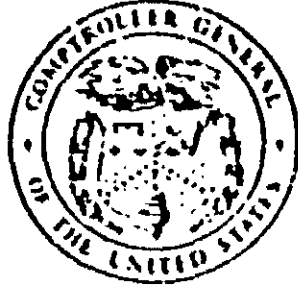


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DECISION



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

FILE: B-186852

DATE: October 21, 1976

MATTER OF: L. B. Manufacturing Company

DIGEST:

1. Where purchaser of excess high grade zinc sent check to agency and check was made payable to agency but drawn on bank account of third party, such check, which was accepted and paid by bank, may properly be considered as payment from purchaser and subject to setoff.
2. Where inadvertent, erroneous advice of agency concerning amount of Government's excess zinc results in overpayment by purchaser, agency has right and duty to apply excess payment to extinguishment of indebtedness of purchaser, even though portion of such debt arose from separate and independent transaction.

The General Services Administration (GSA) requests an advance decision concerning the propriety of its applying an erroneous overpayment received from the L.B. Manufacturing Company (LB) to an existing indebtedness to it by LB.

The record shows that GSA and LB entered into contract No. GS-00-DS-(S)-47849 under which LB agreed to purchase 450,000 pounds of high grade zinc for \$160,875 and 350,000 pounds of prime western zinc for \$119,875. Subsequently, LB took delivery of some high grade zinc and was erroneously advised by GSA that it still did not take delivery of about 315,000 pounds of high grade zinc. GSA advised that under the contract the cost of the undelivered high grade zinc plus an accrued storage charge was \$127,575. LB later sent GSA a check in the amount of \$127,575 drawn on the General Cable Corporation's bank account and made payable to the order of GSA. In its letter enclosing the check, LB stated that such check was payment for the undelivered high grade zinc and provided GSA with instructions for shipment. GSA accepted the check (which was accepted and paid by the bank) as payment in full.

It later appeared that the correct amount of undelivered high grade zinc under the contract was 297,282 pounds, a variation of quantity within the limits of the contract. The correct cost of that

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amount of zinc was \$118,169.60 plus \$2,086 for storage charges, thus resulting in an erroneous overpayment of \$7,319.41. Since LB was then indebted to GSA for \$5,101.71, GSA retained that amount from LE's overpayment and, on LE's instructions, sent the balance to General Cable.

The GSA's request for an advance decision was prompted by General Cable's informal advice to GSA that it intends to file a claim with GSA or this Office for the amount retained by GSA. It appears that General Cable contends that the payment to GSA was made on behalf of LB and the overpayment, which directly resulted from GSA's erroneous advice, should be returned to General Cable.


The record shows that GSA entered into the contract with LB, not General Cable, that GSA received the payment, a negotiable instrument, from LB, not General Cable, that GSA delivered the high grade zinc as instructed by LB, not General Cable, and that on the instructions of LB, GSA sent the balance of the overpayment, \$2,086, to General Cable. While it may be that LB and General Cable have entered into an agreement, GSA is not a party to the agreement. Accordingly, we conclude that the check received from LB by GSA was a payment from LB and not a payment by General Cable on behalf of LB. See 60 Am. Jur. 2d Payment § 50 (1972).

Since LB's payment to GSA was in fact an overpayment, GSA has the right and the duty to apply the balance to LB's existing indebtedness, even though the overpayment resulted from LB's reliance on GSA's inadvertent, erroneous advice. It is well settled that the United States has the same right which belongs to every creditor to apply the unappropriated monies of his debtor in its possession to the extinguishment of debts of the debtor. Gratiot v. United States, 40 U.S. (15 Peters) 336 (1841); Barry v. United States, 229 U.S. 47 (1913); B-168619, January 14, 1970. Further, the Government's right to set off a contractor's debts against contract proceeds extends to debts owed by the contractor as a result of separate and independent transactions and is not confined to the immediate contract. B-168619, supra, and cases cited therein. Thus, GSA has the unquestioned right to use an overpayment by LB to set off the debt of LB. Moreover, in these circumstances, GSA has the duty to set off LB's debt because our Office maintains that Federal agencies have the duty to take aggressive action to collect the Government's claims. 4 C.F.R. § 101.1 (1976).

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Accordingly, GSA correctly applied the amount retained by it to LB's indebtedness resulting from the erroneous overpayment.

Deputy


Comptroller General
of the United States