

**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

FILE: B-184506

DATE: OCT 29 1975

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MATTER OF: Nabisco, Inc.

**DIGEST:**

Set-off by the United States of noncontractual debts is a proper means of claim collection. Use of the Army Holdup List to effect collection by set-off in such circumstances is therefore authorized. Federal Claims Collection Standards, 4 C.F.R. Part II (1973); GAO Policies and Procedures Manual, title 4, chapters 8 and 9.

Nabisco, Inc., through its attorneys, has protested to this Office a threatened withholding by the United States of amounts due Nabisco pursuant to Government contracts. The protest is directed to the General Accounting Office because the withholding would be under the claimed authority of regulations for which we (and the Department of Justice) are responsible.

According to the submission on behalf of Nabisco, the Agricultural Stabilization and Conservation Service (ASCS) of the Department of Agriculture has a disputed claim against Nabisco, arising under the Processor Wheat Marketing Certificate Program. The merits of the claim are not here at issue. The Administrator of ASCS, citing as authority 4 C.F.R. § 102.3, has referred the claim to the Department of the Army for inclusion on the "Army Holdup List," with a request that amounts due Nabisco as a Government contractor be withheld to satisfy the subject claim. Nabisco contends that there are "serious questions concerning the appropriateness and legality of this threatened use" of the List, and requests that we instruct the Department of Agriculture and the Department of the Army not to use the Holdup List for collection of this claim, or that at the least we direct them not to do so until argument on the matter has been heard by this Office.

Nabisco's first contention is that the regulations found in the General Accounting Office (GAO) Policy and Procedures Manual govern the use of the Army Holdup List by Federal agencies, and that those regulations do not allow the use of the List in the instant circumstances, because the claim against Nabisco does not arise out of a contract, but rather is for the return of a refunded license fee. It is our view that collection of claims by offset is authorized by the

law and regulations whether the claims are contractual or not, and that the use of the Holdup List is an appropriate means of effecting collection.

The Federal Claims Collection Standards 4 C.F.R. Chapter II (1975), promulgated jointly by this Office and the Department of Justice, pursuant to the Federal Claims Collection Act of 1966, 31 U.S.C. §§ 951-953 (1970), provide, with respect to the administrative collection of claims, that:

"The head of an agency or his designee shall take aggressive action, on a timely basis with effective followup, to collect all claims of the United States for money or property arising out of the activities of or referred to, his agency in accordance with the standards set forth in this chapter \* \* \*." 4 C.F.R. § 102.1

The section of the Standards relied upon by the Administrator for the use of the Holdup List begins with the statement that:

"Collections by offset will be undertaken administratively on claims which are liquidated or certain in amount in every instance in which this is feasible." 4 C.F.R. § 102.3

The section concludes with the statement, cited by Nabisco, that:

"Appropriate use should be made of the cooperative efforts of other agencies in effecting collections by offset, including utilization of the Army Holdup List, and all agencies are enjoined to cooperate in this endeavor."

The net effect of these regulations is that offset is clearly an appropriate, and indeed a preferred, method of collecting all claims in favor of the Government. The use of this method is not conditioned on whether the claims arise out of contract or otherwise.

It is Nabisco's contention, however, that since the Government's authority to collect claims by offset "resides in 31 U.S.C. § 71, which directs that all claims or demands for or against the United States 'shall be settled and adjusted in the General Accounting Office,'" our regulations define the appropriate circumstances in which the Army Holdup List can be used. Nabisco construes those regulations to preclude the use of the Holdup List in the present instance.

Nabisco states that the only authority in the GAO Policies and Procedures Manual for the use of the Holdup List is found in chapter 9 and in section 55.2 of chapter 8. (Both chapters are in title 4 of the Manual, "Claims.")

Nabisco contends that chapter 9 deals with debts arising out of contracts with the United States, and that the claim against Nabisco is not on a contract. Nabisco argues further that in section 55.2 of chapter 8, the only references to set-offs "pertain to debts arising out of contracts and debts owed by individuals;" and that neither type of debt is involved here.

It is not necessary to reach the question whether "appropriate use" of the collection efforts of other agencies, as that term is used in 4 C.F.R. § 102.3, is delimited by title 4 of the GAO Manual, because it is abundantly clear, in our view, that the provisions in the Manual authorize the use of set-off in any case in which it will facilitate the collection of a claim.

Chapter 8 deals generally with debt claims by the United States (with exceptions not here relevant). (It should be noted that the terms "claim" and "debt" are used, in this context, interchangeably; both terms refer to amounts allegedly owed to the United States.

Section 55.2 dealing with collection methods, provides as follows:

"Debt collection procedures should provide for the use of all means of collection reasonably available to the administrative agencies and consistent with good business practices and the debtor's ability to pay, such as \* \* \*."

The list of methods of collection thereafter set forth in section 55.2 is thus not exclusive. Section 55.2 encourages the use of "all means of collection reasonably available" and "consistent with good business practices and the debtor's ability to pay," and the list of means is prefaced with the phrase "such as." Clearly, section 55.2 does not preclude the use of set-off for the purpose of administrative collection of debts. See also section 54.2, making the agencies responsible for adopting policies and developing procedures to "assure maximum collection results \* \* \*," and to--

"provide for suitable integration of agency processes with those of other agencies which are designed to supplement, but not to be substituted for the responsible agency's actions \* \* \*."

One such method of integration might well be the use of collection by set-off by another agency with which the debtor has a contract.

In sum, we do not agree that our regulations preclude collection of Agriculture's claim against Nabisco by means of set-off by another agency which may be indebted to Agriculture, and we see no reason why this set-off should not be accomplished by use of the Army Holdup List. Moreover, the United States has the same right which belongs to every creditor to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him. United States v. Munsey Trust Co., 332 U.S. 234 (1947). We are not aware of any reason why that right should be construed as limited to the extinguishment only of debts arising out of contract. See for example, Crain v. United States, 84 F. Supp. 876 (Ct. Cl., 1949), cert. denied 339 U.S. 911 (1950), in which the Court held that the Secretary of Agriculture clearly had the authority to offset amounts due to the plaintiffs under the Soil Conservation and Domestic Allotment Act against overpayments in prior years, as determined by the Secretary, under the same and other programs. See also John P. Squire Co. v. United States, 30 F. Supp. 708 (Ct. Cl.) cert. denied, 309 U.S. 689 (1940), in which the Court upheld the authority of this Office to adjust and settle accounts between the Government and the plaintiff by set-off of amounts due the plaintiffs as refunds of a processing tax against later processing tax liabilities of the plaintiff which were then due and unpaid. In both Crain and Squire, set-off was used to extinguish a noncontractual claim.

An additional argument has been made that an anomaly is created if collection of a noncontractual claim by means of the Holdup List is permitted. The anomaly is said to be that, since there is presumably no contractual dispute with the agency which effects collection by means of set-off, the debtor has no opportunity to contest the validity of the claim within the framework of the administrative procedures established for contract disputes. Consequently, it is argued, no avenue of administrative review was available to Nabisco, except informal communications between Nabisco and the Department of Agriculture, and if set-off is permitted, Nabisco is left with the sole remedy of suing on the contract with respect to which set-off is accomplished, notwithstanding the fact that the parties to the contract may be content with it and willing to abide by it. Nabisco refers to this as an "archaic procedure," and suggests that--

"before the necessity for undertaking such litigation arises, there should be an opportunity to air the matter before an agency not so deeply involved as an adversary as the agency making the claim \* \* \*."

Specifically, a hearing before this Office is requested.

As Nabisco points out, where set-off is used to collect a noncontractual debt, the administrative channels which are available under the disputes clause of a contract are not available to the debtor to contest the validity of the Government's claim. But a debtor could, in the event the debt were collected from him by means of set-off, assert a claim against the United States for the amount which it alleges it is entitled to, and the claim could be submitted to this Office for adjudication on the merits, pursuant to our statutory authority in 31 U.S.C. § 71 (1970) to settle and adjust claims and demands against the Government. The procedure for submitting such a claim is set forth in 4 C.F.R. Part 31 (1975).

Thus, there would be an opportunity for Nabisco to air the matter before an agency which is not a party to the dispute, although not in the context of a formal hearing, since GAO settles claims based on the written record only. Nabisco would of course be free to submit evidence and arguments of law, orally, as well as in writing. 4 C.F.R. § 31.7. Accordingly, it cannot be said that a debtor whose non-contractual debt is collected by set-off is deprived of any right, as Nabisco suggests is the case, by not having had a "guaranteed opportunity to pursue the validity of the claim administratively except perhaps within the agency that is asserting it."

Nabisco contends further that, should the set-off be permitted, its sole remedy would be to sue on a contract with respect to which there is no dispute. The real issue, it states, would only be joined by the Government's defense to such a suit, claiming the right to set-off. This is characterized by Nabisco as an "archaic procedure," but no allegation is made that an undue burden is thereby placed on the plaintiff.

As noted above, suing on the contract would not be Nabisco's sole remedy since it could submit to GAO a claim against the United States. If Nabisco should ultimately bring suit, whether or not it first submitted a claim, we have no opinion concerning the antiquity of such a procedure, but it would not appear to create a genuine hardship to a plaintiff. In any event, considerations of the form which a suit might ultimately take have no bearing on our determination whether set-off may be used in this instance.

For the foregoing reasons, we decline to instruct the Department of Agriculture not to use the Army Holdup List for collection of its claim against Nabisco. Indeed, we consider the use of set-off as implemented by means of the List entirely in keeping with the Federal

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Claims Collection Standards. Also, for the reasons stated above, we would not hold a hearing on this matter as requested even if, after set-off, it were presented to us as a claim. We would, however, consider the matter on the merits as provided in 4 C.F.R. Part 31, if a claim were submitted.

R.F. KELLER

Deputy Comptroller General  
of the United States