

December 18, 2003

Barbara A.  
Schermerhorn  
Clerk

NOT FOR PUBLICATION  
UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE TENTH CIRCUIT

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IN RE CARLA J. CHAVEZ,  
Debtor.

BAP No. NM-02-081

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CARLA J. CHAVEZ,  
Plaintiff – Appellant,

Bankr. No. 13-01-11036 SS  
Adv. No. 01-1186 S  
Chapter 13

v.

ORDER AND JUDGMENT\*

KELLEY L. SKEHEN, Trustee,  
Appellee,

NEW MEXICO DEPARTMENT OF  
LABOR and NEW MEXICO TAXATION  
AND REVENUE DEPARTMENT,

Defendants – Appellees,

INTERNAL REVENUE SERVICE<sup>1</sup>,  
Defendant.

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Appeal from the United States Bankruptcy Court  
for the District of New Mexico

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Before CLARK, MICHAEL, and BROWN, Bankruptcy Judges.

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\* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

<sup>1</sup> Chavez named the Internal Revenue Service (“IRS”) as a defendant in the adversary proceeding subject to this appeal, and the IRS appears as such in the caption of various bankruptcy court papers relevant to this appeal. As a result, the Court listed the IRS as a defendant-appellee. Upon review of the records, we order the caption be amended to strike the IRS as a party to this appeal. The IRS withdrew its claim against Chavez some time ago and has not participated in this appeal in any way.

MICHAEL, Bankruptcy Judge.

This is a case of failures, both real and alleged. The appellant, Carla Chavez (“Chavez”) is the party to a failed marriage. During the marriage, her husband, Richard Ortiz (“Ortiz”), operated a business that also failed. In the course of the business, Ortiz failed to properly report the income from the business to the New Mexico Department of Labor (“NMDOL”) and the New Mexico Taxation and Revenue Department (“NMTRD”). As a result, these two agencies (hereafter collectively referred to as the “Taxing Entities”) recorded liens against the marital residence. Chavez alleges that both of the Taxing Entities failed to provide her with procedural due process and also violated New Mexico law and that, as a result, the liens that they hold are subject to avoidance. The trial court disagreed and found that the Taxing Entities hold valid claims against Chavez as well as valid liens against certain property. We have been asked to reverse that decision. For the reasons stated below, we decline to do so.

## **I. Factual Background**

Chavez and Ortiz were married in May of 1986.<sup>2</sup> During the marriage, they acquired real estate and built a residence thereon (the “Residence”). Both Ortiz and Chavez made financial contributions to the construction of the Residence. Chavez does not dispute that the Residence was a community asset of the marriage.<sup>3</sup> The Residence was the primary home of Chavez and Ortiz during the marriage. The Residence is the focal point of the current dispute.

In 1995, Ortiz started and operated a construction business that he called “Ortiz Southwest Custom Builders” (“OSCB”). As part of the formation of OSCB, Ortiz filed papers with both of the Taxing Entities identifying OSCB as a sole proprietorship with

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<sup>2</sup> Appellant’s App. at 17.

<sup>3</sup> *Id.* at 28 (Trial Transcript at 108, lines 3–5).

Ortiz as the sole owner.<sup>4</sup> Each of these documents listed the address of the Residence as the business address for OSCB.<sup>5</sup> Chavez did not play a role in the operation of OSCB, and she is not identified on any of the documents filed with the Taxing Entities.

Under the name of OSCB, Ortiz constructed houses and acted as a subcontractor. He hired employees to perform tasks related to the business. Unfortunately, Ortiz failed to file tax forms reporting his gross receipts to NMTRD. Due to these failures, the NMTRD conducted an audit of OSCB. Ortiz failed to provide any documentation to the NMTRD as it performed its audit. Based on the NMTRD audit, the NMTRD assessed taxes against Ortiz. Ortiz was given notice of the assessment and did not protest the amount. The NMTRD ultimately filed tax liens against Ortiz in the amount of \$61,083.78 on June 2, 1997, and \$109,255.35 on March 29, 1999.<sup>6</sup> Ortiz never protested any of the actions taken by the NMTRD.

Ortiz also failed to file unemployment tax returns with the NMDOL. Acting in accordance with New Mexico law, the NMDOL estimated the unemployment taxes owed to it by Ortiz. On the basis of those estimates, the NMDOL filed documents entitled “Warrant of Levy and Lien” against Ortiz.<sup>7</sup> Ultimately, the NMDOL filed a collection action against Ortiz, obtaining a contempt citation against him. Ortiz was incarcerated until he purged the contempt by entering into a settlement agreement with the NMDOL. Ortiz took no steps to protest the collection efforts of the NMDOL.

Chavez and Ortiz filed a joint petition for relief under Chapter 13 of the United States Bankruptcy Code on May 16, 2000 (the “First Case”). On June 12, 2000, the NMDOL filed a proof of claim in the First Case in the amount of \$20,853.93 for unpaid

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<sup>4</sup> *Id.* at 79-80 and 148.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 149-50.

<sup>7</sup> *Id.* at 82-90. These documents were dated May 2, 1997, November 25, 1997, February 25, 1998, July 29, 1998, February 17, 1999, April 27, 1999, January 30, 2001, and May 30, 2001.

taxes. The NMDOL filed its claim as a secured claim, claiming a lien upon “any and all assets of the debtor.”<sup>8</sup> On November 2, 2000, the NMTRD filed its proof of claim for pre-petition taxes in the First Case in the amount of \$239,885.03. Of that amount, \$206,834.41 was filed as a secured claim, \$32,479.72 was filed as a priority claim, and \$570.90 was filed as a general unsecured claim.<sup>9</sup> Both Taxing Entities claimed a lien upon the Residence. Neither Chavez nor Ortiz objected to the claims of the Taxing Entities in the First Case. The First Case was dismissed on December 11, 2000.<sup>10</sup>

Chavez and Ortiz were divorced in September of 2000.<sup>11</sup> Under the terms of the divorce decree, Chavez was granted the Residence as her sole and separate property, subject to a claim of exemption by Ortiz in the amount of \$30,000.00.<sup>12</sup> Under the divorce decree, Ortiz agreed to hold Chavez harmless from any and all obligations owed to the Taxing Entities.

After her divorce, Chavez filed her own separate petition for relief under Chapter 13 of the Bankruptcy Code on February 20, 2001. On March 7, 2001, she filed her Chapter 13 Plan and Motion to Avoid Certain Liens (the “Plan”). The Plan contained the following provisions:

Debtor has listed the property located at 1020 Don Gaspar, Santa Fe, New Mexico 87501 [the Residence] with Buck Meyer Realty for \$399,500.00, and proposes to sell the property on or before October 3, 2001.

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<sup>8</sup> *Id.* at 97-98.

<sup>9</sup> *Id.* at 91. The NMTRD later reduced the amount it sought. In the proof of claim filed on March 13, 2002, in Carla Chavez’s individual bankruptcy case, it sought \$133,817.96, of which \$133,462.45 was filed as a secured claim, \$331.61 as a priority claim, and \$23.90 as a general unsecured claim. *Id.* at 132-34.

<sup>10</sup> NMTRD App. at 15-16.

<sup>11</sup> Appellant’s App. at 17.

<sup>12</sup> Ortiz pledged his claim of exemption in the Residence to the various taxing authorities for payment of state and federal taxes. That pledge is not at issue in this appeal. *See* Appellant’s App. at 166.

The property is co-owned by the Debtor and her ex-husband, Richard Ortiz. Under a decree of divorce Richard Ortiz has agreed that the Debtor shall have the right to sell the subject property, subject only to his claim of homestead exemption, if any. The first and second mortgages on the property are held by Bank of America Mortgage, securing the amount of \$141,883.79. Tax liens are claimed by New Mexico Taxation and Revenue Department securing estimated claims for unpaid gross receipts taxes in the amount of \$206,834.41 generated by Richard Ortiz's construction business. The Debtor will file objections to those claims insofar as Taxation and Revenue seeks to collect estimated taxes from her share of marital assets. She has no objection to Taxation and Revenue collecting its taxes as a secured claim against Richard Ortiz's one-half interest in the marital residence, when the residence is sold. The Debtor claims a \$30,000.00 homestead exemption in the residence. Any proceeds in excess of the amounts necessary to pay the expenses of sale, first and second mortgage liens, tax liens of the New Mexico Taxation and Revenue Department, and the Debtor's claim of exemption will be paid to the Chapter 13 Trustee and administered according to this Plan.<sup>13</sup>

The Plan proposed to treat the NMDOL as a disputed unsecured creditor.

On June 26, 2001, Chavez filed a motion with the trial court seeking authority to sell the Residence free and clear of liens, with any liens to attach to the proceeds of sale. An order approving the sale of the Residence was entered on August 2, 2001. That order is now final, and the sale of the Residence has been completed. After payment of the costs of sale, real estate taxes, and the first and second mortgages to Bank of America Mortgage, the sum of approximately \$106,000.00 remains in an escrow account pending the outcome of this litigation.

On or about August 29, 2001, Chavez filed an adversary proceeding (the "Adversary Proceeding") in which she objected to the claims of the Taxing Entities and sought to avoid the liens that they claimed upon the Residence. Specifically, Chavez contended that: (1) any liabilities owed to the Taxing Entities were the separate obligations of Ortiz, for which she had no personal responsibility; (2) the liens claimed by the Taxing Entities were avoidable to the extent they impaired her claim of exemption in the Residence. Chavez asked that the liens be avoided and that she be paid the

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<sup>13</sup> NMTRD App. at 20.

allowed amount of her homestead exemption (\$30,000.00) under New Mexico law.<sup>14</sup> The relative priority of the liens of the Taxing Entities upon the Residence was not raised as an issue in the Adversary Proceeding.

Trial of the Adversary Proceeding was held on April 3, 2002. At trial, it was established that Ortiz failed to file any of the required returns with the NMDOL. It was further established that when he was audited by the NMTRD, Ortiz failed to respond or take any action to dispute the amount of taxes assessed by the NMTRD. Indeed, based upon the testimony of Ortiz elicited at trial, the trial court concluded that Ortiz failed to keep any records that would have allowed him to mount a meaningful contest to the NMTRD's assessments.<sup>15</sup> The trial court also heard testimony to the effect that Chavez had no involvement in the operation of OSCB, and was not aware of the collection activities or the filing of liens by the Taxing Entities. Chavez admitted that she had no documents or information in her possession at the time of trial to refute the claim of the NMTRD.<sup>16</sup>

On September 27, 2002, the trial court entered its findings of fact, conclusions of law, and judgment. The trial court found that the obligations to the Taxing Entities were community obligations.<sup>17</sup> The trial court further found that the Residence was community property<sup>18</sup> and that, under the laws of the state of New Mexico, both spouses (as well as the community property of those spouses) were liable for the debts of the marital community. The trial court determined that Chavez failed to present sufficient evidence at trial to set aside or alter the amount of the taxes assessed or estimated by the Taxing

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<sup>14</sup> *Id.* at 30-32.

<sup>15</sup> Appellant's App. at 167.

<sup>16</sup> *Id.* at 30 (Trial Transcript at 114, line 18 through 115, line 3).

<sup>17</sup> *Id.* at 171.

<sup>18</sup> Counsel for Chavez admitted this fact in his opening statement to the trial court. *See* Appellant's App. at 16.

Entities. The trial court ruled that the liens of the Taxing Entities were enforceable against Chavez's interests in the Residence. Chavez filed a motion for new trial, which was denied on October 22, 2002. This appeal followed.

## **II. Jurisdiction**

This Court has jurisdiction to hear timely-filed appeals from “final judgments, orders, and decrees” of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.<sup>19</sup> Neither party elected to have this appeal heard by the United States District Court for the District of New Mexico. They have thus consented to review by this Court.

A decision is considered final “if it ‘ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’”<sup>20</sup> In this case, the order of the bankruptcy court determined the validity of the secured claims of the Taxing Entities. Nothing remains for the trial court's consideration. Thus, the order is “final” for purposes of 28 U.S.C. § 158.

## **III. Standard of Review**

Chavez asks this court to reverse the trial court's determination that she was afforded procedural due process and that the liens at issue are enforceable under the statutory taxation scheme of the state of New Mexico. The bankruptcy court's interpretation of a statute is a question of law that we review *de novo*.<sup>21</sup> When reviewing questions of law *de novo*, the appellate court is not constrained by the trial court's conclusions, and may affirm the trial court on any legal ground supported by the

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<sup>19</sup> 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-1.

<sup>20</sup> *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

<sup>21</sup> *See In re Gledhill*, 164 F.3d 1338, 1340 (10th Cir. 1999).

record.<sup>22</sup> The bankruptcy court’s findings of fact, including those based on the parties’ stipulations, are not to be set aside unless clearly erroneous.<sup>23</sup> “A finding of fact is ‘clearly erroneous’ if it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with a definite and firm conviction that a mistake has been made.”<sup>24</sup>

#### **IV. Discussion**

This Court has found review of this case to be extremely challenging, due largely to the fact that the issues raised to the trial court seem to have been a moving target. In her original complaint, Chavez alleged that the obligations owed to the Taxing Entities were the separate obligation of Ortiz, and that the liens claimed by those entities impaired her claim of homestead in the Residence. Her claims somehow evolved into claims of violation of procedural due process.<sup>25</sup>

It appears that what Chavez desires is a determination that her claim of exemption in and to the Residence is superior to the claims of the Taxing Entities.<sup>26</sup>

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<sup>22</sup> See *Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515, 1524 (10th Cir. 1997).

<sup>23</sup> Fed. R. Bankr. P. 8013; see also *First Bank v. Reid (In re Reid)*, 757 F.2d 230, 233-34 (10th Cir.1985).

<sup>24</sup> *Cowles v. Dow Keith Oil & Gas, Inc.*, 752 F.2d 508, 511 (10th Cir. 1985) (citations omitted).

<sup>25</sup> The Court bases this conclusion upon the arguments of counsel contained in the trial transcript. Although the record before this Court contains a pre-trial order, that order does not frame the issues to be tried. We do not know whether such an order was required by the trial court.

<sup>26</sup> The Court’s understanding of Chavez’s position is borne out by the following statement made by counsel for Chavez in his reply brief:

Contrary to the opinion of the court below, Chavez does not seek a declaration that this statute is unconstitutional. Just the opposite, the Court is asked to make a ruling that is consistent with the plain meaning of the statute (see *Storey v. University of NM Hospital*, 105 N.M. 205, 207, 730 P.2d 1187, 1189 (1986)) and preserves its constitutionality, namely that the liens in Ortiz’s name attach only to his undivided one-half interest in the homestead he owned on the date they were filed. All other

(continued...)

Chavez has acknowledged that she is seeking to retain proceeds of sale equal to her claim of exemption (\$30,000.00); under the Plan, any balance in excess of \$30,000.00 would go to her creditors. The real issue before this Court is whether Chavez should be allowed to keep those monies.

On appeal, Chavez lists six separate issues. However, Chavez has chosen to brief only three of those issues: (1) whether the liens claimed by the Taxing Entities violate Chavez's due process rights; (2) whether the trial court erred in not finding that, under New Mexico statutory law, the Taxing Authorities were required to obtain a writing from Chavez acknowledging the validity and amounts of the taxes assessed prior to obtaining an enforceable lien against the Residence; and (3) whether the trial court erred in not determining the amounts owed to the Taxing Entities under § 505 of the Bankruptcy Code. The Court will consider only those issues that Chavez has chosen to brief. All other issues are deemed abandoned.<sup>27</sup>

*General Principles of New Mexico Community Property Law*

New Mexico is a community property state. Under New Mexico law, community property is defined as “property acquired by either or both spouses during marriage which is not separate property.”<sup>28</sup> The New Mexico statutory framework also defines “community debt” as “a debt contracted or incurred by either or both spouses during

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<sup>26</sup> (...continued)  
taxes, penalties, and interest can be collected against Ortiz or as unsecured claims in Chavez's Chapter 13 bankruptcy.

Appellant's Reply Brief at 12. An admission that the tax claims are collectible as unsecured claims in Chavez's bankruptcy case seems to be an admission that the amounts of the tax have been calculated in accordance with New Mexico law, or that, at a minimum, Chavez has no real interest in litigating their accuracy. Her goal is to have her claim of exemption in and to the proceeds of sale of the Residence trump the claims of the taxing authorities.

<sup>27</sup> See *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1277-78 (10th Cir. 1994) (issue not briefed in opening brief is deemed abandoned on appeal); *State Farm Fire & Cas. Co v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994) (same).

<sup>28</sup> N.M. Stat. Ann. § 40-3-8(B) (Matthew Bender & Co. 2003).

marriage which is not a separate debt.”<sup>29</sup> New Mexico law goes on to provide that:

Community debts shall be satisfied first from all community property and all property in which each spouse owns an undivided interest as a joint tenant or tenant in common, excluding the residence of the spouses. Should such property be insufficient, community debts shall then be satisfied from the residence of the spouses, except as provided in Subsection B of this section or Section 42-10-9 NMSA 1978. Should such property be insufficient, only the separate property of the spouse who contracted or incurred the debt shall be liable for its satisfaction. If both spouses contracted or incurred the debt, the separate property of both spouses is jointly and severally liable for its satisfaction.<sup>30</sup>

The New Mexico Supreme Court has ruled that “one spouse can incur a community debt without the participation of the other spouse.”<sup>31</sup> The United States Court of Appeals for the Tenth Circuit, applying New Mexico law, has held that “a community debt incurred prior to the dissolution of the marital community, and for the benefit thereof, would properly be payable out of ‘community’ funds notwithstanding the fact that such ‘community’ property had been transmuted into ‘separate’ property by virtue of a

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<sup>29</sup> *Id.* § 40-3-9(B). The definition of separate debt includes:

- (1) a debt contracted or incurred by a spouse before marriage . . . ;
- (2) a debt contracted or incurred by a spouse after entry of a decree [of divorce], unless the decree provides otherwise;
- (3) a debt designated as a separate debt of a spouse by a judgment or decree of any court having jurisdiction;
- (4) a debt contracted by a spouse during marriage which is identified by a spouse to the creditor in writing at the time of its creation as the separate debt of the contracting spouse;
- (5) a debt which arises from a tort committed by a spouse before marriage or after entry of a decree of dissolution of marriage or a separate tort committed during marriage; or
- (6) a debt declared to be unreasonable . . . .

*Id.* § 40-3-9(A).

<sup>30</sup> *Id.* § 40-3-11(A).

<sup>31</sup> *Huntington Nat’l Bank v. Sproul*, 861 P.2d 935, 939 (N.M. 1993).

decree of divorce.”<sup>32</sup> The NMTRD, through one of its hearing officers, has expressly held that “[g]ross receipts tax due on community earnings is a community debt.”<sup>33</sup>

#### *The New Mexico Homestead Exemption*

Each resident of the state of New Mexico is entitled to a homestead exemption in an amount not to exceed \$30,000.00.<sup>34</sup> Where the property at issue is owned jointly, each of the joint owners (such as a husband and wife) is entitled to the \$30,000.00 exemption.<sup>35</sup> The homestead exemption is not effective against tax obligations.<sup>36</sup>

#### *Taxes, Liens, and the NMTRD*

The state of New Mexico imposes a tax of five percent upon the gross receipts of businesses that operate in that state.<sup>37</sup> Under New Mexico law, the gross receipts tax “includes the amount of any interest or civil penalty relating thereto . . . .”<sup>38</sup> In addition to this “gross receipts tax,” employers are required to withhold and submit to the state income tax owed by employees from the gross pay of those employees.<sup>39</sup> The statutory framework speaks of the liability of a “taxpayer,” which is defined as “a person liable for payment of any tax, a person responsible for withholding and payment or for

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<sup>32</sup> *Moucka v. Windham*, 483 F.2d 914, 916-17 (10th Cir. 1973).

<sup>33</sup> *In re Raines*, No. 00-18, at 3 (N.M. Tax. & Rev. Dept. June 29, 2000) (Westlaw, RIA-NMCAS database).

<sup>34</sup> N.M. Stat. Ann. § 42-10-9 (Matthew Bender & Co. 2003).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* § 42-10-11 (“The provisions of this article [the homestead exemption statutes] do not apply or extend to taxes, garnishment, recorded liens of mortgagees or lessors or recorded liens of laborers or materialmen for labor or materials furnished for the construction or repair of the dwelling house.”).

<sup>37</sup> *Id.* § 7-9-4.

<sup>38</sup> *Id.* § 7-1-3 (V).

<sup>39</sup> *Id.* § 7-3-3 and § 7-3-4.

collection and payment of any tax or a person to whom an assessment has been made.”<sup>40</sup>

Employers must file tax returns reports with the NMTRD.<sup>41</sup> If the employer/taxpayer fails to file the appropriate returns, the NMTRD is authorized to audit the taxpayer and make its own estimation of the amount of taxes owed.<sup>42</sup> The assessments are assumed to be correct as a matter of New Mexico law.<sup>43</sup> Under New Mexico law, the burden lies with the taxpayer to present evidence or legal authority or both in order to overcome the presumption.<sup>44</sup> Unpaid taxes accrue interest at the rate of fifteen percent per annum.<sup>45</sup> If either the gross receipts tax or the employee withholding taxes are not timely paid after assessment and demand, the NMTRD has the ability to record liens against the assets of the taxpayer.<sup>46</sup>

*Taxes, Liens, and the NMDOL*

Under New Mexico law, the NMDOL is charged with the collection of those taxes necessary for the implementation of the state’s unemployment compensation system. New Mexico law requires each employer to submit reports detailing the number of individuals employed and the wages paid to them. In addition, the employer is

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<sup>40</sup> *Id.* § 7-1-3 (W).

<sup>41</sup> *Id.* § 7-1-13 (B).

<sup>42</sup> *Id.* § 7-1-11.

<sup>43</sup> *Id.* § 7-1-17(C).

<sup>44</sup> *Archuleta v. O’Cheskey*, 504 P.2d 638, 641 (N.M. Ct. App.1972); *see also MPC, Ltd. v. N.M. Tax. & Rev. Dept.*, 62 P.3d 308, 310-11 (N.M. Ct. App. 2002) (“The effect of the presumption of correctness is that the taxpayer has the burden of coming forward with some countervailing evidence tending to dispute the factual correctness of the assessment made by the secretary. Unsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness.”) (quoting N.M. Admin. Code § 3.1.6.12(A)); *Wing Pawn Shop v. Tax. & Rev. Dept.*, 809 P.2d 649, 655 (N.M. App. 1991).

<sup>45</sup> N.M. Stat. Ann. § 7-1-67(B) (Matthew Bender & Co. 2003).

<sup>46</sup> *Id.* § 7-1-37.

required to pay taxes that are placed by the NMDOL in the state's unemployment compensation trust fund. Those funds are used for the payment of unemployment benefits to workers who lose their jobs.

In the event an employer fails to submit the necessary reports, the NMDOL is authorized to estimate the amount of taxes due.<sup>47</sup> If there is no timely protest of the estimated tax, the estimate becomes final.<sup>48</sup> When the tax becomes delinquent, the NMDOL is authorized to issue and record liens in order to collect said taxes. The liens attach to all real and personal property "of the person against whom it is issued."<sup>49</sup>

*Procedural Due Process*

Chavez spends the vast majority of her time and energy arguing that the failure of the Taxing Entities to provide her with direct and personal notice of their collection efforts (assessments of taxes due and recording of liens) with respect to OSCB violates her right to procedural due process. The trial court concluded that under the community property laws of the state of New Mexico, community assets (in this case, the Residence) were liable for community debts (the tax liens) and that the liens held by the Taxing Entities were superior to Chavez's claim of homestead exemption. The trial court further concluded that: (1) Ortiz received all of the notice to which he was entitled; (2) notice to Ortiz was the equivalent of notice to the community of Ortiz and

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<sup>47</sup> *Id.* § 51-1-36.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* The statute speaks of an "employing unit," which is defined as:

any individual or type of organization, including any partnership, association, cooperative, trust, estate, joint-stock company, agricultural enterprise, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, household, fraternity or club, the legal representative of a deceased person or any state or local government entity to the extent required by law to be covered as an employer, which has in its employ one or more individuals performing services for it within this state.

*Id.* § 51-1-42(D).

Chavez as husband and wife; and (3) Chavez was not entitled to any further due process protections. We find no error in these conclusions.

Chavez argues that the following regulation adopted by the NMTRD mandates the conclusion that she was entitled to notice prior to the creation of a valid lien upon the Residence.

**3.1.6.16 No separate assessment necessary for those secondarily liable.**

A. For the purposes of Section 3.1.6.16 NMAC, a “secondarily liable” taxpayer includes . . . spouses of sole proprietors with respect to proprietorship tax liability and any other party to whom the department may look for payment whenever the party primarily liable does not pay the tax when due.

B. Whenever a taxpayer is secondarily liable for payment of tax such that the taxpayer would not normally be expected to file a return reporting the liability or would not be expected to have a tax identification number with respect to the liability, the department need not issue a separate assessment against the secondarily liable party. The department may issue a written demand for payment from the secondarily liable party any time within the limitations period provided by Section 7-1-19 NMSA 1978 with respect to the assessment of the primarily liable party. The secondarily liable party becomes a delinquent taxpayer pursuant to Section 7-1-16 NMSA 1978 if no protest is made or security furnished within 30 days of such demand, or such shorter period of time as stated in the demand if the department concludes that the collection of the tax is in jeopardy. The department may file a notice of lien under Section 7-1-38 NMSA 1978 with regard to secondarily liable taxpayers.<sup>50</sup>

Chavez argues that this regulation required the NMTRD to demand payment from her prior to obtaining a valid lien against the Residence. The argument ignores several key principles of New Mexico community property law. Under that law, community assets are liable for community debts. Chavez cannot seriously contest that the taxes owed to the NMTRD were a community debt; indeed, some of the authority cited by Chavez stands for this proposition.<sup>51</sup> The tax obligations owed to the NMDOL constitute community debts for the same reasons. Chavez does not contest the fact that the

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<sup>50</sup> N.M. Admin. Code § 3.1.6.16 (effective October 31, 1996; repealed January 15, 2001).

<sup>51</sup> See *In re Raines*, No. 00-18, at 4 (N.M. Tax. & Rev. Dept. June 29, 2000) (Westlaw, RIA-NMCAS database) (“Gross receipts tax due on community earnings is a community debt.”).

Residence was a community asset. The effect of the NMTRD and NMDOL liens was to encumber the community asset [the Residence] for payment of a community debt [the taxes]. There is nothing in Regulation 3.1.6.16 that contradicts these principles. As the trial court noted, “it is the community that is properly the target of collection activities, and thus [the Taxing Entities] are entitled to pursue the community property in satisfaction of the debt.”<sup>52</sup> The community was given due and proper notice of the collection efforts of the Taxing Entities. If the issue before the Court today were whether the Taxing Entities had the right to reach Chavez’s separate property, as opposed to community property, her argument would carry more weight.

Chavez does not contest that the assessment against Ortiz and the filing of the lien by the NMTRD was valid as against Ortiz. Her argument is that in order to encumber a community asset for payment of a community debt, both members of the community (husband and wife) must be given direct notice of the collection efforts of the taxing authority. Given the ruling of the New Mexico Supreme Court that “one spouse can incur a community debt without the participation of the other spouse,”<sup>53</sup> it is logical to conclude that notice to one spouse of an assessment is sufficient to allow for assessment and collection of that debt from community assets. This is especially true where, as here, the existence of both members of the community was not disclosed to the Taxing Entities. To rule otherwise would serve to encourage non-disclosure to all taxing authorities, because the reward would be the removal of community property from the grasp of their collection efforts.

Chavez argues that the decision of the United States Court of Appeals for the Tenth Circuit in *Aacen v. San Juan County Sheriff’s Department*<sup>54</sup> requires this Court to conclude that Chavez has been denied procedural due process. The argument

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<sup>52</sup> Appellant’s App. at 178.

<sup>53</sup> *Sproul*, 861 P.2d at 939.

<sup>54</sup> 944 F.2d 691 (10th Cir. 1991).

misses the mark. In *Aacen*, the property at issue was a motor vehicle. There was no dispute that under New Mexico law, Aacen had the right to claim the motor vehicle as exempt. She was not given notice of that right. The Tenth Circuit ruled that the failure of the New Mexico execution statutes to require notice of a party's exemption rights be given them rendered the execution statutes unconstitutional due to their failure to provide procedural due process.<sup>55</sup>

The key difference between *Aacen* and the present case is that the state of New Mexico has not granted Chavez an exemption right in the residence superior to the liens held by the Taxing Entities. The New Mexico exemption statute expressly states that any exemption rights to a homestead granted thereunder are inferior to the lien rights of the taxing authorities.<sup>56</sup> Put simply, when it comes to tax liens, Chavez has no superior exemption rights because the New Mexico legislature has chosen not to give them to her. The statement in *Aacen* that “by creating exemptions from execution, New Mexico granted judgment debtors a property interest in retaining their exempt property”<sup>57</sup> is correct. It is merely inapplicable to this case.

Chavez also relies upon a recent decision of the New Mexico Court of Appeals, *Sandia v. Rivera*,<sup>58</sup> to support her claim of denial of due process. In *Sandia*, the county sheriff's office caused a vehicle left on the side of a road and owned by Sandia to be towed. The towing company refused to return the vehicle unless and until it had been paid its towing and storage charges. Those charges were never paid, and the towing company sold the vehicle to itself in satisfaction of the charges. Sandia then

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<sup>55</sup> *Id.* at 699.

<sup>56</sup> N.M. Stat. Ann. § 42-10-11 (Matthew Bender & Co. 2003) (“The provisions of this article [the homestead exemption statutes] do not apply or extend to taxes, garnishment, recorded liens of laborers or materialmen for labor or materials furnished for the construction or repair of the dwelling house.”).

<sup>57</sup> *Aacen*, 944 F.2d at 694.

<sup>58</sup> 46 P.3d 108 (N.M. App. 2002).

sued the state, alleging that the towing of the vehicle without notice and an opportunity to be heard violated her due process rights. The trial court ruled in favor of the sheriff. The appellate court reversed, finding that the failure of the sheriff's office to provide a hearing after the towing to determine whether the towing was wrongful violated procedural due process.<sup>59</sup> In the present case, notice of the assessment and the liens of the Taxing Entities was given to the community. Indeed, the Taxing Entities provided notice to everyone listed on the forms submitted to them. There has been no due process violation.

Chavez's reliance upon two administrative decisions of the NMTRD is also misplaced. Chavez cites *Tafoya*<sup>60</sup> and *Raines*<sup>61</sup> for the proposition that the NMTRD was required to file a separate assessment against Chavez in order for its lien to encumber the Residence. Neither of the cases supports that argument.

In *Tafoya*, the issue was whether an assessment against a corporation operated as a direct demand upon an officer of the corporation.<sup>62</sup> The hearing officer answered that question in the negative; however, in doing so, she found that the corporate officer was liable for the taxes.<sup>63</sup> The key distinction is that here, unlike *Tafoya*, where the filing of an assessment against the corporation was not a sufficient act to constitute a demand upon the corporate officer, the assessment against Ortiz was a sufficient

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<sup>59</sup> *Id.* at 113.

<sup>60</sup> No. 99-19 (N.M. Tax. & Rev. Dept. April 30, 1999) (Westlaw, RIA-NMCAS database).

<sup>61</sup> No. 00-18 (N.M. Tax. & Rev. Dept. June 29, 2000) (Westlaw, RIA-NMCAS database).

<sup>62</sup> *See Tafoya*, No. 99-19, at 3 (“The issue to be decided is whether the Department [NMTRD] may demand payment and pursue collection action against a corporate officer for withholding taxes assessed to the corporation but not separately assessed to the corporate officer.”).

<sup>63</sup> *Id.* at 4 (“Based on these facts, there is no question that Anthony Tafoya was liable for the withholding taxes American Ready-Mix failed to pay to the state of New Mexico.”).

prerequisite to the filing of the lien against Ortiz, and the filing of the lien against Ortiz to collect the taxes (which are a community debt) was sufficient to encumber the interests of the entire community in the Residence. The hearing officer in *Tafoya* expressly found that the corporate officer had no right to protest the assessment against the corporation “because he was not the taxpayer to whom the assessments were issued.”<sup>64</sup> The issue of notice to Tafoya was not in play because the assessment against the corporation did not operate as an assessment against Tafoya’s personal assets.<sup>65</sup> In this case, the assessment against Ortiz operated to encumber the community assets of the Chavez/Ortiz marriage, including the Residence.

In *Raines*, the issue was whether Ms. Raines was liable for gross receipts taxes on her then deceased husband’s appliance installation business. The NMTRD did not seek to assess or collect those taxes from her (or from her husband) for over two and one-half years after her husband’s death. In the interim, the estate of Mr. Raines was probated, and all distributions thereunder completed. For reasons unknown, the NMTRD never sought to collect the taxes from that estate. When assessed the taxes, Mrs. Raines argued that she was not liable for the taxes because: (1) she was not an active participant in her husband’s business; (2) in the alternative, if she were deemed to be an active participant in the business, her participation was so “isolated and occasional” as to justify for a statutory exemption to taxation; (3) the failure of the NMTRD to file a claim against her husband’s estate was cause to prevent the NMTRD from collecting the taxes from her; (4) she did not receive a prompt hearing on her timely protest of the taxes; and (5) she was entitled to assert the “innocent spouse” defense outlined in the United States Internal Revenue Code.

The hearing officer in *Raines* rejected these arguments. The hearing officer

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<sup>64</sup> *Id.* at 6.

<sup>65</sup> *Id.* (“There is nothing in the Tax Administration Act that would make this assessment effective against Anthony Tafoya, a corporate officer of American Ready-Mix, in his individual capacity.”).

specifically found that Ms. Raines, as the spouse of a sole proprietor, was liable for the gross receipts tax.<sup>66</sup> She did so after a thorough analysis of New Mexico community property law not unlike those engaged in by the trial court below. The hearing officer ruled that the failure of the NMTRD to file a claim in the probate proceeding of Mr. Raines barred the NMTRD from seeking to collect the taxes from either his separate property or from his one-half of the community property that was disposed of through the probate proceeding. However, the hearing officer in *Raines* allowed the NMTRD to collect the taxes from Ms. Raines's interest in the community property generated as a result of the marriage. The result in *Raines* supports the result reached by the trial court; namely, that Chavez's interest in the Residence is subject to the lien for collection of taxes owed to the Taxing Entities.

*Requirement That Chavez Execute a Document in Order for the Taxing Entities to Enforce Their Liens*

Chavez relies upon the following portion of the New Mexico exemption statutes to argue that neither of the Taxing Entities may enforce their liens against the Residence:

Unless both spouses join in writing in the creation of the underlying debt or obligation incurred after the marriage, a judgment or other process arising out of such post-marital debt against one spouse alone or both spouses shall not create a lien or otherwise be subject to execution against the interest of the nonjoining spouse in the marital residence, whether held by the spouses as community property, joint tenants or tenants in common.<sup>67</sup>

Chavez contends that, pursuant to this statute, "the New Mexico legislature has clearly expressed its intent to protect a spouse's interest in a homestead from any lien which is obtained without the signature of the affected spouse."<sup>68</sup> Chavez acknowledges that there is no decisional law to support her position on this issue, calling it a "matter of first

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<sup>66</sup> It is interesting to note that Chavez argued in her original complaint that she was not liable for any of the taxes attributable to OSCB due to her failure to participate in its business activities. This argument was rejected in *Raines*, and does not appear to have been seriously advanced at any time in this case.

<sup>67</sup> N.M. Stat. Ann. § 40-3-11(B) (Matthew Bender & Co. 2003).

<sup>68</sup> Appellant's Opening Brief at 15.

impression.”<sup>69</sup> The trial court rejected the argument, holding that taxes are a creature of statute that arise automatically as a result of transacting business in the state of New Mexico, and are not created by any writing (i.e., the filing of the assessment or lien).

This Court agrees with the conclusion of the trial court. The exception set forth above specifically refers to both spouses joining in writing “in the creation” of the underlying debt. The most obvious example is encumbering the homestead with a consensual mortgage. Unless both spouses consent to the encumbrance in writing, the lien created by the mortgage is enforceable only against the interest of the spouse who executed the mortgage. Unlike consensual encumbrances, tax liens are creatures of statute. There is nothing in the tax laws of the state of New Mexico that require the execution of any documents in order for tax liabilities to arise. If it were so, then all parties could avoid the payment of all taxes to the state of New Mexico by refusing to file tax returns.

We decline to adopt the argument advanced by Chavez for yet another reason. The New Mexico exemption statutes should be considered one cohesive statutory framework. A later section of these statutes expressly provides that the homestead exemption “does not apply or extend to taxes.”<sup>70</sup> Were the Court to interpret the section as Chavez suggests, we would be reading this provision out of existence.

#### *The § 505 Argument*

Finally, Chavez argues that the trial court erred because it did not make specific findings of fact and conclusions of law under § 505 of the Bankruptcy Code as to the amount of the taxes owed. This argument is difficult to understand. Chavez does not point to any evidence in the record upon which the trial court should have made such a finding. The only logical way to construe this argument is to assume that Chavez seeks a further hearing in order to present evidence to dispute the claims of the Taxing Entities.

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<sup>69</sup> *Id.*

<sup>70</sup> N.M. Stat. Ann. § 42-10-11 (Matthew Bender & Co. 2003).

She is not entitled to such an opportunity.

Chavez filed her complaint against the Taxing Entities in August of 2001. She sought disallowance of their claims, and was free to raise any manner of legal theory or argument she wished. Interestingly, the complaint makes no mention of § 505. Issue was joined, and a full day trial was held. At that trial, Chavez attempted to present evidence to dispute the claims of the Taxing Authorities. All parties were given a more than ample opportunity to submit pre- and post-trial briefs.<sup>71</sup> After review of the evidence and the arguments, the trial court concluded that the evidence that was presented was insufficient to defeat the presumptive validity of the claims of the Taxing Authorities. As the trial court stated in denying Chavez's motion for new trial:

Second, Plaintiff argues that the Court did not consider section 505 of the Bankruptcy Code and that she should be given a new trial so she can introduce evidence pertaining to the amount of taxes owing from the community. Plaintiff has already had the opportunity to present material challenging the validity of the tax assessments, but did not do so at trial. Indeed, one fact that was abundantly clear at trial was that there were no such documents because Plaintiff's husband [Ortiz] failed to keep records from which the taxes could be accurately computed. The burden was on Plaintiff to establish that the taxes claimed were incorrect, and she failed to do so at trial. There is no clear error or manifest injustice.<sup>72</sup>

To the extent the trial court erred in failing to denote its conclusions in its initial opinion as being made under § 505, the error is harmless. To the extent Chavez seeks to relitigate the issue, she is not entitled to do so.

## **V. Conclusion**

The decision of the trial court is AFFIRMED.

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<sup>71</sup> Indeed, the trial court noted that Chavez submitted not less than nine briefs in support of her various arguments during the course of this litigation. *See* Appellant's App. at 158.

<sup>72</sup> *Id.* at 160.