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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6 In re:) BAP No. NC-09-1145-BaDJu
7)
8 BREANDA MARIE JONES,) Bk. No. 07-43288
9)
10 Debtor.)
11)
12 CALIFORNIA FRANCHISE TAX)
13 BOARD,)
14)
15 Appellant,)
16)
17 vs.) O P I N I O N
18)
19 BREANDA MARIE JONES; JOHN)
20 T. KENDALL, Trustee;)
21 UNITED STATES TRUSTEE,)
22 OAKLAND,)
23 Appellees.)
24)

Argued and Submitted on September 25, 2009
at San Francisco, California

Filed - November 24, 2009

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Edward D. Jellen, Bankruptcy Judge, Presiding

Before: BAUM,¹ DUNN and JURY, Bankruptcy Judges.

1 Hon. Redfield T. Baum, Sr., Bankruptcy Judge for the District
of Arizona, sitting by designation.

1 BAUM, Bankruptcy Judge:

2
3 Appellant, California Franchise Tax Board ("FTB"), appeals
4 the bankruptcy court's "Decision: Motion For Order Determining
5 That Tax Liability Is Excepted From Discharge" and accompanying
6 "Order Denying Motion For Order Determining That Tax Liability Is
7 Excepted From Discharge" (together "Decision"). We **AFFIRM**.

8 **I. FACTS**

9 The facts are not in dispute. The parties' stipulated facts
10 are: On July 22, 2002, Brenda Marie Jones ("Jones" or
11 "Debtor") and her former spouse filed a petition for relief under
12 Chapter 13 of the Bankruptcy Code² (the "Prior Case"). The
13 bankruptcy court entered a confirmation order in the Prior Case
14 on September 12, 2002. While the Prior Case was pending, Jones
15 and her former spouse filed their 2002 California income tax
16 return on October 15, 2003. That return was filed timely based
17 on an extension, however, no tax payment was remitted. On
18 September 22, 2006, the Prior Case was dismissed.

19 On October 5, 2007, Jones filed the present petition for
20 relief under Chapter 7 of the Bankruptcy Code. Jones received
21 her Chapter 7 discharge on January 2, 2008, and the case was
22

23 ² Unless otherwise indicated, all "Code," chapter, and section
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
25 all rule references are to the Federal Rules of Bankruptcy
26 Procedure, Rules 1001-9037, as enacted and promulgated as of
27 October 17, 2005, the effective date of most of the provisions of
the Bankruptcy Abuse Prevention and Consumer Protection Act of
2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23.

1 closed. On March 12, 2009, the FTB obtained an order reopening
2 the present case in order to file its motion to determine if the
3 2002 California income tax was excepted from Debtor's discharge.
4 Following a hearing, the Bankruptcy Court on April 8, 2009,
5 entered its Decision which denied the FTB's motion and held that
6 the tax debt was discharged. The FTB appeals.

7 **II. JURISDICTION**

8 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
9 §§ 1334 and 157(b)(2)(I). This Court has jurisdiction under
10 28 U.S.C. § 158(a)(1) and (b)(1).

11 **III. ISSUE**

12 Whether the bankruptcy court erred when it held that a
13 confirmed Chapter 13 plan in Debtor's Prior Case did not toll the
14 three-year lookback period of Section 507(a)(8) for a post-
15 petition tax.

16 **IV. STANDARD OF REVIEW**

17 No questions of fact are at issue in this appeal; at issue
18 are the bankruptcy court's legal conclusions. We review the
19 bankruptcy court's interpretation of the Bankruptcy Code de novo.
20 Bankr. Receivables Mgmt. v. Lopez (In re Lopez), 345 F.3d 701, 705
21 (9th Cir. 2003).

22 **V. DISCUSSION**

23 **A. The unnumbered paragraph added at the end of Section 507(a)(8)**
24 **by BAPCPA does not suspend or toll the three-year lookback period**
25 **for a post-petition tax.**

26 Section 507(a)(8)(A)(i) provides for priority treatment of
27 unsecured income taxes if the date the return was required to be
28

1 filed is within three years before the petition date.³ The three
2 year period is known as the "three-year lookback period." By
3 definition, a post-petition tax (such as the 2002 California
4 income tax at issue here) cannot fall within the "three-year
5 lookback period."

6 Priority income taxes are non-dischargeable in a Chapter 7
7 (and also non-dischargeable for a hardship discharge under
8 Chapter 13). See Section 523(a)(1)(A). Priority taxes provided
9 for in a Chapter 13 plan must be fully paid in order to receive a
10 discharge. See Sections 1322(a)(2) and 1328.

11 In 2005, BAPCPA added an unnumbered paragraph at the end of
12 Section 507(a)(8) that provides for suspension of the priority
13 time periods under certain conditions, including "any time during
14 which the stay of proceedings was in effect in a prior case . . .
15 plus 90 days."⁴ The unnumbered paragraph begins "an otherwise
16 applicable time period specified in this paragraph," making it
17 clear that it is the priority time period contained in Section
18 507(a)(8) that can be suspended. We interpret the phrase "an

19
20 ³ Section 507(a)(8)(A)(i) provides, in relevant part, priority
21 status for unsecured income taxes that are "for a taxable year
22 ending on or before the date of the filing of the petition" and
23 "for which a return, if required, is last due, including
24 extensions, after three years before the date of the filing of
25 the petition."

26 ⁴ The unnumbered paragraph at the end of Section
27 507(a)(8) provides, in relevant part, "An otherwise applicable
28 time period specified in this paragraph shall be suspended for
any period during which a governmental unit is prohibited under
applicable nonbankruptcy law from collecting a tax as a result of
. . . any time during which the stay of proceedings was in effect
in a prior case . . . or during which collection was precluded by
the existence of 1 or more confirmed plans . . . plus 90 days."

1 otherwise applicable time period" to mean that the tax year at
2 issue falls within the three-year lookback period in a prior case
3 and the subject claim is for a priority tax. The use of the word
4 "applicable"⁵ limits the tax to a pre-petition tax, because only a
5 tax for which the return is due to be filed during the subject
6 period may fall within the three-year lookback period under
7 Section 507(a)(8)(A)(i). An income tax obligation for which the
8 return is due post-petition (here, also post-confirmation) does
9 not meet the priority definition contained in Section
10 507(a)(8)(A)(i). A post-petition tax is not "capable or suitable"
11 to invoke priority status under Section 507(a)(8)(A)(i) and
12 therefore cannot fall within "an applicable time period" as
13 contemplated by the unnumbered paragraph.

14 The income tax at issue, for the 2002 tax year, was due
15 (based on an extension granted by the FTB) on October 15, 2003.
16 Debtor's Prior Case was filed on July 22, 2002. The three-year
17 lookback period in the Prior Case is July 22, 1999 to July 22,
18 2002. Thus, in the Prior Case, the 2002 income taxes would be
19 given priority status under Section 507(a)(8)(A)(i) only if the
20 return recognizing liability for such taxes was required to be
21 filed between July 22, 1999 and July 22, 2002. Since Debtor's
22 2002 income tax return was due on October 15, 2003, the 2002
23 income taxes did not fall within the three-year lookback period.

24
25
26 5 The Ninth Circuit recently defined "applicable" as used in
27 Section 707(b)(2)(A)(ii)(I) as "capable or suitable for being
28 applied," citing Merriam-Webster's Collegiate Dictionary 60 (11th
ed. 2005). Ransom v. MBNA (In re Ransom), 577 F.3d 1026, 1031
(9th Cir. 2009).

1 Similarly, because the due date for Debtor's 2002 income tax
2 return did not fall within the three-year lookback period, it did
3 not fall within "an otherwise applicable time period," and
4 suspension is inappropriate under Section 507(a)(8)'s unnumbered
5 paragraph.⁶

6 **B. The principle of equitable tolling expressed in Young v.**
7 **United States is not applicable.**

8 According to the legislative history, the unnumbered
9 paragraph was added to codify the holding in Young v. United
10 States, 535 U.S. 43 (2002). In Young, the Supreme Court equitably
11 tolled the three-year lookback period during the pendency of a
12 prior bankruptcy. Young dealt with facts significantly different
13 from those before us. In Young, the debtors filed a Chapter 13
14 petition on May 1, 1996. The tax at issue, 1992 federal income
15 tax, was due on October 15, 1993, which was within the three-year
16 lookback period (May 1, 1993 - May 1, 1996). Id. at 44-45. The
17 Youngs moved to dismiss the Chapter 13 and filed a Chapter 7 on
18 March 12, 1997, one day before dismissal of the Chapter 13. The
19 back-to-back filings in Young were an attempt to run out the
20 three-year lookback period. The Young Court concluded that:

21 Tolling is in our view appropriate regardless of petitioners'
22 intentions when filing back-to-back Chapter 13 and Chapter 7
23 petitions—whether the Chapter 13 petition was filed in good
24 faith or solely to run down the lookback period. In either
25 case, the IRS was disabled from protecting its claim during

25 6 In the instant case, the 2002 taxes also do not fall within
26 the three-year lookback period and are thus not entitled to
27 priority status. The Chapter 7 was filed on October 5, 2007.
28 Three years prior thereto begins on October 5, 2004. The 2002
return was due on October 15, 2003, which is outside the three-
year lookback period.

1 the pendency of the Chapter 13 petition, and this period of
2 disability tolled the three-year lookback period when the
Youngs filed their Chapter 7 petition.

3 Id. at 50-51. Young found back-to-back petitions relevant in
4 determining that the IRS was disabled from protecting its claim.
5 Here, over a year passed between the dismissal of Jones'
6 Chapter 13 and the Chapter 7 filing.⁷

7 Young applied equitable tolling to pre-petition income taxes
8 that were required to be filed within the three-year lookback
9 period.⁸ In this case, the tax did not become due within the
10 three-year lookback period, and Jones did not file back-to-back
11 petitions. Young reasoned that the automatic stay disabled the
12 IRS from protecting its pre-petition tax claim during the pendency
13 of the prior Chapter 13. "The Youngs' Chapter 13 petition erected
14 an automatic stay under § 362, which prevented the IRS from taking
15 steps to protect its claim." Id. at 50. As discussed below, we
16 believe the FTB was not disabled from protecting its claim during
17 the pendency of Jones' prior Chapter 13 case.

18 Because our facts are significantly different from those in
19 Young, we conclude that equitable tolling, as applied in Young, is
20 inapplicable here.

21 **C. The FTB was not disabled from protecting its post-confirmation**
22 **tax claim in the prior Chapter 13 case.**

23 Notwithstanding our conclusion that the tax at issue does not
24

25 ⁷ There was no confirmed plan in Young and therefore no need to
26 discuss the extent of the Section 362 automatic stay as to
property of the estate under Sections 1306 and 1327.

27 ⁸ 535 U.S. at 50 ("The Youngs' 1992 tax return was due within
28 that three-year period.").

1 fall within the three-year lookback period and is therefore not
2 subject to suspension, as to its priority status under the
3 unnumbered paragraph of Section 507(a)(8) or equitable tolling
4 under Young, we must still determine if the FTB was disabled from
5 protecting or collecting the tax during the pendency of Jones'
6 Chapter 13 case. If the FTB was disabled from collecting the
7 post-petition tax, then equitable tolling may be appropriate under
8 Section 105.⁹ (Although not raised by the FTB, under certain
9 circumstances, Section 108(c)¹⁰ has been used to toll a priority
10 determination for Section 507(a)(8) taxes.) To determine if the

11
12 9 Section 105(a) provides, in relevant part, that "The court
13 may issue any order, process, or judgment that is necessary or
appropriate to carry out the provisions of this title."

14 10 The Ninth Circuit has tolled the priority tax period (under
15 what is now Section 507(a)(8)(A)(ii)) using Section 108(c) and
16 incorporating the tolling provision found in Section 6503 of the
17 Internal Revenue Code. See West v. United States (In re West),
18 5 F.3d 423, 427 (9th Cir. 1993). West adopted the reasoning of
19 Brickley v. United States (In re Brickley), 70 B.R. 113 (9th Cir.
BAP 1986). Both West and Brickley concerned tax returns that
20 were due prior to the filing of the first petition and neither
21 case decided the tolling issue in the context of a confirmed
22 plan.

23 At least one court within the Ninth Circuit has analyzed
24 West and Brickley in the context of a post-petition tax in the
25 prior case. See In re Cowen, 207 B.R. 207 (Bankr. E.D. Cal.
1997). Cowen also analyzed the effect of a confirmed plan on
26 estate property and reasoned that had the debtors put in their
27 Chapter 13 plan that estate property revested in the debtors
under Section 1327 then "the IRS could have attempted to collect
the taxes without violating the automatic stay." Id. at 211.

28 In Young, the Supreme Court noted that the courts are split
over the issue of whether Section 108(c) contains a tolling
provision, and declined to resolve the split. 535 U.S. at 52.
In any event, the FTB has not raised any Section 108(c) argument
(requiring a specific tolling provision under California law),
thus the issue is not before us.

1 FTB was disabled or barred from collecting the tax, we must
2 analyze what happens to estate property when a Chapter 13 plan is
3 confirmed.

4 1. Sections 362(a), 541 and 1306

5 Sections 362(a)(3) and (4) stay acts to obtain possession of,
6 exercise control over or create, perfect or enforce a lien against
7 property of the estate. Sections 362(a)(3) and (4) apply to post-
8 petition claims. Section 541 defines property of the estate.
9 Section 1306 further defines property of the estate in Chapter 13
10 cases to include property defined in Section 541 and broadens the
11 definition to include property acquired and earnings earned after
12 the petition date but before the case is closed, dismissed or
13 converted.¹¹ Read together, and isolated from the other sections
14 of the Code, Sections 362(a) and 1306 appear to prevent a taxing
15 authority such as the FTB from collecting a post-confirmation debt
16 because collection would be against estate property and would
17 violate the automatic stay. Put another way, Section 1306 leaves
18 no non-estate property available to satisfy a post-petition debt.

19 2. Section 1327(b)

20 Section 1327(b) vests all estate property in the debtor upon
21 confirmation unless otherwise provided for in the plan or

22
23 11 Section 1306 provides, in relevant part, "(a) Property of
24 the estate includes, in addition to the property specified in
25 section 541 . . . all property . . . that the debtor acquires
26 after the commencement of the case but before the case is closed,
dismissed, or converted . . . and . . . earnings from services
performed by the debtor after the commencement of the case but
before the case is closed, dismissed, or converted . . .

27 (b) Except as provided in a confirmed plan or order confirming a
28 plan, the debtor shall remain in possession of all property of
the estate."

1 confirmation order.¹² Under this section unless the plan or
2 confirmation order provides otherwise, a post-petition creditor
3 could attempt post-confirmation collection without violating the
4 automatic stay because all estate property vests in the debtor at
5 confirmation.¹³

6 3. Split of Authority

7 When interpreting Sections 1306 and 1327, the courts have
8 split into four groups, with each having its own interpretation of
9 the combined meaning of Sections 1306 and 1327(b) on the automatic
10 stay as it applies to property in Chapter 13 cases. The courts
11 have acknowledged the conflict between these two sections and
12 noted that they are not models of clarity. The opinions range
13 from holding that all property of the estate remains so until the
14 case is closed, dismissed or converted, to holding that property
15 of the estate terminates upon confirmation. The Ninth Circuit has
16 not decided this issue.¹⁴ The four approaches are:

17 _____
18 12 Section 1327(b) provides "Except as otherwise provided in
19 the plan or order confirming the plan, the confirmation of a plan
20 vests all of the property of the estate in the debtor."

21 13 See Section 362(c)(1) (providing that the stay against
22 property of the estate under 362(a) continues until the property
23 is no longer property of the estate).

24 14 The parties cite to two Ninth Circuit cases that touch on
25 the issue before us: Nash v. Kester (In re Nash), 765 F.2d 1410
26 (9th Cir. 1985), and Hillis Motors, Inc. v. Hawaii Auto. Dealers'
27 Ass'n, 997 F.2d 581 (9th Cir. 1993). Although neither case is
28 directly on point, our holding here is supported by the general
propositions in both cases.

In Nash a Chapter 13 trustee who was holding funds from a
wage order disbursed those funds to a secured creditor after the
case was dismissed. Nash at 1412. Debtor filed a second case
the day after the dismissal and claimed the funds held by the
trustee exempt under the Section 522(d)(5) wildcard. Id. The

(continued...)

1 A. "The estate preservation approach" - Property
2 of the estate exists until the case is closed,
3 dismissed or converted.

4 Under this approach, property 'vesting' in the debtor does
5 not mean that the estate no longer exists after plan confirmation.
6 No property is transferred from the estate. See Security Bank of
7 Marshalltown, Iowa v. Neiman, 1 F.3d 687, 690 (8th Cir. 1993) ("We
8 join the line of cases holding the estate continues to exist after
9 confirmation of the Chapter 13 plan. Upon reviewing § 1327 . . . ,
10 even if property of the estate vests in the debtor at
11 confirmation, that does not necessarily mean that the estate no
12 longer exists."); Riddle v. Aneiro (In re Aneiro), 72 B.R. 424, 429
13 (Bankr. S.D. Cal. 1987):

14 The mere revesting of the property in the debtor upon
15 Chapter 13 plan confirmation does not convert property of the
16 estate into property of the debtor. Instead, the revested
17 property remains property of the estate subject to the terms
18 of the order of confirmation and all the protections of
19 § 362(a).

20 14(...continued)
21 court stated that the money received before dismissal "was the
22 property of the estate because it was received after commencement
23 of the case but before dismissal." The court further stated,
24 "However, ownership over all of the property of the estate,
25 including the [funds disbursed by the trustee] vested in the
26 Nashes once the plan was confirmed. 11 U.S.C. § 1327(b)." Id.
27 at 1414. The court then further supported the ownership rationale
28 and cited to Section 349(b). Nash held that the trustee made an
improper distribution. Id. at 1415.

29 Hillis concerned an antitrust suit in a Chapter 11 case.
30 Hawaii dissolved the debtor under State law while the case was
31 pending. The court found that the State exercised control over
32 corporate property when it dissolved the corporation and that
33 under Section 1141(b) (similar language as Section 1327(b))
34 "confirmation . . . ordinarily lifts the automatic stay . . .
35 because confirmation usually terminates the existence of the
36 estate." Hillis at 587. In Hillis the court found an atypical
37 situation because the plan "unambiguously provides for the
38 continuation of the estate post-confirmation." Id. at 589.

1 "The estate preservation approach" line of cases rely on
2 Section 1306(a), and give little effect to Section 1327.

3 B. "The modified estate preservation approach" –
4 Existing estate property vests in the debtor at
5 confirmation, and estate property continues to
6 exist from post-petition income.

7 Under this approach, property obtained after confirmation is
8 estate property, subject to the Section 362(a) stay. See Barbosa
9 v. Soloman, 235 F.3d 31, 37 (1st Cir. 2000) ("Because we think
10 that this approach has a logical consistency that harmonizes two
11 apparent inconsistent sections"). Barbosa was most
12 concerned with the debtor's ability to continue to make payments
13 under the plan and the pre-petition creditors' interest in
14 preserving that ability. Id.

15 C. "The estate transformation approach" – Only
16 property needed to fund the plan is estate
17 property, all other property is under the debtor's
18 control.

19 Under this approach, the view is that the debtor is competent
20 to manage all property not needed to fulfill the plan. Under this
21 approach, at confirmation property of the estate vests in the
22 debtor, and the estate remains funded by way of post-confirmation
23 earnings and acquisitions. See Matter of Heath, 115 F.3d 521, 524
24 (7th Cir. 1997):

25 We read the two sections, 1306(a)(2) and 1327(b), to mean
26 simply that while the filing of the petition for bankruptcy
27 places all the property of the debtor in the control of the
28 bankruptcy court, the plan upon confirmation returns so much
of that property to the debtor's control as is not necessary
to the fulfillment of the plan.

29 In Heath, the confirmation order stated "the debtor's income and
30 other assets including accounts receivables (sic) remain estate
31 property to the extent necessary to fulfill the plan." Id. at

1 522-23. See also Telfair v. First Union Mortgage Corp., 216 F.3d
2 1333, 1340 (11th Cir. 2000) ("In this case, after confirmation,
3 only the amount required for the plan payments remained property
4 of the estate.").

5 D. "The estate termination approach"—All property
6 reverts in the debtor and estate property is
terminated upon confirmation.

7 Under this approach, all property of the estate vests in the
8 debtor at confirmation. See In re Petruccelli, 113 B.R. 5, 15
9 (Bankr. S.D. Cal. 1990):

10 This court concludes that the reasoning of In re Mason,
11 45 B.R. 498 (Bankr. D. Or. 1984) is persuasive and that
12 § 1327(b) means what it appears to say — that is, that upon
13 confirmation property of the estate vests in the debtor and
is no longer property of the estate, unless the plan or order
of confirmation provides otherwise.

14 The Petruccelli court found:

15 Given that § 1306(b) gives debtors possession of property of
16 the estate, § 1327(b) would be rendered meaningless if it
were not found to vest title and ownership in the debtor upon
17 confirmation . . . § 1327(b) is the more specific statute
relating to the circumstances. It is a traditional canon of
18 construction that the specific statute controls the more
general statute in the face of an apparent conflict.

19 Id. See also Oliver v. Toth (In re Toth), 193 B.R. 992, 996
20 (Bankr. N.D. Ga. 1996) (finding the Petruccelli analysis the most
21 persuasive; policy reasons (being able to obtain credit and use
22 property after confirmation) support concluding vesting at
23 confirmation ends the estate.¹⁵); In re Dagen, 386 B.R. 777, 782
24 (Bankr. D. Colo. 2008) ("only the estate termination approach gives

25
26
27 15 But see In re Clark, 71 B.R. 747 (Bankr. E.D. Pa. 1987), for
28 the opposite conclusion that policy reasons (protecting debtor
and resources from post-petition creditors) support continuing
the estate post-confirmation.

1 effect to the literal terms of § 1327(b)”).

2 This approach has been criticized by courts that adopt one of
3 the other approaches as not giving proper effect to Section 1306.

4 4. The “estate termination approach” appropriately
5 interprets and gives effect to Sections 1306 and 1327

6 We agree with the bankruptcy court’s interpretation and adopt
7 the estate termination approach for several reasons.

8 Under the estate termination approach, the vesting of all
9 estate property in the debtor at confirmation (unless the plan or
10 confirmation order provides otherwise) and the concomitant
11 termination of estate property gives effect to both Sections 1306
12 and 1327. Section 1306 generally defines property of the estate
13 as all property held by the debtor when the Chapter 13 case is
14 commenced and any property thereafter acquired until the case is
15 “closed, dismissed, or converted.” Simply put, Section 1306
16 establishes the moment when estate property is first created and
17 the outside triggering event which terminates property of the
18 debtor from becoming estate property. Significantly, Section 1306
19 does not state that property of the estate can only become non-
20 estate property when the case is closed, dismissed, or converted.
21 Section 1327(b) “vests” estate property in the debtor upon
22 confirmation unless the plan or order provides otherwise. The
23 conclusion that “vesting” property of the estate in the debtor
24 terminates estate property is confirmed by Section 1327(c).
25 Section 1327 (c) provides that “property vesting in the debtor
26 . . . is free and clear of any claim or interest . . . provided
27 for by the plan.” The change in language from “vests . . .
28 property of the estate” to “property vesting in the debtor” is

1 compelling to this Panel's conclusion that confirmation changes
2 estate property to property of the debtor unless the plan or
3 confirmation order specifically provides otherwise.

4 The estate termination approach effectuates the important
5 choice Section 1327(b) gives to the debtor as to whether property
6 of the estate remains (and to what extent) after confirmation.
7 Section 1327(b) expressly provides the debtor with the ability to
8 vest in itself all, none, or some combination of estate property.
9 The other three approaches deny the debtor this full choice. The
10 estate termination approach implements a major theme of Chapter 13
11 by preserving to the debtor the ability to have ownership, as well
12 as possession, of all property. See 8 Collier on Bankruptcy
13 ¶ 1327.03, at p. 1327-11 (15th ed. rev. 2008).

14 In so holding, we conclude that collection of a post-petition
15 debt can occur against a Chapter 13 debtor who does not otherwise
16 provide in the plan or confirmation order that all property
17 remains property of the estate. This gives effect to
18 Section 1327(b).¹⁶ Conversely, under our holding, if the Chapter
19 13 plan or confirmation order provides that all or some portion of
20 property of the estate remains property of the estate post-
21 confirmation, then collection of a post-petition debt can only be
22 made against the debtor's property, if any (unless relief from
23 stay is obtained). This interpretation also gives effect to
24 Section 1306.

25 Further, "vests" as used in Section 1327(b) means more than
26

27
28 ¹⁶ We recognize that the vesting of former estate property back
in the debtor does not dissolve the automatic stay with respect
to pre-petition claims against the debtor.

1 obtaining possession of estate property because Section 1306(b)
2 already provides that debtors remain in possession of all estate
3 property. Otherwise, "vests" as used in Section 1327(b) is
4 superfluous.¹⁷ We conclude that "vests" means absolute ownership,
5 not mere possession.

6 Our holding that under Section 1327(b) the estate may cease
7 to exist prior to the case being "closed, dismissed, or
8 converted," does not harm bankruptcy policy. Because the debtor
9 is given the choice (subject to court approval), the debtor's
10 decision dictates which competing policy (protect pre-petition
11 creditors and the ability to complete a plan, versus a debtor's
12 access to credit and use of property post-confirmation) the debtor
13 wishes to utilize. Thus, the estate termination approach does not
14 harm bankruptcy policy.

15 Under the estate termination approach, and on our facts,
16 there was no automatic stay in effect at the time the return was
17 filed. Here, estate property revested in Jones on September 12,
18 2002, when her Chapter 13 plan was confirmed. When she filed her
19 return on October 15, 2003 (on the due date), the taxes were "self
20 assessed." Thus, at the time the taxes were assessed, there was
21 no estate property for the automatic stay to protect,¹⁸ leaving the
22 FTB free to collect on its tax claim.

24 17 Petrucelli, 113 B.R. at 15 ("§ 1327(b) would be rendered
25 meaningless if it were not found to vest title and ownership in
the debtor upon confirmation").

26 18 See Shell Oil Co. v. Capital Financial Services, 170 B.R.
27 903, 905 (Bankr. S.D. Tex. 1994) (IRS post-confirmation
28 assessment/lien was not against estate property because
confirmation terminates the stay.).

1 5. The plan provides that property of the estate vests in
2 the Debtor

3 Here, the Debtor's Chapter 13 plan provides: "[t]he debtor(s)
4 elect to have property of the estate revert in the debtor(s) upon
5 plan confirmation. Once the property reverts, the debtor(s) may
6 sell or refinance real or personal property without further order
7 of the court, upon approval of the Chapter 13 Trustee." Such
8 language clearly expresses Jones' choice to have estate property
9 revert as her property at confirmation subject to some supervision
10 by the Chapter 13 Trustee. Importantly, Section 1327(b) does not
11 require a debtor to make an affirmative election in order for
12 estate property to vest in the debtor upon confirmation. However,
13 Section 1327(b) does require a debtor to provide in a plan or
14 confirmation order its election to have property remain property
15 of the estate post-confirmation.¹⁹

16 6. The confirmation order did not contain language which
17 would prevent revesting in the Debtor under Section 1327(a)

18 The confirmation order stated: "the future income of the
19 Debtor(s) is submitted to the supervision and control of the
20 Trustee, as is necessary for the execution of the Plan." The FTB
21 argues that such language creates confusion when compared with the
22 plan language that reverts estate property in the Debtor. We
23 recognize that ambiguities are to be construed against the debtor
24 who drafted the plan, but we do not see any ambiguity here.

25
26 ¹⁹ Petruccelli, 113 B.R. at 17 ("the better approach, as
27 recognized by many of the cases, is that revesting of all of the
28 property of the estate occurs upon confirmation, as contemplated
by § 1327(b), unless revesting is expressly postponed, as
authorized by § 1327(b).").

1 According to the FTB, the "supervision and control"²⁰ language
2 demonstrates Debtors' election that estate property does not cease
3 at confirmation.²¹ We disagree. Such language does not rise to
4 the level of triggering the "except as otherwise provided"
5 election in Section 1327(b). See Laughlin v. I.R.S., 98 B.R. 494,
6 496 (D. Neb. 1989) (" that the trustee retains supervision and
7 control . . . does not compel the result that such property be
8 labeled 'property of the estate'"); Petrucelli, 113 B.R.
9 at 17 ("If a debtor seeks to postpone reversioning of all or some of
10 the property of the estate, the plan or order of confirmation
11 should clearly say so. Saying so is easy to do."). The
12 "supervision and control" language gives the trustee a basis for
13 monitoring and requiring execution of the provisions of the plan.
14 Such language does not negate the reversioning of property at
15 confirmation.

16 7. Equity does not favor the FTB

17 The parties have not provided, nor have we found, a case
18 where a taxing authority such as the FTB has been sanctioned for
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21 20 See Section 1322(a)(1).

22 21 FTB cites to In re Allen, 241 B.R. 710, 719 (Bankr. D. Mont.
23 1999). Allen concerned Chapter 13 confirmation issues, holding
24 that "supervision and control" language contained in a plan
25 complies with the Section 1327(b) election, therefore future
26 income remains estate property. We disagree as to the import of
27 such language. Allen implicitly recognized that the "supervision
28 and control" language may not clearly postpone reversioning when it
held: "[t]he confirmation order shall include a provision that
all future income of the Debtor from whatever source is necessary
for completion of the Plan and thus is property of the estate,
and does not vest in the Debtor post-confirmation." Id. at 719.

1 attempting collection post-confirmation on a post-petition debt.²²

2 We consider this relevant to the FTB's basic premise that the
3 uncertainty caused by the split of authority disabled the FTB's
4 claim.²³ Uncertainty as to the law is different from a taxing
5 authority being "disabled" in protecting its claim, as found in
6 Young. Here, although the FTB did not, it could have sought
7 relief from the stay under Section 362(d) or moved to dismiss²⁴
8 Debtor's case in order to confirm its right to collect on its
9 post-confirmation claim. Many of the cases²⁵ applying equitable
10 tolling under Section 105 concern multiple unpaid tax periods
11 (both pre and post-petition) along with successive and repetitive
12 bankruptcy filings. Such is not the case before us. Based on the
13 facts here, we decline to apply equitable tolling under

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16 22 On the other hand, the parties cite cases where a taxing
17 authority holding a post-petition claim was permitted to collect
18 post-confirmation. See Petrucelli, 113 B.R. at 17 (IRS post-
19 confirmation levy did not violate the stay, thus debtor's motion
20 for sanctions under § 362(h) is denied.); Laughlin v. I.R.S.,
98 B.R. at 496 (IRS did not violate the automatic stay in
attempting to recover funds post-confirmation held by the Chapter
13 trustee.).

21 23 Over a year passed between dismissal of Jones' Chapter 13
22 and the Chapter 7 filing. Nothing in the record indicates the
23 FTB moved to collect the tax during that time period. This seems
odd, since the essence of FTB's argument is that the automatic
stay prevented collection.

24 24 Dismissal may be warranted where a debtor fails to pay post-
25 petition taxes.

26 25 We have previously held that where there is serious inequity
27 the bankruptcy court's equitable authority found in
28 Section 105(a) can be used to suspend the priority tax periods.
See Gurney v. State of Ariz Dep't of Revenue (In re Gurney),
192 B.R. 529 (9th Cir. BAP 1996).

1 Section 105.²⁶

2 **VI. CONCLUSION**

3 For the foregoing reasons, we AFFIRM the Decision.
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25 26 We recognize that the FTB chose to err on the side of
26 caution and avoid what it saw as a potential violation of the
27 stay. We do not fault the FTB for its healthy respect of the
28 automatic stay. Our holding allows a taxing authority, under
certain circumstances, to initiate collection for a post-petition
tax right away as opposed to waiting perhaps years for a case to
be dismissed or discharged.