



## First Circuit Declines Second Bite at Utelcom Apple

On Friday, the Louisiana First Circuit Court of Appeal issued its highly-anticipated opinion in [Cynthia Bridges, Secretary, Department of Revenue v. Polychim USA, Inc.](#) In *Polychim*, the First Circuit considered whether the district court properly granted summary judgment in favor of the Louisiana Department of Revenue (the "Department") in its holding that Polychim was subject to Louisiana corporation franchise tax ("Franchise Tax") based on its ownership of interests in CMB, Inc. and Cami Polymers, LLC (collectively, the "Affiliates") that in turn owned interests in Pinnacle Polymers, a general partnership that conducted business in Louisiana. The First Circuit also considered whether the district court properly determined that Polychim maintained its commercial domicile in Louisiana.

In reversing the grant of summary judgment for the Department, the First Circuit relied heavily on its prior holding in [Utelcom](#), stating that this case represented another attempt by the Department to subject a foreign corporation to Franchise Tax based on the actions of other related entities. In affirming its *Utelcom* opinion, the Court made the following salient points:

**\*Common Control.** The Court was not persuaded by the Department's argument that Polychim controlled Pinnacle Polymers through its Affiliates and conducted business in Louisiana by virtue of the fact that certain individuals on the respective management boards may have been the same. The Court expressly held that such commonality did not change the fact that the entities were "***separate juridical entities under the law.***"

**\*Single Business Enterprise.** The Court rejected the "single business enterprise" doctrine advanced by the Department as a basis for imposing Franchise Tax liability on Polychim. The First Circuit held the single business enterprise doctrine to be inapplicable in this case, and applicable only to hold a corporation liable for the ***wrongful acts*** committed in pursuit of a common business purpose. The Court further noted that like the "unity of purpose" argument which was resoundingly rejected by the Court in *Utelcom*, the "single business enterprise" theory does not appear anywhere in the Franchise Tax statute.

**\*Tax Avoidance.** As in *Utelcom*, the Department argued that the business structure of the companies in *Polychim* constituted a tax avoidance scheme. In keeping with its prior decision, the First Circuit easily dismissed this argument, holding that there is no impediment to setting up a business structure in such a way as to avoid paying taxes, so long as the business structure is legal.

The Court's holding in *Polychim* represents a significant affirmance of its prior holdings in *Utelcom* and makes clear that the First Circuit will not accept the Department's continued efforts to expand the scope of the Franchise Tax to entities whose only connection to Louisiana is the direct or indirect ownership of passive interests in entities that conduct business in Louisiana.

On the issue of commercial domicile, the Court noted that the question of *Polychim*'s principal place of business had been answered in contradictory fashion by the submitted affidavits, the findings of the Department's auditor, and by the information provided on *Polychim*'s tax returns. Thus, the Court held that genuine issues of material fact precluded the grant of summary judgment in favor of either party, and the Court remanded the case to the trial court for further proceedings.

Affected taxpayers should continue to pursue refund claims and defend vigorously against proposed or final assessments in cases where the Department is asserting any of the failed legal positions advanced in *Utelcom* and *Polychim* in support of its claims for Franchise Tax.

--[Katie Friel](#), [Jay Adams](#), [Bill Backstrom](#)

*Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues,*

[Kathryn S. Friel](#)

Partner, Jones Walker LLP  
201 St. Charles Ave  
New Orleans, LA 70170-5100  
504.582.8428 tel  
kfriel@joneswalker.com

[Jesse R. Adams, Jr.](#)

Partner, Jones Walker LLP  
201 St. Charles Ave  
New Orleans, LA 70170-5100  
504.582.8364 tel  
jadams@joneswalker.com

[William M. Backstrom, Jr.](#)

Partner, Jones Walker LLP  
201 St. Charles Ave  
New Orleans, LA 70170-5100  
504.582.8228 tel  
bbackstrom@joneswalker.com

[Jones Walker State & Local Tax Practice Group](#)

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