NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 0307

CYNTHIA BRIDGES, SECRETARY,
DEPARTMENT OF REVENUE,
STATE OF LOUISIANA

VERSUS

POLYCHIM USA, INC.

Judgment Rendered: APR 2 4 2015

* * * * *

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, State of Louisiana
Docket No. 581,759, Section 25
Honorable Wilson E. Fields, Judge Presiding

* * * * *

John J. Weiler
Christian N. Weiler
New Orleans, LA

Attorneys for
Plaintiff-Appellee
Cynthia Bridges, Secretary
Department of Revenue,
State of Louisiana

J. Grant Coleman
Robert J. Burvant
New Orleans, LA

Attorneys for
Defendant-Appellant
Polychim USA, Inc.

BEFORE: McDONALD, CRAIN, AND HOLDRIDGE, JJ.

HOLDRIDGE, J.

Defendant, Polychim USA, Inc. (Polychim), has appealed a judgment of the trial court, which granted a motion for summary judgment in favor of Cynthia Bridges, in her capacity as Secretary of the Louisiana Department of Revenue (the Department), finding that Polychim was subject to the Louisiana corporation franchise tax for the taxable periods from January 1, 2005, to December 31, 2007 (the relevant periods). Polychim further appeals the trial court's judgment denying its motion for summary judgment, seeking a dismissal of the Department's petition, with prejudice, and a finding that Polychim was not subject to the Louisiana corporation franchise tax for the relevant periods. For the reasons that follow, we affirm in part, reverse in part, and remand.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Polychim is a foreign corporation, which was organized under the laws of Georgia during the relevant periods,[1] and was not registered or qualified to do business in Louisiana during the relevant periods. At all times during the relevant periods, Polychim owned 100% of the stock in CMB, Inc. (CMB), a Georgia corporation, as well as 96.76% of the interest in Cami Polymers, L.L.C. (Cami Polymers), a Georgia limited liability company. CMB and Cami Polymers, in turn, owned 0.1% and 99.9% respectively, of the interest in Pinnacle Polymers, a Pennsylvania joint venture, which owned property and was doing business in Louisiana. Pinnacle Polymers was registered as a foreign general partnership in Louisiana, and CMB and Cami Polymers were the general partners.

Polychim filed Louisiana Corporation Income/Franchise Tax Returns (CIFT returns) for the relevant periods, reporting and paying only its share of flow-through net income earned by Cami Polymers. According to the Department, all of

[1] Subsequent to the relevant periods, Polychim was organized as a Delaware corporation.

Cami Polymers' income was earned from its share of Pinnacle Polymers' net income, which is earned by conducting business and owning property in Louisiana. Polychim reported no franchise tax in its CIFT returns for the relevant periods, contending that it had no franchise tax nexus.

Thereafter, the Department conducted an audit of Polychim's CIFT returns for the relevant periods and issued notices of proposed taxes due, alleging that the companies owed franchise taxes and interest for the relevant periods. Specifically, on August 26, 2008, the Department sent Polychim a notice of proposed tax due, alleging that Polychim owed franchise tax in the amount of $173,969, with interest through September 10, 2008, in the amount of $66,754.04, and penalties of $21,741.15. Polychim protested the tax assessment by a letter dated September 24, 2008, again denying that it had any franchise tax nexus and requesting a hearing.

On August 25, 2009, the Department filed a petition against Polychim to collect franchise tax in the amount of $256,412.00, plus interest through June 2, 2009, in the amount of $117,692.72, and penalties in the amount of $31,846.00. Polychim answered the petition and filed a peremptory exception pleading the objections of no cause of action and no right of action.[2] Polychim specifically asserted that it was not subject to Louisiana franchise tax jurisdiction, because it did not exercise its corporate charter in the state of Louisiana, it did not own any property in the state of Louisiana, it had no employees in the state of Louisiana, and it did not transact any business in the state of Louisiana. Therefore, Polychim argued that it did not maintain sufficient contacts with the state to have a franchise taxable nexus in Louisiana under the law. Polychim further contended that the proposed assessment of the franchise tax violated the privileges, immunities, and protections afforded them by the Commerce Clause of the United States

[2] Polychim had previously filed a declinatory exception of insufficiency of service of process, and also filed a dilatory exception pleading the objections of vagueness and nonconformity of the petition with the requirements of LSA-C.C.P. art. 891.

Constitution and the Due Process and Louisiana Constitutions.

Polychim and the Department filed cross-motions for summary judgment concerning the Department's petition to collect the tax. Polychim's motion sought a summary judgment in its favor, finding that it was not subject to Louisiana franchise tax jurisdiction during the relevant periods under the statutory law of Louisiana or under United States or Louisiana constitutional authorities. In making this motion, Polychim specifically relied on this court's previous holding in UTELCOM, Inc. v. Bridges, 10-0654 (La. App. 1st Cir. 9/12/11), 77 So.3d 39, writ denied, 11-2632 (La. 3/2/12), 83 So.3d 1046. The Department's motion, on the other hand, sought a summary judgment, finding that the proposed franchise tax assessment fully complied with Louisiana franchise tax laws and was not in violation of United States and/or Louisiana constitutional authorities. In addition, the Department's motion sought an award of attorney fees pursuant to LSA-R.S. 47:1512.

After a hearing, the trial court rendered a judgment granting the Department's motion for summary judgment, finding that Polychim owed the franchise tax, penalties, and interest for the relevant periods. In so finding, instead of providing independent written reasons for judgment, the trial court adopted the Department's memorandum in support of its cross-motion for summary judgment as its reasons for judgment. The trial court further denied Polychim's motion for summary judgment.[3] A judgment in accordance with this oral ruling was signed on January 2, 2014. It is from this judgment that Polychim has suspensively appealed.

SUMMARY JUDGMENT

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by LSA-C.C.P.

---

[3] As to the Department's motion for attorney fees, the trial court advised the Department to file a separate motion on which the court would rule.

art. 969; the procedure is favored and shall be construed to accomplish these ends. LSA-C.C.P. art. 966(A)(2). Summary judgment shall be rendered in favor of the mover if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B)(2).

An appellate court's review of a summary judgment is a *de novo* review based on the evidence presented to the trial court, using the same criteria used by the trial court in deciding whether a summary judgment should be granted. Buck's Run Enterprises, Inc. v. Mapp Const., Inc., 99-3054 (La. App. 1st Cir. 2/16/01), 808 So.2d 428, 431. In ruling on a motion for summary judgment, the judge's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. All doubts should be resolved in the non-moving party's favor. Hines v. Garrett, 04-0806 (La. 6/25/04), 876 So.2d 764, 765.

On a motion for summary judgment, the burden of proof remains with the movant. However, if the moving party will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the moving party's burden on the motion is to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. See LSA-C.C.P. art. 966(C)(2).

RELEVANT LAW

The Louisiana corporate franchise tax is imposed pursuant to LSA-R.S.

47:601, which, during the relevant periods, provided:

> A. Every domestic corporation and every foreign corporation, exercising its charter, or qualified to do business or actually doing business in this state, or owning or using any part or all of its capital, plant, or any other property in this state, subject to compliance with all other provisions of law, except as otherwise provided for in this Chapter shall pay an annual tax at the rate of $1.50 for each $1,000.00, or major fraction thereof on the first $300,000 of taxable capital and at the rate of $3.00 for each one $1,000.00, or major fraction thereof, which exceed $300,000.00 of taxable capital. Taxable capital shall be determined as hereinafter provided. The tax levied herein is due and payable on any one or all of the following alternative incidents:
>
> (1) The qualification to carry on or do business in this state or the actual doing of business within this state in a corporate form. The term "doing business" as used herein shall mean and include each and every act, power, right, privilege, or immunity exercised or enjoyed in this state, as an incident to or by virtue of the powers and privileges acquired by the nature of such organizations, as well as, the buying, selling, or procuring of services or property.
>
> (2) The exercising of a corporation's charter or the continuance of its charter within this state.
>
> (3) The owning or using any part or all of its capital, plant, or other property in this state in a corporate capacity.
>
> B. It is the purpose of this Section to require the payment of this tax to the state of Louisiana by domestic corporations for the right granted by the laws of this state to exist as such an organization, and by both domestic and foreign corporations for the enjoyment, under the protection of the laws of this state, of the powers, rights, privileges, and immunities derived by reason of the corporate form of existence and operation. The tax hereby imposed shall be in addition to all other taxes levied by any other statute.
>
> C. (1) As used herein the term "domestic corporation" shall mean and include all corporations, joint stock companies or associations, or other business organizations organized under the laws of this state which have privileges, powers, rights, or immunities not possessed by individuals or partnerships.
>
> (2) The term "foreign corporation" shall mean and include all such business organizations as hereinbefore described in this Paragraph which are organized under the laws of any other state, territory or district, or foreign country.

Taxing statutes are to be interpreted liberally in favor of the taxpayer and

against the taxing authority. See Goudchaux/Maison Blanche, Inc. v. Broussard, 590 So.2d 1159, 1161 (La. 1991). If the statute can reasonably be interpreted more than one way, the interpretation less onerous to the taxpayer is to be adopted. Entergy Louisiana, Inc. v. Kennedy, 03-0166 (La. App. 1st Cir. 7/2/03), 859 So.2d 74, 78, writ denied, 03-2201 (La. 11/14/03), 858 So.2d 430; see also United Gas Corp. v. Fontenot, 241 La. 564, 579, 129 So.2d 776, 781 (1961).

Furthermore, words defining a thing to be taxed should not be extended beyond their clear import. Cleco Evangeline, LLC v. Louisiana Tax Com'n, 01-2162 (La. 4/3/02), 813 So.2d 351, 355. Absent evidence to the contrary, the language of the statute itself must clearly and unambiguously express the intent to apply to the property in question. Unless the words imposing the tax are expressly in the statute, the tax cannot be imposed. Id.

THE UTELCOM DECISION

In making its motion for summary judgment to the trial court, as well as in its arguments to this court, Polychim relies primarily on this court's prior holding in UTELCOM, *supra.* That case also involved an appeal by two foreign corporations, which challenged a summary judgment granted by the trial court, requiring that they pay Louisiana franchise taxes for certain periods. The two foreign corporations, UTELCOM and UCOM (the companies), were part of an affiliated group of corporations whose parent corporations was Sprint Corporation. Neither company was registered or qualified to do business in Louisiana during the tax periods, and each company maintained its only commercial domicile exclusively outside Louisiana. UTELCOM, Inc., 77 So.3d at 43.

The companies owned limited partnership interests in three Delaware limited partnerships. The only relevant limited partnership for purposes of the UTELCOM case was Sprint Communications Company LP (Sprint Communications LP).

Sprint Communications LP was registered in Louisiana as a foreign limited partnership and conducted business in Louisiana. UTELCOM and UCOM own limited partnership interests in Sprint Communications LP, and US Telecom, Inc. (US Telecom) was the general partner. UTELCOM, Inc., 77 So.3d at 44.

After the trial court had granted summary judgment requiring that the companies pay the franchise tax sought by the Department, the companies appealed, contending that they were not subject to the franchise tax. Specifically, the companies contended that they were non-resident corporations whose only contacts with Louisiana were through their passive ownership interests as limited partners in Sprint Communications LP, a limited partnership that owned property and conducted business in Louisiana. The companies further noted that, during the tax periods, neither of them: (1) rendered any services to or for any affiliate, or to or for any other party in Louisiana; (2) had any employees, independent contractors, agents, or other representatives in Louisiana; (3) bought, sold, or procured any services or property in Louisiana; or (4) maintained any bank accounts in Louisiana. UTELCOM, Inc., 77 So.3d at 47.

The Department did not contest any of the above facts; however, the Department contended that the companies were subject to the franchise tax based on the actions of other entities. In making this argument, the Department emphasized the fact that the companies were wholly-owned subsidiaries of Sprint Corporation and that the companies, along with US Telcom, the general partner of Sprint Communication LP, acted in unison and with a common purpose, controlled by their common parent. UTELCOM, Inc., 77 So.3d at 48.

In rejecting this argument, this court stated:

> The Department does not provide any examples of how Sprint Corporation directed the activities of Sprint Communications LP or of the companies, other than to suggest that they were united in their purpose. However, "unity of purpose" does not appear anywhere as

> an incident of taxation in LSA-R.S. 47:601(A). Furthermore, Sprint Corporation, US Telecom, Sprint Communications LP, and the companies are all separate juridical entities under the law. See LSA-C.C. arts. 24 and 2801; LSA-R.S. 12:41. The Department has provided no Louisiana codal, statutory, or jurisprudential authority to explain how the actions of these other entities are to be attributed to the companies, and nothing in LSA-R.S. 47:601 authorizes any such attribution.
>
> The Department also contends that the actions of US Telecom, as the general partner for Sprint Communications LP, should be attributable to the companies, because US Telecom carried out its actions on behalf of all partners. Thus, it appears that the Department is contending that US Telecom has acted as the agent for the companies. This argument has no basis in the law. As the only general partner, US Telecom has the authority to bind the partnership, but it has no authority to act as the agent for the limited partners, namely, the companies. See LSA-C.C. art. 2843. Accordingly, the Department's argument that US Telecom's actions can be attributed to the companies is without merit.

UTELCOM, 77 So.3d at 48.[4] (Internal footnotes omitted.)

DISCUSSION

On appeal, Polychim contends that the trial court erred in finding that it was subject to Louisiana franchise tax during the relevant periods. According to Polychim, it had no ties with Louisiana during the relevant periods, other than its indirect passive interest in Pinnacle Polymers. The Department's initial arguments in the trial court in support of the imposition of the franchise tax on Polychim tracked the first two incidents of taxation found in LSA-R.S. 47:601(A). Specifically, the Department contended that Polychim had: (1) conducted business in a corporate form within the state of Louisiana; and (2) exercised its charter within the state of Louisiana. See LSA-R.S. 47:601(A)(1) and (2).

In this case, as in UTELCOM, the Department contends that Polychim is subject to the franchise tax based on the actions of other entities. According to the Department's memorandum in support of its cross-motion for summary judgment,

[4] The UTELCOM case also contained a lengthy discussion of the third incident of taxation set forth in LSA-R.S. 47:601(A)(3), regarding the "owning or using of any part or all of [a corporation's] capital, plant, or other property in this state in a corporate capacity." This incident of taxation has not been raised as an issue in the matter currently before this court.

which was adopted as the trial court's written reasons for judgment, Polychim controlled and conducted business on behalf of Pinnacle Polymers, which was specifically operated within Louisiana by a common board of directors and officers. More specifically, the Department contends that Polychim, through its wholly-owned subsidiary corporation, CMB, and its limited liability company Cami Polymers, "exercised its powers and rights directly in Louisiana and retained continued management rights as a general [partner]. Consequently, [Polychim] has conducted business within Louisiana, and the first and second incidents of taxation under [LSA-R.S. 47:601(A)] are applicable based on the known facts of this case."

The Department does not provide any evidence to demonstrate how Polychim, itself, controlled and conducted business on behalf of Pinnacle Polymers. Instead, it relies on the fact that certain members of Polychim's board of directors were the same as Pinnacle Polymers' venture managers. However, the fact that certain individuals in these management boards may have been the same does not change the fact that Polychim and Pinnacle Polymers are separate juridical entities under the law. See LSA-C.C. arts. 24 and 2801; LSA-R.S. 12:41 (repealed by Acts 2014, No. 328, § 5, effective January 1, 2015); see also UTELCOM, Inc., 77 So.3d at 48. Furthermore, the Department's argument completely ignores the existence, or minimizes the presence, of CMB and Cami Polymers by attempting to attribute the conduct of CMB and/or Cami Polymers to Polychim such that Polychim would be considered a general partner of Pinnacle Polymers. Nevertheless, as is clear from the record, CMB and Cami Polymers were, at all times during the relevant periods, the general partners of Pinnacle Polymers.[5]

---

[5] In its brief to this court, the Department argues, for the first time, that Polychim became a general partner in Pinnacle Polymers pursuant to the written consent of the sole shareholder of CMB, which authorized the eventual merger of CMB into Polychim. This argument was not presented to the trial court and is, therefore, not properly before this court. However, we note that the written consent at issue only

Next, the Department argues that courts in Louisiana have repeatedly allowed creditors to use the "single business enterprise" theory to breach the corporate walls between corporations and their parents, subsidiaries, and affiliated entities. The Department cites several cases, which allegedly support the application of this theory to the imposition of franchise tax to this matter. See Brown v. ANA Insurance Group, 07-2116 (La. 10/14/08), 994 So.2d 1265; Holly & Smith Architects, Inc. v. St. Helena Congregate Facility, 03-0481 (La. App. 1st Cir. 2/23/04), 872 So.2d 1147; Green v. Champion Insurance Company, 577 So.2d 249 (La. App. 1st Cir.), writ denied, 580 So.2d 668 (La. 1991). However, according to Brown, the "single business enterprise" doctrine is a theory for imposing liability where two or more business entities act as one. Generally, under this doctrine, when corporations integrate their resources in operations to achieve a common business purpose, each business may be held liable for wrongful acts done in pursuit of that purpose. Brown, 994 So.2d at 1266, n.2. (Emphasis added.)

Based on this definition, the "single business entity" doctrine is inapplicable to this case. In this matter, the Department does not seek to hold Polychim liable for the wrongful acts of CMB, Cami Polymers, or Pinnacle Polymers;[6] it merely seeks to have Polychim assessed Louisiana franchise tax liability based on the actions of others. We note that, in this context, the "single business entity" doctrine sounds very similar to the "unity of purpose" theory that this court rejected in UTELCOM, finding that the term "unity of purpose" does not appear

---

provided for the eventual merger of the two companies, "upon the effective date of such merger." However, the actual plan and agreement of merger mentioned in the written consent, which was supposed to be attached thereto, is not in the record. Therefore, we note that the record contains no evidence demonstrating that Polychim was a general partner of Pinnacle Polymers during the relevant periods.

[6] The Department suggests that the business structure of these companies is "obviously" a tax avoidance scheme; however, there is nothing that prevents a business from setting up its structure in such a way as to avoid paying taxes, as long as the business structure is legal. The Department has not suggested or established that Polychim's business structure is illegal or otherwise constitutes "wrongdoing" under the law.

anywhere in LSA-R.S. 47:601(A) as an incident of taxation. UTELCOM, Inc., 77 So.3d at 48. Likewise we find that the term "single business entity" does not appear anywhere in the franchise tax statute. Accordingly, no franchise tax may be assessed to Polychim under this theory.

On appeal, the Department relies primarily on the issue of commercial domicile[7] to support its claim that Polychim owes Louisiana franchise tax for the relevant periods. The commercial domicile[8] of a corporation exists where the principal place of business is located and from which the corporation's activities function and are managed. United Gas Corp. v. Fontenot, 241 La. 488, 509, 129 So.2d 748, 756 (1961). A corporation may acquire a commercial domicile outside the state of its incorporation when it does not operate at its legal domicile, but maintains in another state its principal business office from which its management functions. See United Gas Corp., 241 La. 564, 571, 129 So.2d at 778.

In Kevin Associates, L.L.C. v. Crawford, 03-0211 (La. 1/30/04), 865 So.2d 34, the supreme court found that imposition of Louisiana corporate income and franchise tax on Yendis Properties, Inc. (Yendis),[9] a Delaware corporation, was proper, because its commercial domicile was in Louisiana. Kevin Associates, 865 So.2d at 44. In so finding, the court evaluated numerous aspects of Yendis's activities and management. The court noted that Yendis was a holding company, which engaged in little or no corporate activity on a daily basis. Nevertheless, the

---

[7] "Commercial domicile" shall mean the state where management decisions are implemented, which is presumed to be the state where the taxpayer conducts its principal business and thereby benefits from public facilities provided by that state. The location of board of directors' meetings is not presumed to create a commercial domicile at that location. LSA-R.S. 47:606(A)(1)(e)(v)(bb).

[8] The Department's regulation defining the concept of commercial domicile, LAC 61:I.306(A)(1)g.iii, provides:

> Commercial Domicile is in that state where management decisions are implemented which is presumed to be the state where the taxpayer conducts its principal business and thereby benefits from public facilities and protection provided by that state. The location of board of directors' meetings is not presumed to create commercial domicile at the location.

[9] Kevin Associates, L.L.C. was the successor in interest by merger to Yendis. Kevin Associates, 865 So.2d at 36, n.1.

court concluded that, when management of Yendis was required, the management was undertaken in, and directed from, Louisiana. Kevin Associates, 865 So.2d at 40-41.

In discussing the business activities of Yendis, the court noted:

> As memorialized in the November 1991 corporate minutes, Yendis was formed to receive dividends from its subsidiaries and to make loans to affiliated debtor corporations. The dividends Yendis received from its subsidiary corporations were to be loaned to debtor corporations under a Master Borrowing Note Agreement through banking arrangements with the Bank of Delaware on a repetitive basis. Yendis's witnesses testified this business purpose was thoroughly discussed at its annual meeting held in Delaware. Yendis contends that it carried out this purpose "on autopilot" and all tasks performed relative to the receipt of dividends and the making of loans were administrative tasks performed by employees of K & B Services. The record reveals, however, that management decisions and activities related to the making of the loans occurred in Louisiana.
>
> Although a corporation is a juridical person with a personality distinct from that of its members, La. C.C. art. 24, it only acts through its officers, employees, and other agents. Doe v. Parauka, 97-2434, p. 5, n. 5 (La. 7/8/98), 714 So.2d 701, 705, n. 5. Each year, Mr. Dyer prepared and Mr. Besthoff approved a schedule indicating the dividends to be paid to Yendis by each subsidiary, the loan to be made to Virginia, and the loans Virginia, in turn, was to make to its subsidiaries. The schedule was developed and approved in Louisiana and outlined the procedure to be used and the documents to be produced. In making this annual schedule, Mr. Dyer and Mr. Besthoff, both officers and directors of Yendis, were in effect conducting the business of Yendis, which was to receive dividends and make loans to Virginia. Yendis claims that these activities were merely administrative and that Mr. Dyer and Mr. Besthoff performed these duties as employees of K & B Services. We disagree. Although we recognize the difficulties of pinpointing the exact capacities in which Mr. Dyer and Mr. Besthoff acted due to the fact that they held myriad positions in various corporations within the K & B corporate group, we find the scheduling of the loans to Virginia constituted a management activity on the part of Yendis's management. The schedule involved a determination of how the funds would flow for bookkeeping purposes. The funds began in the New Orleans bank account of K & B Services. K & B Services transferred the funds to the bank account of Yendis's subsidiary, which declared them as dividends and transferred the funds to Yendis's Delaware bank account. Yendis wired the dividends it received to Virginia's bank account as a loan, and the funds were then transferred back to the account of K & B Services. These transfers were all made during the course of one day.
>
> Mr. Besthoff testified that after the schedule was developed and

> approved, the next step was its implementation. The instructions for the wire transfers from Yendis to Virginia were initiated in New Orleans. After verbal authorization for the wire transfers was given, Mr. Dyer, as Treasurer, and Mr. Besthoff, as Chairman, sent written confirmation to Yendis's Delaware bank. These instructions, too, were initiated in New Orleans. The activities undertaken by Yendis's officers and directors concerning the wire transfer instruction constituted management of Yendis's business affairs. Furthermore, in addition to being management activities in and of themselves, the wire transfer instructions, which came from Louisiana, implemented the management decisions made in Louisiana regarding the schedule of the transfer of funds. This implementation of management decisions serves to satisfy, at least in part, the definition of commercial domicile contained in the Department's regulations.
>
> As a holding company, part of Yendis's business was authorizing certain actions of its subsidiaries. The authorization was often provided through the use of a unanimous consent of the board in lieu of meetings. These unanimous consents were prepared in Louisiana. The unanimous consents contained in the record generally relate to Yendis's function as the sole shareholder of the stock of its subsidiaries. For example, one unanimous consent in lieu of meeting authorized the transfer of all of Yendis's shares of stock in its subsidiary BOK Corporation to another subsidiary, Yendis Realty, Inc. The unanimous consents were not initiated by the Delaware director, Mr. Meyer, and were presumably conceived in Louisiana by one of the Louisiana directors, who then directed Louisiana counsel to prepare them.
>
> Yendis, as a holding company, had little activity anywhere. However, our reading of the record as a whole convinces us that the substantial management activities that did occur took place in Louisiana. Yendis's funds were controlled from New Orleans in K & B Plaza. Its management determined in New Orleans that authorizations of its subsidiaries' actions were in order and had the appropriate documentation prepared. The minutes of Yendis's Delaware board meetings were drafted in New Orleans prior to the meeting and used as an agenda for the meeting. Yendis used, from time to time, the New Orleans address of its corporate headquarters as its own address. All of these factors, taken together, lead us to the conclusion that Yendis's principal place of business was in K & B Plaza in New Orleans, Louisiana.

The Department contends on appeal that Polychim runs its business in a similar fashion and that, therefore, its commercial domicile is in Louisiana. The Department notes that, although Polychim had listed an address in Atlanta as its principal place of business for years, that address is merely the address of its attorneys and that Polychim has no office in Atlanta. Furthermore, the Department

argues that Polychim is unable to state with certainty where its principal place of business is; rather, it simply contends that its principal place of business is not Louisiana. Moreover, the Department relies heavily on the fact that Polychim listed the Garyville, Louisiana, address of Pinnacle Polymers as its principal place of business on its tax returns during the relevant periods. It was this fact that the trial court focused on in granting the Department's motion for summary judgment at the hearing on this matter as the following colloquy demonstrates:

> **THE COURT:** Tell me about your tax returns that [show] a Louisiana address as the corporate address.
>
> **[COUNSEL FOR POLYCHIM:]** That is what our tax preparer did. He put that on there. And that is true. But, Judge, we would say that if you're looking at commercial domicile, you have to look at and try to answer the question, where is the company managed from? Where is the company directed from?
>
> **THE COURT:** Why should I go beyond what was reported on the tax return?
>
> **[COUNSEL FOR POLYCHIM:]** Because that's a mailing address, Judge. And when you look at the Kevin Associates case, there are eight or nine factors. One of them is, mailing address. And, yes, that is a factor. And that may preclude summary judgment in our favor, but the fact that you have a mailing address is only one factor. It doesn't mean that that's where your [commercial] domicile is. It's a strict test under Kevin Associates. And the question that's asked is, where is the business operated from? Where is the business managed from? They didn't take a corporate deposition of our corporate rep. And so what we have is affidavits as to where the business is managed from, where the flow of funds [comes] from. And all of those things show that it would not be in Louisiana.

In support of its argument that it is not subject to Louisiana franchise tax for the relevant periods and that its commercial domicile is not in Louisiana, Polychim notes that it was a Georgia corporation, which listed Atlanta, Georgia, as its principal place of business on its annual corporate filings. In addition, none of Polychim's officers and directors resided in Louisiana; rather, the officers and directors all resided either in Belgium or Connecticut during the relevant periods. Moreover, Polychim did not hold any board of directors meetings in Louisiana, nor

were any unanimous consents executed in Louisiana during the relevant periods. All decisions concerning the flow of funds to or from Polychim were made in Belgium, and no one with an office in Louisiana was involved in the business of Polychim. Polychim further notes that Anthony Caruso, the auditor for the Department, listed Polychim's commercial domicile as Atlanta while conducting his audit. Finally, during the relevant periods, Polychim's corporate records were kept in Connecticut, not Louisiana.

In addition to the address listed in the tax returns, the Department notes that, when Polychim filed certain tax returns, it asked for an extension, because its business had been impacted by Hurricane Katrina.[10] Furthermore, the Department argues that the fact that Polychim chose a New Orleans accounting firm to prepare its tax returns was significant to the issue of commercial domicile. The Department does not present any evidence to demonstrate that Polychim had any bank accounts in Louisiana or that it conducted any other business activities in the state. In fact, in its memorandum in support of its cross-motion for summary judgment filed in the trial court, it acknowledged that there were many unknown facts about the business activities of Polychim.[11] Even so, it asked the trial court to grant a summary judgment in its favor anyway.

After a thorough review of the record, we find that genuine issues of material fact remain, which preclude the granting of summary judgment in favor of either party. The question of Polychim's principal place of business has been answered in contradictory fashion by the affidavits submitted by Polychim, the findings of the Department's auditor, and the information provided on Polychim's

---

[10] Polychim derived income from Pinnacle Polymers, which would have been impacted by Hurricane Katrina.

[11] As stated by Polychim's counsel at the hearing on the summary judgment motions, the Department never took the deposition of a corporate representative of Polychim pursuant to LSA-C.C.P. art. 1442. Instead, the Department sought to obtain information about the company through a deposition of Gus Kahramanidis, an employee of Pinnacle Polymers.

tax returns. Furthermore, there is no independent evidence to support one finding over another in the record. Accordingly, we find that the trial court erred in granting the Department's motion for summary judgment in this matter.

CONCLUSION

For the foregoing reasons, we affirm that portion of the trial court judgment that denied the motion for summary judgment filed by Polychim USA, Inc., and we reverse that portion of the trial court judgment that granted the motion for summary judgment filed by Cynthia Bridges, in her capacity as Secretary of the Louisiana Department of Revenue. The matter is remanded to the trial court for proceedings consistent with this opinion. Each party is to bear its own costs of this appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.