

DECISION



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

PLM-1

10/102

FILE: B-189154

DATE: May 8, 1979

Application of?

MATTER OF: ~~Collection of Debts~~ Statute of Limitations on
Administrative Setoff *by Agency To Collect Employee Debts*

DIGEST: 1. *the* Government may not withhold current salary to satisfy general debts owed by employee and may not setoff against employee's retirement account until employee withdraws contribution or claims annuity. *and* However, Government has right to setoff indebtedness administratively against annuity payments or refund of retirement contribution *based upon* common-law right long recognized by our Office and the courts. *the*

2. Government's right to setoff indebtedness against annuity payments or refund of retirement contribution is not subject to statute of limitations on court action by Government, contained in 28 U.S.C. § 2415. Legislative history shows no intention to limit Government's right to setoff indebtedness administratively without resort to courts.

The Honorable Alan K. Campbell, Director, Office of *DLG 00925* Personnel Management (formerly Civil Service Commission), has requested our opinion as to whether the provisions of 28 U.S.C. § 2415 (1976), or any other general statute of limitations, in any way limits an agency's authority to setoff claims by that agency or another agency against money it holds for an individual.

In order to answer this question properly, we shall first discuss the general authority of the Government to collect its debts and then proceed to the issue of the effect of the statute of limitations.

DEBT COLLECTION AND SETOFF

Our Office is vested with broad authority to settle claims by the Government of the United States or against it and to superintend the recovery of debts due the United States. See 31 U.S.C. §§ 71 and 93 (1976). Claims procedures are found in title 4 of

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the "General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies." In addition, under the Federal Claims Collection Act of 1966, 31 U.S.C. §§ 951-953 (1976), the Comptroller General and the Attorney General are jointly charged with promulgating standards for collecting and compromising claims of the United States. The Federal Claims Collections Standards are contained in 4 C.F.R. Parts 101-105 (1978). Agencies are required to take aggressive action to collect all claims of the United States (4 C.F.R. § 102.1), including collection by offset as prescribed in 4 C.F.R. § 102.3. In collecting claims by offset agencies are instructed to use the cooperative efforts of other agencies, and all agencies are enjoined to cooperate in this endeavor. See 4 C.F.R. § 102.3.

Under 5 U.S.C. § 5514, a Government agency may use the setoff procedure against an employee's current salary to collect a debt which arises from an erroneous payment made by the agency to or on behalf of the employee. Also, under 5 U.S.C. §§ 5705 and 5724(f), agencies may setoff against current salary to collect unused advances for travel and transportation expenses. However, our Office has long held that the Government cannot withhold current salary of employees to satisfy general debts owed to the Government without the employee's consent. 29 Comp. Gen. 99 (1949); 24 id. 334, 338 (1944). Collection of such debts may be made after the employee's separation by offset against his final salary check or lump-sum payment for leave. See 29 Comp. Gen. 99, supra, and decisions cited therein.

We have also held that monies held in an employee's retirement account are not available for setoff until he is separated and withdraws his contribution or until he qualifies for a retirement annuity. 39 Comp. Gen. 203 (1959). However, we have long held that once such funds become payable, the amount may be applied in liquidation of the employee's indebtedness to the United States. 39 Comp. Gen. 203, supra; 27 id. 703 (1948); 21 id. 1000 (1942); and 16 id. 161 (1936). Such action is accomplished by the filing of a request with the Office of Personnel Management under the procedures set forth in Federal Personnel Manual Supplement 831-1, Subchapter S19.

It is also well recognized that the Government has the common-law right which belongs to every creditor to apply the appropriated monies of his debtor, in his hands, to extinguish the debts of that debtor. United States v. Cohen, 389 F.2d 689 (5th Cir. 1967).

See also United States v. Munsey Trust Co., 332 U.S. 234, 239 (1947); Gratiot v. United States, 40 U.S. 336, 370 (1841); and Avant v. United States, 165 F. Supp. 802 (E.D. Va. 1958). This principle has been consistently followed by this Office as well. See 49 Comp. Gen. 44 (1969); 46 id. 178, 182 (1966); and 41 id. 85 (1960).

STATUTE OF LIMITATIONS

With the enactment of Pub. L. 89-505, July 18, 1966, 80 Stat. 304, Congress for the first time imposed a general statute of limitations on civil actions brought by the United States. See 28 U.S.C. § 2415. The law provides in section 2415(a) that every action for money damages brought by the United States which is founded upon any contract express or implied in law or fact, shall be forever barred unless the complaint is filed within 6 years after the right of action accrues. Similarly, section 2415(d) imposes a 6-year statute of limitations on actions brought by the United States to recover money erroneously paid to a Federal employee or member of the uniformed service.

However, the Congress preserved the right of offset or counterclaim in section 2415(f) of title 28, United States Code, which provides as follows:

"(f) The provisions of this section shall not prevent the assertion, in an action against the United States or an officer or agency thereof, of any claim of the United States or an officer or agency thereof against an opposing party, a co-party, or a third party that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. A claim of the United States or an officer or agency thereof that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may, if time-barred, be asserted only by way of offset and may be allowed in an amount not to exceed the amount of the opposing party's recovery."

DEPARTMENT OF JUSTICE OPINION

With regard to the application of a statute of limitations on setoff actions we have been advised that the Department of Justice, by letter of September 29, 1978, has sent the Office of Personnel Management a memorandum opinion signed by Mr. John M. Harmon, Assistant Attorney General, Office of Legal Counsel. The opinion concludes that where judicial enforcement of a debt is barred by 28 U.S.C. § 2415, the debt may not be collected by administrative offset. The opinion refers to "administrative offset" as merely a "prejudgment attachment device," and the opinion states that if there is no possibility of obtaining a judgment on the debt, administrative offset would be inappropriate and could not be used. The Assistant Attorney General recognizes that, under the provisions of 28 U.S.C. § 2415(f), the Government may assert a time-barred claim by way of offset against the claim of an opposing party which does not arise out of the same transaction or occurrence, but such offset may not exceed the recovery of the opposing party on its claim. Furthermore, if the Government's time-barred claim arises out of the same transaction or occurrence as the opposing party's claim, the Government may assert its claim without any limitation on recovery. However, the opinion states that where a person seeks to dispute an offset, his action does not constitute a claim against the United States.

The Justice memorandum opinion states that the statute of limitations was intended to allow repose to stale debts except where the debtor initiates and prevails in a claim against the United States arising out of the same or a different transaction or occurrence, and that allowing administrative setoff of time-barred debts where the debtor has not filed a claim would render the statute completely ineffective. Finally, the opinion refers to two court decisions where the offset of time-barred debts against civil service retirement benefits was at issue. The Assistant Attorney General agrees with the court's decision in Tomakin v. United States, No. C 75 1079 (N.D. Cal. 1975) (unpublished order), which holds that administrative setoff is subject to the 6-year statute of limitations contained in 28 U.S.C. § 2415(a). However, he disagrees with the decision in Atwater v. Roudebush, 452 F. Supp. 622 (N.D. Ill. 1976) which holds that section 2415 has no application to administrative setoff.

Based upon our review of court decisions, prior decisions of our Office, and the legislative history of the statute of limitations,

28 U.S.C. § 2415, we disagree with the memorandum opinion of the Assistant Attorney General and conclude that section 2415 has no application to administrative setoff. Our reasons are as follows.

DISCUSSION

The general rule is that statutes of limitations applicable to suits for debts or money demands bar or run only against the remedy (the right to bring suit) to which they apply and do not discharge the debt or extinguish, or even impair, the right or obligation, either in law or in fact, and the creditor may avail himself of every other lawful means of realizing on the debt or obligation. See Mascot Oil Co. v. United States, 42 F.2d 309 (Ct. Cl. 1930), affirmed 282 U.S. 434; and 33 Comp. Gen. 66 (1953). See also Ready-Mix Concrete Co. v. United States, 130 F. Supp. 390 (Ct. Cl. 1955).

As shown above, the inherent right of administrative setoff by the Government was recognized by the courts and our Office long before the enactment of the statute of limitations contained in 28 U.S.C. § 2415. This statute of limitations applies specifically to civil actions brought by the United States. The statute also contains an exception in section 2415(f) whereby the United States, in an action filed against it, may assert a claim by way of offset or counterclaim. The legislative history of this statute of limitations reveals no clear intention by the Congress to apply this statute to administrative setoff. In fact, it suggests the contrary. In testifying before the House subcommittee which held hearings on the bill, the spokesman for the Department of Justice made the following statement concerning the effect of the bill on offsets and counterclaims:

"The bill will not affect the authority of each agency to offset, on its own books and without resort to the courts, any claim it may have against a person to whom it is about to make a payment based on the same or an unrelated transaction. For example, under 31 U.S.C. 71a, 237, a claimant has ten full years to present to the General Accounting Office a claim against the United States. We do not intend any diminution of that agency's authority to offset against a claim so presented any debt, however old, such claimant owes to the United States.

"Further, if the Government is sued there is no time bar to the assertion by the Government of claims arising out of the same transaction upon which it is being sued. The only change we are proposing in existing law is with respect to claims which would be time barred under the present proposal in an independent action and which do not arise out of the same transaction upon which the United States is being sued. Under the bill, these latter claims may be asserted only to offset the opposing party's claim in an amount not to exceed such party's recovery." (Hearing on H. R. 13652 before Subcommittee No. 2 of the House Committee on the Judiciary, 89th Cong., 2d Sess., at 8 (1966)). (Emphasis added.)

This statement was adopted in the Committee Reports of both Houses, as evidenced by the following statement from the House Committee Report:

"Subsection (f) of section 2415 contains carefully drafted provisions permitting the Government to assert its claims by way of offset or counterclaim in actions brought against the United States. Where the United States finds itself involved in litigation, it very often is to the interest of the Government to assert claims by way of counterclaim and the provisions of this subsection represent a very practical implementation and classification of the Government's rights in this regard. It is expressly provided that the limitations provided in the section will not prevent the assertion of a claim by the United States against the opposing party in such an action, or a coparty, or a third party when the claim of the United States arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. This merely gives the Government the right to a full hearing of all aspects of the case arising out of the same transaction or occurrence. When the claim of the United States does not arise out of the transaction or occurrence that is the subject of the

opposing party's claim and is time barred, it may only be asserted by the United States to the degree that it offsets the other claim and cannot exceed the amount of the opposing party's recovery.

"The testimony at the hearing on the bill noted the fact that this bill does not affect the authority of each agency to offset on its own books and without resort to court any claim it may have against a person to whom it is about to make a payment based on the same or an unrelated transaction. There is a 10-year statute of limitations which applies to claims against the United States filed with the General Accounting Office. This provision is found in title 31 of the United States Code, sections 71a and 237. This bill therefore does not affect that agency's authority to offset a claim presented within that time period any debt which the same claimant owes to the United States."

H. R. Rep. No. 1534, 89th Cong., 2d Sess. 6, 7 (1966). See also S. Rep. No. 1331, 89th Cong., 2d Sess. (1966).

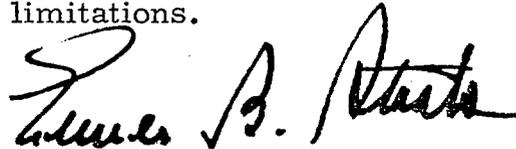
The application of 28 U.S.C. § 2415 to administrative setoff was also raised by the plaintiff in Atwater v. Roudebush, *supra*, where the Government was collecting a time-barred Federal Housing Administration debt by setoff against the plaintiff's final salary payment and his retirement annuity. However, the court concluded, based upon the common law doctrine of setoff and the legislative history of the statute of limitations cited above, that, even though the statute barred direct action by the Government to collect the debt, the Government could still recover the debt by administrative setoff against current payments to the debtor. 452 F. Supp. 622, at 632. We agree with the District Court's reasoning and conclusion and must respectfully disagree with the Assistant Attorney General's memorandum opinion.

Finally, we note that the Justice memorandum states that where a person seeks to dispute an offset, his action in so doing does not constitute a claim. We do not agree since we have held that a debtor could, if the debt were collected by means of setoff, assert his right against the United States for the alleged amount, and that such action would constitute a claim which could be

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submitted to our Office for adjudication on its merits, pursuant to our statutory authority contained in 31 U.S.C. § 71 (1976). See Matter of Nabisco, Inc., B-184506, October 29, 1975. Similarly, we know of no reason why the debtor could not pursue his claim in Federal courts under 28 U.S.C. §§ 1346(a)(2) or 1491 (1976). We note, for example, that the plaintiff in Tomakin v. United States, supra, asserted jurisdiction for repayment of the money deducted under the authority of 28 U.S.C. § 1346(a)(2). Therefore, we believe that a debtor's action in challenging an offset by asserting his right to the money which has been withheld does constitute a claim against the United States.

Accordingly, we conclude that the statute of limitations contained in 28 U.S.C. § 2415 has no application to the Government's collection of indebtedness through administrative setoff, and we are aware of no other statute which limits administrative setoff. Hence, the Government has the right to collect the indebtedness of its employees by means of setoff against monies owed to the employee even if direct action to collect the debt would be barred by the statute of limitations.



Comptroller General
of the United States