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**STATE OF NEW MEXICO
ADMINISTRATIVE HEARINGS OFFICE
TAX ADMINISTRATION ACT**

**IN THE MATTER OF THE PROTEST OF
MICHELE GIACOMO
TO NOTICE OF LEVY ISSUED UNDER
LETTER ID NO. L1539363632**

**D&O No. 19-12
Case Number 18.04-080L**

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

DECISION AND ORDER

A hearing in the above-captioned protest occurred on November 20, 2018, before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. Mr. Robert Gorman, Esq. appeared representing Ms. Michele Giacomo (“Taxpayer”), who appeared by telephone accompanied by her spouse Mr. Michael Giacomo. Staff Attorney, Jama Fisk, Esq. appeared representing the Taxation and Revenue Department of the State of New Mexico (“Department”) and was accompanied by Mr. Nicholas Pacheco, protest auditor.

Department Exhibits A – J and Taxpayer Exhibits 1 – 8 were admitted. Based on the evidence and arguments presented, the Hearing Officer finds that Taxpayer’s protest should be GRANTED because it has demonstrated by a preponderance of evidence that Ms. Giacomo was not a delinquent taxpayer, and the Department was not entitled to levy on her individual retirement account to satisfy the gross receipts tax liability against her husband, even if he had a community interest in that account.

IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Michele Giacomo and Michael Giacomo were married in New Mexico in 2000. They resided in New Mexico until June of 2016, at which time they relocated to Colorado, where they

1 now permanently reside. **[Direct Examination of Michele Giacomo; Direct Testimony of**
2 **Michael Giacomo]**.

3 2. During the period of time that she resided in New Mexico, Ms. Giacomo was
4 employed part-time as a registered nurse with Presbyterian Healthcare Services (“PHS”). **[Direct**
5 **Examination of Michele Giacomo]**

6 3. As an employee of PHS, Ms. Giacomo established and participated in a 401(k) plan.
7 **[Direct Examination of Michele Giacomo]**

8 4. Some or all of the 401(k) was acquired through Ms. Giacomo’s employment with
9 PHS in New Mexico during her marriage to Mr. Giacomo. **[Direct Examination of Ms. Giacomo]**

10 5. Ms. Giacomo’s employment with PHS ended at the time she and Mr. Giacomo
11 relocated to Colorado in June 2016. **[Direct Examination of Michele Giacomo]**

12 6. At some point after Ms. Giacomo and her spouse relocated to Colorado, Ms.
13 Giacomo initiated a rollover of her 401(k) plan into an individual retirement account (“IRA”). She
14 initiated the rollover through a Colorado branch office of Fidelity. **[Direct Examination of Michele**
15 **Giacomo; Taxpayer Ex. 4]**

16 7. The IRA is solely in Ms. Giacomo’s name consistent with the requirements of 26
17 U.S.C. Section 408 which provide that an “‘individual retirement account’ means a trust created or
18 organized in the United States for the exclusive benefit of an individual or his beneficiaries.”
19 **[Taxpayer Exs. 3 – 4]**

20 8. Mr. Giacomo, during the relevant period of time was engaged in the business of
21 selling medical equipment and devices as a representative for one or more distributors. Business
22 was conducted through Giacomo Medical, Inc. **[Direct Examination of Michael Giacomo]**

23 9. Ms. Giacomo had no involvement with the business of selling medical equipment
24 and devices, although she was identified as a director of Giacomo Medical, Inc. **[Cross**

1 **Examination of Michele Giacomo; Re-Direct Examination of Michele Giacomo; Direct**
2 **Examination of Michael Giacomo]**

3 10. Giacomo Medical, Inc. never conducted a meeting of its directors. **[Re-Direct**
4 **Examination of Michele Giacomo; Direct Examination of Michael Giacomo]**

5 11. On November 27, 2012, the Department issued a Notice of Limited Scope Audit
6 Commencement – Gross Receipts. The notice was mailed to Michael Giacomo and Michele
7 Giacomo at 9421 Glendale Ave NE, Albuquerque, NM 87122-3964. The Notice of Limited Scope
8 Audit Commencement resulted from an apparent Schedule C mismatch in personal income tax year
9 2008. **[Department Exhibits C, D, and E1 – E5]**

10 12. Mr. Giacomo admitted that neither he nor Giacomo Medical, Inc. paid gross receipts
11 tax on receipts derived from commissions on the sale of devices in reliance on advice he received
12 regarding the application of NMSA 1978, Section 7-9-66 (providing a deduction from gross receipts
13 for “commissions on sales of tangible personal property which are not subject to the gross receipts
14 tax[.]”) **[Direct Examination of Michael Giacomo; Department Ex. B4 – B9]**

15 13. At the time that Mr. and Ms. Giacomo received the Notice of Limited Scope Audit
16 Commencement, and from 2006 until June 2016, they resided at 9421 Glendale Ave NE,
17 Albuquerque, NM 87122, which was also the address used for tax filings during those periods of
18 time, including their 2008 state and federal tax returns. **[Direct Examination of Michele Giacomo;**
19 **Direct Examination of Michael Giacomo; Taxpayer Ex. 1; Department Exs. C; D; E1 – E5]**

20 14. The Notice of Limited Scope Audit Commencement estimated a total sum of
21 \$29,323.00 in gross receipts tax due for tax year 2008, deriving from the sum of \$342,310.00 in
22 reported 2008 Schedule C income. **[Department Ex. B1 – B2]**

23 15. Mr. Giacomo’s 2008 Schedule C forms demonstrated that he generated business
24 income from two sources: 1) Outside Medical Equipment Sales generated \$338,800.00 in gross

1 receipts or sales [Department Ex. E1, Part 1, Line 1]; Health Products – Party Plan generated
2 \$3,510.00 in gross receipts or sales. The total amount was \$342,310.00. [**Department Ex. E2, Part**
3 **1, Line 1]**

4 16. On January 1, 2013, Mr. Giacomo responded to the Notice of Limited Scope Audit
5 Commencement, and claimed that the Department’s information was incorrect. He explained the
6 manner in which he believed Section 7-9-66 should apply to the commissions he received on the
7 sale of medical equipment and devices. His tax preparer similarly attempted to resolve the matter,
8 also in reliance on the application of Section 7-9-66, but all attempts to resolve the dispute were
9 unsuccessful. [**Direct Examination of Michael Giacomo; Department Ex. B3 – B9]**

10 17. Mr. and Ms. Giacomo had previously received a Notice of Limited Scope Audit for
11 tax years 2005 and 2006 which Mr. Giacomo had succeeded in resolving without the need for further
12 action. The issues giving rise to limited scope audit for tax year 2008 were identical to those that
13 had previously been raised, but 2008 could not be resolved in similar fashion. [**Direct Examination**
14 **of Michael Giacomo; Taxpayer Ex. 5]**

15 18. On August 29, 2013, the Department issued a Notice of Assessment of Taxes and
16 Demand for Payment to Michael Giacomo under Letter ID No. L1038748112 in the total amount of
17 \$30,068.08 including \$21,882.42 in gross receipts tax, \$4,366.48 in penalty, and \$3,869.18 in
18 interest. The notice provides a mailing address of 10605 Central Avenue NE, Albuquerque, NM
19 87123-2723, and references CRS No. 03-085592-00-6. [**Direct Examination of Michael Giacomo;**
20 **Department Ex. A; Taxpayer Ex. 6]**

21 19. CRS No. 03-085592-00-6 is associated with a limited liability company named Third
22 Coast Auto Sales, LLC, an entity established to sell automobiles, but which never had any sales. It
23 is not the same entity subject of discussions stemming from the Notice of Limited Scope Audit
24 Commencement. [**Direct Examination of Michael Giacomo; Cross-Examination of Nicholas**

1 **Pacheco; Department Ex. E (pages not numbered)]**

2 20. The Department utilized the address associated with Third Coast Auto Sales, LLC
3 (CRS No. 03-085592-00-6) because it apparently perceived that entity to be the taxpayer. The
4 assessment made no reference to Giacomo Medical, Inc. **[Cross-Examination of Nicholas**
5 **Pacheco]**

6 21. More than four years later, on September 14, 2017, the Department issued a Final
7 Notice Before Seizure under Letter ID No. L1047911728 indicating a then-outstanding liability in
8 the amount of \$32,983.74. It was mailed to Michael A. Giacomo at 9421 Glendale NE Ave [sic],
9 Albuquerque, NM 87122 and referenced the debt of Michael A. Giacomo (SSN: ***-**-4645),
10 Michele Giacomo (SSN: ***-**-7181), and Michael Giacomo (CRS: 03-085592-00-6).
11 **[Department Ex. F]**

12 22. On October 4, 2017, the Department issued a Final Notice Before Seizure under
13 Letter ID No. L1300046640 indicating a then-outstanding liability in the amount of \$32,988.53. It
14 was mailed to Michele Giacomo at 1102 Morris St. NE, Albuquerque, NM 87122-5445 and
15 referenced the debt of Michael A. Giacomo (SSN: ***-**-4645), Michele Giacomo (SSN: ***-**-
16 7181), and Michael Giacomo (CRS: 03-085592-00-6). **[Department Ex. G]**

17 23. Ms. Giacomo resided at 1102 Morris St. NE, Albuquerque, NM 87122-5445 from
18 childhood until 1998. By the time the Department mailed the Final Notice Before Seizure to that
19 address, she had not resided at that address for approximately nine years. **[Direct Examination of**
20 **Michele Giacomo]**

21 24. Mr. Giacomo never resided at 1102 Morris St. NE, Albuquerque, NM 87122-5445.
22 **[Direct Examination of Michael Giacomo]**

23 25. On October 12, 2017, the Department issued a Warrant of Levy to Giacomo Medical,
24 Inc. at 9421 Glendale Ave. NE, Albuquerque, NM 87122-3964 under Letter ID No. L0874431280

1 indicating a total liability then due in the amount of \$32,988.53 for wages or monies due and owing
2 to “Michael A. Giacomo DBA: Michael Giacomo”, an address of 9421 Glendale NE Ave. [sic],
3 Albuquerque, NM 87122, and reference to the CRS number associated with Third Coast Auto Sales,
4 LLC. The attached schedule identified August 23, 2013 as the date of assessment. **[Department Ex.
5 E (pages not numbered)]**

6 26. On November 1, 2017, the Department issued a Warrant of Levy to USP Denver,
7 Inc. at 15305 Dallas Pkwy Ste 1600, Addison, TX 75001-6491 under Letter ID No. L1332351792
8 indicating a total liability then due in the amount of \$33,055.27 for wages or monies due and owing
9 to “Michele Giacomo DBA: Michael Giacomo”, an address of 2905 Rockbridge Dr., Highlands
10 Ranch, CO 80129-1514, and reference to the CRS number associated with Third Coast Auto Sales,
11 LLC.. The attached schedule identified August 23, 2013 as the date of assessment. **[Department
12 Ex. E (pages not numbered)]**

13 27. On November 1, 2017, the Department issued a Warrant of Levy to Payroll/HR
14 Department CHC Payroll Agent, Inc. at P.O. Box 550, Nashville, TN 37202-0550 under Letter ID
15 No. L0529523504 indicating a total liability then due in the amount of \$33,055.27 for wages or
16 monies due and owing to “Michele Giacomo DBA: Michael Giacomo”, an address of 2905
17 Rockbridge Dr., Highlands Ranch, CO 80129-1514, and reference to the CRS number associated
18 with Third Coast Auto Sales, LLC. The attached schedule identified August 23, 2013 as the date of
19 assessment. **[Department Ex. E (pages not numbered)]**

20 28. On November 1, 2017, the Department issued a Warrant of Levy to Diane Fisher,
21 Agent for Presbyterian Healthcare Services at 2501 Buena Vista Dr. SE, Albuquerque, NM 87106-
22 4260 under Letter ID No. L1249551152 indicating a total liability then due in the amount of
23 \$33,055.27 for wages or monies due and owing to “Michele Giacomo DBA: Michael Giacomo”, an
24 address of 2905 Rockbridge Dr., Highlands Ranch, CO 80129-1514, and reference to the CRS

1 number associated with Third Coast Auto Sales, LLC.. The attached schedule identified August 23,
2 2013 as the date of assessment. **[Department Ex. E (pages not numbered)]**

3 29. On November 1, 2017, the Department issued a Warrant of Levy to
4 HR/Payroll/Garnishment Dept National Financial Serv., LLC (“Fidelity”) under Letter ID No.
5 L1201349424 indicating a total liability then due in the amount of \$33,040.97 for wages or monies
6 due and owing to “Michele Giacomo DBA: Michael Giacomo”, an address of 2905 Rockbridge Dr.,
7 Highlands Ranch, CO 80129-1514, and reference to the CRS number associated with Third Coast
8 Auto Sales, LLC.. The Warrant of Levy admitted as Department Exhibit H did not include the
9 schedule referenced therein. Accordingly, the Warrant of Levy does not indicate the date of the
10 assessment. **[Department Ex. H]**

11 30. Contrary to the information provided in the Warrants of Levy, Ms. Giacomo never
12 engaged in business as “Michele Giacomo DBA: Michael Giacomo” or was associated with Third
13 Coast Auto Sales, LLC. **[Direct Examination of Michele Giacomo; Direct Examination of**
14 **Michael Giacomo]**

15 31. Since Mr. and Ms. Giacomo relocated to Colorado in June 2016, they did not receive
16 any of the correspondence from the Department after that time, which was addressed to 9421
17 Glendale Ave NE, Albuquerque, NM 87122. **[Direct Examination of Michele Giacomo; Direct**
18 **Examination of Michael Giacomo]**

19 32. The Final Notice of Seizure, dated September 14, 2017, issued under Letter ID No.
20 L1047911728 also contained a slight deviation from the address as provided on Mr. and Ms.
21 Giacomo’s tax returns. It listed Mr. Giacomo’s address as 9421 Glendale NE Ave. as opposed to
22 9421 Glendale Ave. NE. Whether that deviation could potentially impair the delivery of the
23 correspondence is unknown. However, the address used is nevertheless incorrect. **[Department Ex.**
24 **F]**

1 33. On or about November 8, 2017, Fidelity Investments notified Ms. Giacomo that it
2 had received a state tax levy in the amount of \$33,040.97 from the State of New Mexico and
3 explained that it would liquidate assets contained in the IRA unless it received confirmation from
4 the Department that the matter had been resolved before November 22, 2017. **[Direct Examination
5 of Michele Giacomo; Direct Examination of Michael Giacomo; Taxpayer Ex. 3]**

6 34. Ms. Giacomo never received a copy of the Warrant of Levy referenced in the
7 correspondence from Fidelity Investments, either from the Department or from Fidelity. **[Direct
8 Examination of Michele Giacomo; Direct Examination of Michael Giacomo; Taxpayer Ex. 3]**

9 35. On November 22, 2017, Fidelity Brokerage Services, LLC paid \$18,604.05 from Ms.
10 Giacomo's IRA to the Department. **[Direct Examination of Michele Giacomo; Direct
11 Examination of Michael Giacomo; Department Ex. I; Taxpayer Exs. 4 and 7]**

12 36. The payment from Fidelity Brokerage Services, LLC, in the amount of \$18,604.05,
13 was credited to Mr. Giacomo's CRS account on or about November 28, 2017. **[Taxpayer Ex. 8]**

14 37. On November 30, 2017, after Fidelity Brokerage Services, LLC paid \$18,604.05
15 pursuant to the Warrant of Levy, the Department issued a Final Notice Before Seizure under Letter
16 ID No. L1076040496 indicating a then-outstanding liability in the amount of \$33,121.63. It was
17 mailed to Michael Giacomo at 2905 Rockbridge Dr., Highlands Ranch, CO 80129-1514 and
18 referenced the debt of Michael A. Giacomo (SSN: ***-**-4645), Michele Giacomo (SSN: ***-**-
19 7181), and Michael Giacomo (CRS: 03-085592-00-6). **[Taxpayer Ex. 2]**

20 38. On December 6, 2017, the Department issued a Notice of Levy to Michele Giacomo
21 at 2905 Rockbridge Dr., Highlands Ranch, CO 80129-1514, under Letter ID No. L1539363632,
22 stating that it had secured payment in the amount of \$18,604.05 on November 22, 2017 from Fidelity
23 (National Financial Services) and that the amount of \$14,515.56 remained due and owing.
24 **[Administrative File]**

1 39. On January 30, 2018, Mr. and Ms. Giacomo submitted a written protest. The protest
2 was received in the Department's Protest Office on January 31, 2018. **[Administrative File]**

3 40. On February 6, 2018, the Department acknowledged the protest of the Notice of Levy
4 dated December 6, 2017 indicating that it had seized \$18,604.05. The acknowledgment was issued
5 under Letter ID No. L1767463728. **[Administrative File]**

6 41. On February 6, 2018, the Department notified counsel for Mr. Giacomo under Letter
7 ID No. L0886741808 that the Final Notice Before Seizure, bearing Letter ID No. L1076040496,
8 was non-protestable under the Tax Administration Act. **[Administrative File]**

9 42. On April 17, 2018, the Department submitted a Hearing Request in which it
10 requested that the Administrative Hearings Office set the matter for a scheduling hearing.
11 **[Administrative File]**

12 43. The Administrative Hearings Office entered a Notice of Telephonic Scheduling
13 Hearing on April 18, 2018 that set a hearing for May 7, 2018. **[Administrative File]**

14 44. On May 7, 2018, the Administrative Hearings Office entered a Scheduling Order and
15 Notice of Administrative Hearing that in addition to establishing various deadlines, set a hearing on
16 the merits of the protest for June 26, 2018. **[Administrative File]**

17 45. On June 20, 2018, the parties filed a Joint Request for Continuance. **[Administrative**
18 **File]**

19 46. On June 22, 2018, the Administrative Hearings Office entered a Continuance and
20 Amended Notice of Administrative Hearing that set a hearing on the merits of the protest for
21 November 20, 2018. **[Administrative File]**

22 47. On October 16, 2018, Taxpayer submitted Taxpayer's Unopposed Motion to Permit
23 Telephonic Testimony. **[Administrative File]**

24 48. On October 23, 2018, the Administrative Hearings Office entered an Order

1 Permitting Telephonic Appearance and Testimony of Mr. and Ms. Giacomo. **[Administrative File]**

2 49. On October 29, 2018, the Department filed its portion of the Joint Prehearing
3 Statement. **[Administrative File]**

4 50. On October 31, 2018, the parties jointly submitted an Amended Joint Prehearing
5 Statement. **[Administrative File]**

6 51. A hearing on the merits of the protest was conducted on November 20, 2018. At the
7 conclusion of the hearing, the parties stipulated to holding the matter in abeyance pending
8 consideration of Ms. Giacomo's application for innocent spouse relief. **[Record of Hearing**
9 **(11/20/2018)]**

10 52. On February 14, 2019, the Administrative Hearings Office entered a Notice of
11 Telephonic Status Hearing. **[Administrative File]**

12 53. On March 1, 2019, the status hearing occurred in which the parties agreed that the
13 matter should no longer be held in abeyance. **[Administrative File]**

14 **DISCUSSION**

15 The primary issue in this protest is whether the Department should be permitted to levy upon
16 Ms. Giacomo's IRA in order to satisfy the outstanding tax liability incurred by her spouse while
17 engaging in business.

18 The correctness of the underlying assessment is not at issue in the current protest. Ms.
19 Giacomo's counsel acknowledged on several occasions on the record that the central issue in protest
20 was the propriety of the levy against Ms. Giacomo's IRA. Counsel further acknowledged that any
21 prospective protest of the underlying assessment would need to be initiated through a request for
22 refund, if denied.

23 However, the issue in dispute cannot be fully evaluated without reference and consideration
24 of some facts relevant to the underlying assessment, particularly as those facts may have relevance

1 to the Department's subsequent collection activities against Ms. Giacomo. Therefore, nothing stated
2 herein shall be construed in opposition to the correctness of the underlying assessment in any
3 subsequent protest in which the correctness of the assessment may be in dispute.

4 Although the Department frames its issue as a simple question of whether community
5 property, in the form of an IRA, can be levied upon to satisfy a community debt, resolving this
6 protest requires a more thorough examination of the facts leading up to the levy, as well as
7 consideration of the distinctions between "community property" in marriage, and a spouse's
8 "community interest" in the separate property of the other spouse.

9 **Whether Ms. Giacomo is a Delinquent Taxpayer?**

10 The general rule is that the Department may collect taxes owed by levy on all property of a
11 delinquent taxpayer. NMSA 1978, Sec. 7-1-31 (1993). A taxpayer is delinquent if an assessment
12 against a taxpayer is not paid in full within 90 days of the assessment, protested, or security for
13 payment has not been furnished. NMSA 1978, Sec. 7-1-16. Thus, the threshold issue at this juncture
14 is whether Ms. Giacomo is a "taxpayer" or a "delinquent taxpayer."

15 A "taxpayer" under the Tax Administration Act ("TAA"), NMSA 1978, Section 7-1-3 (AA)
16 "means a person liable for payment of any tax; a person responsible for withholding and payment
17 or for collection and payment of any tax; a person to whom an assessment has been made, if the
18 assessment remains unabated or the amount thereof has not been paid; or a person who entered into
19 a special agreement pursuant to Section 7-1-21.1 NMSA 1978 to assume the liability of gross
20 receipts tax or governmental gross receipts tax of another person and the special agreement was
21 approved by the secretary pursuant to the Tax Administration Act."

22 The term "person" is also defined in the TAA at Section 7-1-3 (P) and includes individuals
23 in addition to corporations, limited liability companies, and a variety of other entities. With respect

1 to corporations, the term “person” also includes officers or employees of a corporation, but only for
2 the purposes of Sections 7-1-72 –74 which are not at issue in this protest.

3 Therefore, if Ms. Giacomo’s IRA was subject to levy due to her purported status as a
4 taxpayer or delinquent taxpayer, then it was because she was: (1) liable for payment of any tax; (2)
5 responsible for withholding and payment or for collection and payment of any tax; (3) a person to
6 whom an assessment has been made; or (4) a person who entered into a special agreement to assume
7 the liability.

8 The fourth segment of the definition of “taxpayer” may be summarily addressed because it
9 is simply inapplicable to this protest. There are no facts to suggest that Ms. Giacomo entered into
10 any agreement to assume any sort of tax liability.

11 The second segment of the definition may also be summarily addressed because there was
12 no evidence to establish that Ms. Giacomo was responsible for withholding, payment or collection
13 of any tax for any business in which Mr. Giacomo was engaged. Although Ms. Giacomo admitted
14 that she was appointed as a director of Giacomo Medical, Inc., that alone does not establish
15 responsibility for unpaid gross receipts tax when the outstanding tax liability in this protest was
16 attributed to Third Coast Auto Sales, LLC, not Giacomo Medical, Inc.

17 Moreover, even if the assessment attributed tax liability to Giacomo Medical, Inc., rather
18 than Third Coast Auto Sales, LLC, the protest at hand does not concern the sorts of issues in which
19 the definition of person is extended to include officers or employees of a corporation, such as willful
20 attempts to evade or defeat tax, tax fraud, or interference with the administration of revenue laws.
21 NMSA 1978, Sections 7-1-72 -74.

22 The next question is whether Ms. Giacomo is a person to whom an assessment has been
23 made, relevant to the third segment of the definition of “taxpayer.” The Hearing Officer was
24 persuaded that since the assessment in this case was not expressly made against Ms. Giacomo, but

1 against Mr. Giacomo, at a CRS number associated with Third Coast Auto Sales, LLC, that Ms.
2 Giacomo is not “a person to whom an assessment has been made[.]”

3 Third Coast Auto Sales, LLC was a business Mr. Giacomo established with his brother
4 which never generated a single sale, and which is now defunct. Nevertheless, the Department mailed
5 the assessment issued under Letter ID No. L1038748112 to Mr. Giacomo’s attention only, at an
6 address presumably associated with Third Coast Auto Sales, LLC, although there was no evidence
7 to establish with certainty whether that address was indeed associated with that entity.

8 However, Ms. Giacomo credibly testified that she never received the notice, which is
9 reasonable under the circumstances. All correspondence in reference to the limited scope audit had
10 occurred between the Department and Mr. Giacomo using the Glendale Avenue address, which at
11 the time, represented their address of record and permanent residence. Ms. Giacomo was not
12 involved with Third Coast Auto Sales, LLC and had no familiarity with the address to which the
13 assessment was mailed.

14 Therefore, if Ms. Giacomo is obligated for the tax liability subject of the assessment under
15 Letter ID No. L1038748112, then the liability must be established by virtue of the first portion of the
16 definition of “taxpayer” providing that she must be “a person liable for payment of any tax[.]”

17 Thus, the next question is who is liable for payment of the gross receipts tax underlying the
18 assessment and levy in this protest. New Mexico imposes a gross receipts tax on the receipts of any
19 person engaged in business. NMSA 1978, Section 7-9-4 (2002); *See also Comer v. State Tax*
20 *Comm'n*, 41 N.M. 403, 406, 69 P.2d 936, 938 (N.M. 1937). “Engaging in business” is defined as
21 “carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit.”
22 NMSA 1978, Section 7-9-3.3 (2003). Under Regulation 3.2.4.8 NMAC (04/30/01), “the gross
23 receipts tax is imposed on persons engaging in business in New Mexico. Such persons are solely
24 liable for payment of the tax[.]”

1 As the New Mexico Court of Appeals has previously explained, “only those persons who
2 engage in business can be held liable for the gross receipts tax.” *Breen v. State Taxation & Revenue*
3 *Dep’t.*, 2012-NMCA-101, ¶31. Although *Breen* and the present matter may be factually
4 distinguishable, the analysis employed by the court is enlightening because, similar to the case at
5 bar, the Court of Appeals engaged in an examination intended to ascertain the identity of the
6 “taxpayer” with concern for gross receipts tax obligation stemming from the business activities of
7 one spouse in a marriage, but not the other.

8 *Breen* was the plaintiff in an employment discrimination action, when the defendant
9 attempted to acquire the gross receipts tax records of his spouse by subpoena. The plaintiff’s spouse
10 objected and asserted an evidentiary privilege against the disclosure of her business’ tax records
11 under NMRA 11-502, the New Mexico Taxpayer Bill of Rights, and various other confidentiality
12 statutes under the Tax Administration Act. The defendant asserted that the records were
13 discoverable because the plaintiff and spouse jointly filed income tax returns and because the
14 plaintiff owned a community property interest in his spouse’s business income. *Breen*; 2012-
15 NMCA-101, ¶¶30-31.

16 In evaluating whether the gross receipts records of the plaintiff’s spouse were privileged or
17 discoverable, the Court of Appeals considered whether plaintiff was a “taxpayer” for his spouse’s
18 business. *Breen*; 2012-NMCA-101, ¶31. The Court of Appeals concluded that only a person
19 engaged in business is liable for gross receipts tax. *Id.* Since the plaintiff was not active and did not
20 engage in his spouse’s business, he was not a “taxpayer” for his spouse’s business receipts. *Breen*;
21 2012-NMCA-101, ¶32. Accordingly, the fact that a person jointly filed income tax returns with their
22 spouse, who engaged in business subject to the gross receipts tax, did not also mechanically
23 transform that person into a “taxpayer” liable for the gross receipts tax incurred by their spouse’s
24 business activities. *Breen*; 2012-NMCA-101, ¶¶31-32.

1 For these reasons, the Hearing Officer is persuaded that Ms. Giacomo was not a person
2 engaging in business subject to gross receipts tax during the relevant period of time. Instead, she was
3 employed as a nurse for PHS, and this was her only source of income. She was not involved in any
4 manner with Third Coast Auto Sales, LLC, the assessed entity. Regarding Giacomo Medical, Inc., Ms.
5 Giacomo was a director only “on paper” and did not partake in any activities in reference to that entity.
6 Moreover, her status as a director does not, by itself, establish that she was engaged in business. Anyone
7 can be appointed to serve as a director. They need not be residents of this state or even shareholders of
8 the corporation, unless required by the articles of incorporation or bylaws. NMSA 1978, Section 53-
9 11-35.

10 Otherwise, there was no evidence to establish that Ms. Giacomo prepared, consulted, or
11 reviewed CRS returns relevant to Giacomo Medical, Inc., or Third Coast Auto Sales, LLC, or that she
12 engaged in any activities relating to Mr. Giacomo’s business activities. Her testimony was credible and
13 persuasive.

14 Similar to *Breen*, the fact that Ms. Giacomo jointly filed personal income taxes with her
15 spouse, which would have included income he derived from his business ventures does not subject
16 her to the gross receipts tax liability incurred by those ventures. The New Mexico personal income
17 tax is a separate and distinct tax from gross receipts tax. Compare NMSA 1978, Section 7-2-1 *et*
18 *seq.* to NMSA 1978, Section 7-9-1 *et seq.*

19 There is no dispute that the income Mr. Giacomo derived from his business activities in New
20 Mexico was community property subject to personal income tax. *Katson v. Katson*, 43 N.M. 214, 217,
21 89 P.2d 524, 526 (1939) (income earned from a husband’s separate business is community property).
22 There was also no allegation in this case that Ms. Giacomo and Mr. Giacomo, as joint filers, failed to
23 accurately calculate and pay their New Mexico income tax. It was by virtue of that filing that the
24 Department detected a potential Schedule C mismatch that eventually resulted in the limited scope

1 audit and the assessment under Letter ID No. L1038748112, but any joint liability that Ms. Giacomo
2 may have with her spouse under the income tax act does not necessarily also extend to Mr.
3 Giacomo's potential liability for gross receipts tax under the Gross Receipts and Compensating Tax
4 Act.¹

5 The Hearing Officer perceives no basis to deviate from the reasoning in *Breen*, and adheres
6 to its conclusion when it said, “[w]e agree and conclude that [spouse] is the only person engaging
7 in the business of her law practice, and she is solely liable for payment of its gross receipts tax
8 obligations.” *Breen*, 2012-NMCA-101, ¶32 (emphasis added). Because this conclusion is
9 inconsistent with the Department's position that a gross receipts tax liability, under these facts,
10 should be attributed to the marital community as community debt, it must be rejected, and treated
11 as the *separate debt* of the spouse, to the extent that the liability does not rest solely with the business
12 entities. *See also* NMSA 1978, Section 7-9-4; Regulation 3.2.4.8 NMAC. Note, however, that the
13 Administrative Hearings Office has not been called upon to determine whether any potential gross
14 receipts tax liability should be attributed to Mr. Giacomo in his personal capacity, or to the juridical
15 entities through which business was conducted. “It is a basic tenet of corporate law that a corporation
16 is a legal entity, separate from its shareholders, directors, and officers. Thus, the shareholders,
17 directors and officers are not personally liable for the acts and obligations of the corporation.”
18 *Stinson v. Berry*, 1997-NMCA-076, ¶17, 123 N.M. 482, 943 P.2d 129 (internal citation omitted);
19 *See also* NMSA 1978, Section 53-19-13 (in reference to limited liability companies, “the debts,
20 obligations and liabilities of a limited liability company, whether arising in contract, tort or
21 otherwise, shall be solely the debts, obligations and liabilities of the limited liability company.”)

22 **Community Property considerations.**

¹ Until January 2001, the Department adhered to the rule that a spouse was “secondarily liable” for the tax liability of the other spouse's sole proprietorship. *See* Regulation 3.1.6.16 NMAC (10/31/96). That regulation was repealed without replacement on January 15, 2001 suggesting that the Department no longer adheres to that rule.

1 The Hearing Officer is also unpersuaded that the IRA may be levied to satisfy Mr.
2 Giacomo's purported liability because the IRA is allegedly community property under New Mexico
3 law, or marital property under Colorado law. In fact, the Hearing Officer finds the distinction in this
4 protest to be irrelevant. Colorado courts recognize that "under generally accepted principles of
5 conflict of laws, marital interests in movables acquired during marriage are determined by the law
6 of the domicile when acquired, and that community property retains its character as such when it is
7 removed to a common law state." *People ex rel. Dunbar v. Bejarano*, 145 Colo. 304, 358 P.2d 866,
8 1961 (Colo. 1961). New Mexico adheres to the same general rule. "The respective property interest
9 or ownership of the parties are to be determined by the trial court pursuant to the statutes and case
10 law of the foreign state in which the property was acquired." *Brenholdt v. Brenholdt*, 1980-NMSC-
11 051, ¶10, 94 N.M. 489, 612 P.2d 1300. The fact that the 401(k) was rolled over into an IRA is
12 inconsequential since the funds used to establish the IRA are traceable directly to the 401(k). *Id.*

13 Because the funds expended to acquire the IRA represented a rollover from Ms. Giacomo's
14 401(k) which was established while she was residing, employed, and married in New Mexico, and
15 because those funds can be traced to New Mexico even after they have been converted to an IRA in
16 Colorado, they should retain the character they acquired in New Mexico, which is community
17 property.

18 However, 26 U.S.C. Section 408 imposes a requirement that presents potential discord with
19 Section 40-4-8 in that an IRA is "a trust created or organized in the United States for the exclusive
20 benefit of *an individual* or his beneficiaries." (Emphasis Added) Accordingly, the very definition of
21 "individual retirement account" requires that the IRA be established as separate property, yet
22 Section 40-4-8 does not contemplate the technical requirements of an IRA in defining the term
23 "community property."

1 Federal tax courts have recognized this potential conflict and have explained, “[a]s an initial
2 matter, an account imbued with a community property characterization would have difficulty
3 meeting the IRA qualifications. Section 408(a) defines an IRA as a trust created or organized ‘for
4 the exclusive benefit of an individual or his beneficiaries’. An account maintained jointly for a
5 husband and wife would be created for the benefit of two individuals and would not meet this
6 definition.” *Bunney v. Comm’r of Internal Revenue*, 114 T.C. 259, 263 (2000) (quoting *Rodoni v.*
7 *Commissioner*, 105 T.C. 29, 33 (1995))

8 However, in the realm of domestic relations, the potential conflict is avoided because upon
9 dissolution of marriage, a spouse in Mr. Giacomo’s position would nevertheless be entitled to a
10 community lien enabling him to obtain compensation for his community interest in the IRA. A
11 community lien is an interest that the community obtains in the separate property of one of the
12 spouses to a marriage. *Jurado v. Jurado*, 1995-NMCA-014, ¶10, 119 N.M. 522, 892 P.2d 969.
13 “Separate property is not subject to division, but the community may obtain a lien interest in the
14 increased value of separate property of a spouse if community funds or labor are expended which
15 increase the value of the separate property” *Vanderlugt v. Vanderlugt*, 2018-NMCA-073, ¶10, 429
16 P.3d 1269. Consequently, in a dissolution of marriage, the IRA will likely be treated as community
17 property for the purpose of dividing community assets and liabilities, even if under federal law, an
18 IRA may not be jointly owned because “[t]he IRA owner is the individual for whom an IRA is
19 originally established by contributions for the benefit of that individual and that individual’s
20 beneficiaries.” 26 CFR Section 1.408-8.

21 The critical distinction herein is that this is not a dissolution of marriage, and neither the
22 Department, nor the Administrative Hearings Office are vested with the authority to divide
23 community property or enforce community liens against a spouse’s interest in separate property.
24 That authority is vested solely with the district courts to be exercised exclusively within the context

1 of a dissolution of marriage or a legal separation. NMSA 1978, Section 40-4-4. Accordingly, Mr.
2 Giacomo's community interest in the IRA may not be liquidated without Ms. Giacomo's consent,
3 or as provided by the domestic relations law of this state governing division of assets and liabilities
4 in a dissolution of marriage.

5 For these reasons, the Department lacks the authority to levy the IRA of a non-taxpayer
6 spouse, to collect an outstanding liability incurred by her spouse's business activities.

7 **Technical Requirements of Warrant of Levy.**

8 There are additional matters of concern with respect for the technical characteristics of the
9 Warrant of Levy which cannot be disregarded. First, warrants of levy are governed by NMSA 1978,
10 Section 7-1-31 to -36. Section 7-1-31 authorizes the Department to "collect tax from a delinquent
11 taxpayer by levy upon all property or rights to property of such person." Any property to which a
12 delinquent taxpayer has rights is subject to levy under the plain language of Section 7-1-31. As
13 previously discussed, Ms. Giacomo is not a taxpayer, and any community interest Mr. Giacomo has
14 to Ms. Giacomo's IRA is prospective.

15 Nevertheless, Section 7-1-34 requires that one served with a levy surrender any obligated
16 property or rights subject to the levy to the Department. Under Regulation 3.1.10.9 (B) NMAC
17 (01/15/01), a financial institution served with a warrant of levy "must immediately surrender to the
18 department any property or rights to property of the taxpayer which that institution possesses or
19 holds as of the date of service of the warrant."

20 In order to have a valid warrant of levy seizing a person's property, the Department must
21 make a threshold showing that its warrant of levy complied with the content requirements of Section
22 7-1-32. The Department need not establish the substantive validity of the outstanding liability, only
23 the factual particulars of the tax liability as required under Section 7-1-32 (B). That total liability,
24 drawn from previous notices of assessment or demands for payment, is conclusive for purposes of

1 the warrant of levy. In this case, however, the Hearing Officer observed that the Department's
2 warrant of levy as submitted for the evidentiary record failed to strictly comport with the content
3 requirements of Section 7-1-32 because it did not accurately state the name of the delinquent
4 taxpayer. Instead, it made reference to "Michele Giacomo DBA: Michael Giacomo." Yet, there was
5 no evidence to establish that method of identification was accurate. Both Ms. Giacomo and Mr.
6 Giacomo credibly testified that Ms. Giacomo never engaged in business, especially under the name
7 "Michael Giacomo". Her contribution to their income was derived solely through wages earned as
8 a nurse for PHS which were reported on a Form W-2.

9 Moreover, although Ms. Giacomo did not raise this as a concern, the Hearing Officer noted
10 that the Warrant of Levy, admitted as Department Ex. H, excludes any information pertinent to the
11 date the amount of tax became due. NMSA 1978, Section 7-1-32 (B) (a warrant of levy must
12 "identify the taxpayer whose liability for taxes is sought to be enforced, the amount thereof and the
13 date or approximate date on which the tax became due.") In typical circumstances, this information
14 is provided in an attachment to the warrant of levy, which the Hearing Officer has noticed in the
15 latter pages of Department Exhibit E (pages not numbered) in reference to Warrants of Levy sent to
16 Giacomo Medical Inc., USP Denver Inc., Payroll/HR Department CHC Payroll Agent, Inc., and
17 Presbyterian Healthcare Services.

18 However, no such information is attached to the Warrant of Levy provided to
19 HR/Payroll/Garnishment Dept Nation Financial Serv LLC which is the Warrant of Levy through
20 which Ms. Giacomo's IRA was seized. Accordingly, the Warrant of Levy, as provided for the
21 evidentiary record in this matter, fails to comply with the requirements of Section 7-1-32 (B).

22 Ms. Giacomo's protest should be GRANTED.

23 **CONCLUSIONS OF LAW**

1 **NOTICE OF RIGHT TO APPEAL**

2 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this
3 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the
4 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this
5 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the
6 requirements of perfecting an appeal of an administrative decision with the Court of Appeals. Either
7 party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings
8 Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office
9 may begin preparing the record proper. The parties will each be provided with a copy of the record
10 proper at the time of the filing of the record proper with the Court of Appeals, which occurs within
11 14-days of the Administrative Hearings Office receipt of the docketing statement from the appealing
12 party. *See* Rule 12-209 NMRA.

1 **CERTIFICATE OF SERVICE**

2 On May 10, 2019, a copy of the foregoing Decision and Order was served on the parties listed
3 below in the following manner:

4 *First Class Mail*

Interagency Mail

5 INTENTIONALLY BLANK

6
7 _____
8 John D. Griego
9 Legal Assistant
10 Administrative Hearings Office
11 Post Office Box 6400
12 Santa Fe, NM 87502
13 PH: (505)827-0466
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