals the decision of the superior court affirming the conclusion of the Commissioner of the Department of Taxes that taxpayer was a resident of Vermont for purposes of assessing personal income tax for the years 1997, 1998, 1999 and 2000. We affirm.

The following facts are uncontested. Taxpayer and his wife lived in California until 1997, and remained in California for part of that year. They were located in California due to taxpayer's employment. Part way through 1997, the headquarters for taxpayer's company were relocated to Pennsylvania.

The couple had purchased property in Vermont in 1995, and began building a house there at that time. On the property transfer tax return filed that year, the couple stated that they intended to eventually use the Vermont house as their primary residence. In addition, taxpayer claimed the Vermont house was his "new main home" on his 1996 federal tax return. In 1997, when taxpayer's employment was relocated, wife moved into the Vermont house. Wife "subsequently engaged in activities ordinarily associated with domicile." The couple listed the Vermont house address on their federal income tax returns in the following years.

While wife lived in the Vermont house, taxpayer spent very little time there. He was traveling 70-80% of the time for his employment and otherwise spending time in Pennsylvania at his company's headquarters. In 1997 through 2000, taxpayer filed state tax returns in Pennsylvania, listing his company headquarters as his address. Initially, when taxpayer was not traveling or working in Pennsylvania, he spent his available time at the house in Vermont. Taxpayer and wife, however, began to experience marital difficulties, and taxpayer stopped spending time at the Vermont house. Instead, he spent his available time with his adult daughter (who also lived in Vermont) and with a relative in Connecticut. His work required him to spend the majority of his

time in Washington D.C. and Pennsylvania. During this period, taxpayer stayed in hotels and short-term rentals. But when taxpayer sought a divorce from wife in 2001, he filed in Windsor Family Court, declaring that the had been a Vermont resident continuously since June 1997.[1]

On these facts, the Commissioner determined that taxpayer was domiciled in Vermont as described in 32 V.S.A. § 5811(11)(A)(i), was therefore a resident of Vermont as defined by 32 V.S.A. § 5823(a), and subject to Vermont's personal income tax. The superior court affirmed.[2]

On appeal, taxpayer does not focus on the validity of the Commissioner's findings, but challenges their weight and sufficiency, as well as the applicable burden of proof. Specifically, taxpayer argues that the issue before the Commissioner was whether he had changed his domicile under Domicile Regulation § 5(b). That provision requires that "[t]he evidence required to establish both a change of residence and the intention to effect a change of domicile must be clear and convincing." Otherwise, the Department is only required to meet a preponderance of the evidence standard. See Huddleston v. Univ. of Vt., 168 Vt. 249, 252 (1998) (usual standard of proof before administrative agencies is preponderance of the evidence).

"In reviewing this case, we must afford deference to the Commissioner's determination, and his findings should not be set aside unless clearly erroneous. In addition, absent compelling indication of error, the interpretation of a statute by the administrative body responsible for its execution will be sustained on appeal." Morton Bldgs., Inc. v. Dep't of Taxes, 167 Vt. 371, 374 (1997) (citations and quotation omitted).

We affirm the Commissioner's decision that the Department was not required to prove that taxpayer was domiciled in Vermont by clear and convincing evidence, as this case does not involve a change of domicile. The critical factor here is not, as taxpayer contends, whether a taxpayer is "inbound" or "outbound" for purposes of a change in domicile, but the fact that taxpayer in this case conceded that he had abandoned his former domicile in California. A change-of-domicile analysis would require comparison of a taxpayer's contacts in the former domicile (which would presumably be substantial) with contacts in the new domicile. Here, the extent of taxpayer's contacts in his former domicile is no longer at issue. The only issue, rather, is where his new domicile is located. This, by contrast, involves a very different analysis—the relative extent of contacts in the purported new domicile state. There is no compelling indication that the Commissioner erred in concluding that the Department was required to prove domicile in Vermont by a preponderance of the evidence only.

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[1] At the time of the proceedings below, however, the parties still had not divorced.

[2] The superior court noted that taxpayer had waived (1) any challenge to the tax assessment for the year 2001 and (2) any challenge to the penalties assessed against him (insomuch as they may be considered independently of the issue of his tax liability) by failing to raise these issues in his appeal before the Commissioner. Accordingly, we do not address taxpayer's argument that the Commissioner assessed penalties against him in error.

Applying this standard to the record established before the Commissioner, the conclusion that taxpayer was a Vermont resident during the relevant time period is adequately supported. First and foremost, there was no evidence that taxpayer had greater contacts in another state—either Pennsylvania or elsewhere. Second, it is uncontested that taxpayer's wife lived in the Vermont house from 1997 through 2000, and that the parties were married during that time. Third, taxpayer affirmatively stated on several occasions that the Vermont house was his primary residence—most notably his admission to that effect used to invoke the jurisdiction of the Windsor Family Court over his divorce filing. This evidence, in addition to other facts found by the Commissioner and the absence of any similar facts regarding Pennsylvania or any other state, is sufficient to prove the elements of residence and intention. See Piche v. Dep't of Taxes, 152 Vt. 229, 232 (1989).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice