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D E C I S I O N
of 18 May 1994

Case Number: T 0900/90 - 3.2.3

Application Number: 87902755.5

Publication Number: 0270676

IPC: B05B 9/04

Language of the proceedings: EN

Title of invention:

Spray head with protective cap

Applicant:

KITABAYASHI, Seiichi, et al

Opponent:

-

Headword:

Spray head/KITABAYASHI

Relevant legal provisions:

EPC Art. 86(2), 86(3), 122, 122(2), 122(5)

EPC R. 65(1)

Keyword:

"Re-establishment of rights"

"Re-establishment in the time limit referred to in
Article 122(2) EPC (no)"

Decisions cited:

J 0007/82, J 0027/90, T 0191/82

Catchword:

Case Number: T 0900/90 - 3.2.3

D E C I S I O N
of the Technical Board of Appeal 3.2.3
of 18 May 1994

Appellant: KITABAYASHI, Seiichi
919-12, Oaza-Koshikiya
Ageo-shi, Saitama 362 (JP)

Representative: Helms, Joachim, Dipl.-Ing.
Bothmerstrasse 14
D-80634 München (DE)

Decision under appeal: Decision of the Senior Formalities Officer of the Receiving Section of the European Patent Office dated 25 July 1990 deeming the European patent application No. 87 902 755.5 to be withdrawn, and rejecting the application for re-establishment of rights.

Composition of the Board:

Chairman: C. T. Wilson
Members: F. E. Brösamle
J.-C. Saisset

Summary of Facts and Submissions

- I. European patent application No. 87 902 755.5 was filed on 25 April 1987.
- II. The renewal fee for the third year, due on 2 May 1989 was not payed by the due date.
- III. In a letter dated 8 August 1989 the EP0 informed the representative that according to Article 86(2) EPC the renewal fee could still be validly paid within six months of the due date with a surcharge.
- IV. In a communication under Rule 69(1) EPC and dated 15 December 1989, the representative was informed that, because the third year renewal fee remained unpaid on 2 November 1989 which was the end of the time limit of Article 86(2) EPC, the application was deemed to be withdrawn according to Article 86(3) EPC.
- V. By letter received on 17 February 1990 the representative filed a request for re-establishment of rights according to Article 122 EPC and paid simultaneously the corresponding fee and the renewal fee with the surcharge.
- VI. By decision dated 25 July 1990, the Receiving Section rejected the request as inadmissible on the grounds that the representative was mistaken in taking the date of the Rule 69(1) EPC communication as being the commencement of the 2 months period of Article 122(2) EPC because, where the Applicant or representative is already aware that the application has been deemed withdrawn, this communication does not have the effect

of starting the 2 months time limit of Article 122(2) EPC. The decision underlines that, in accordance with the circumstances of the cases the situation relating to the non-payment of the renewal fee was known to all the parties at the latest on 22 November 1989. Consequently, in order to be admissible the application for re-establishment should have been filed within 2 months from that date i.e. on 22 January 1990.

VII. On 25 September 1990 a notice of appeal was lodged against this decision. The prescribed fee was paid simultaneously. In the Grounds of Appeal filed on 15 November 1990, the European patent attorney, who is the authorized representative of the Applicant argued that:

On 15 November 1989 he informed the Japanese patent attorney of the Applicants that European patent application No. 87 902 755.5 was deemed to be withdrawn because of non-payment of the 3rd year renewal fee which had been due on 31 October 1989 and that there remained the possibility of restitutio in integrum.

As an internal precaution the secretary of the European representative made a note that the term for re-establishment was 15 January 1990.

During the absence of the European representative who went on vacation, his secretary received on 22 November 1989 a fax with the information to take any step possible for continuing the application.

This fax was replied to by the secretary on 24 November 1989. In this letter a term for re-establishment had been mentioned of approximately 15 January 1990. The letter and the fax had been put by the secretary in the front of the file for the purpose of presentation to the European representative after his return. But these documents had not been filed in the ordinary way.

Unfortunately the secretary failed to present the file to the European representative immediately on his return.

On 18 December 1989 the European representative received the communication according to Rule 69(1) EPC and informed the Japanese representative that the term for re-establishment was 18 February 1990 since he had not been informed by the secretary about the correspondence in the meantime, and this correspondence had not been filed in the usual place.

On 9 February 1990 the European representative received the instruction to file a request for re-establishment which he did on 16 February 1990.

He concluded that the date of removal of the cause of non-compliance was at the earliest 18 December 1989, and more likely 9 February 1990.

VIII. In a communication dated 28 October 1993 the Board gave the provisional opinion that the explanation given in order to demonstrate that in spite of due care the Appellants were unable to observe the time limit is not admissible because it aimed to support a re-

establishment in a former time limit of re-establishment which had already ended.

- IX. During oral proceedings held on 18 May 1994 the representative of the Appellants emphasized that the removal of the cause of non-compliance was the receipt of the communication under Rule 69(1) EPC and, taking into account namely the 10 days of Rule 78(3) EPC, the request he filed on 17 February 1990 was filed within the 2 months of Article 122(2) EPC because the date of the communication was the 15 December 1989 and the end of the time limit would have been 25 February 1990. He referred to decision T 191/82, OJ EPO, 1985, 189, to assert that because the facts are very similar, the Appellants have to be restored in their rights.

Reasons for the Decision

1. The appeal is admissible.

2. The first point at issue in the present case is whether or not the request for re-establishment of rights filed on 17 February 1990 before the Receiving Section was filed in due time, i.e. within the 2 months time limit of Article 122(2) EPC first sentence.
 - 2.1 The decision J 0007/82, OJ EPO 1982, 391 (point 3 of the Reasons) makes clear that the removal of the cause of non-compliance is a matter of fact which has to be determined in the individual circumstances of each case. This decision states also that, "when the receipt of a notification under Rule 69(1) EPC is relevant, for the purpose of Article 122(2) EPC, it is the fact of

actual receipt ... which is significant". That means that there could be cases in which the receipt of the notification under Rule 69(1) EPC can be regarded as the removal of the cause of non-compliance. This was also clearly stated in point 2.5 of the Reasons of the decision J 0027/90, OJ EPO 1993, 422.

- 2.2 However, in all cases in which the receipt of the notification under Rule 69(1) EPC can be regarded as the removal of the cause of non-compliance, it has to be clearly established that neither the representative nor the Applicant were aware that the application had been deemed to be withdrawn before the receipt of that notification. In the present case it appears from the notice of appeal that the representative was aware of this fact since, at least, the 15 November 1989 and the Applicants since, at least, the 22 November 1989.
- 2.3 Consequently, as stated in the impugned decision, the request for re-establishment of rights received on 17 February 1990 was filed after the 2 months time limit of Article 122(2) EPC, and then was not admissible.
3. In the Statement of Grounds of Appeal, the Appellants seem to envisage two different and consecutive possibilities relating to the date of the removal of the cause of non-compliance:
- (i) The 15 November 1989 as determined by the secretary (with an end of the 2 months time limit for re-establishment fixed approximately on 15 January 1990).

(ii) The 18 December 1989, date on which the representative received the notification under Rule 69(1) EPC (ending on 18 February 1990 as determined by the European representative in the letter he sent to the Japanese attorney on 19 December 1989).

3.1 However, as stated above in point 2.2, it is clear that by the time they received this notification the European and Japanese representatives were aware that the end of the time limit of Article 86(2) EPC was the 2 November 1989 and that, according to Article 86(3) EPC, the application was deemed to be withdrawn. Consequently, the 18 December 1989 also cannot be considered as the date of the removal of the cause of non-compliance.

3.2 It appears consequently that, by considering the 18 February 1990 as the end of the 2 months time limit of Article 122(2), the European representative requests the Board to reestablish the Appellant in the first 2 months time limit of Article 122(2) EPC which has already run since the 2 November 1989, i.e. since the end of the time limit of Article 86(2) EPC. All the argumentation tends to demonstrate that in spite of the alleged due care, he and the Applicants were unable to observe this first time limit which ended approximately at the beginning of January 1990. However, following this argumentation would contravene Article 122(5) EPC which states that the provisions relating to the restitutio in integrum shall not be applicable to the non-observance of the 2 months time limit of Article 122(2) EPC. This applies to the request filed

on 17 February 1990 which is consequently non-admissible.

- 3.3 The Board underlined that in case T 0191/82 the failure to appreciate that the time limit had not been complied with related only to the time limit which in the present case is "the first one" (cf. supra point 3.2). There was not in that case a non-observance of a second 2 months time limit which related to Article 122(5) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

N. Maslin

C. T. Wilson