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D E C I S I O N
of 10 February 2004

Case Number: J 0016/02 - 3.1.1

Application Number: 96940410.2

Publication Number: 0873431

IPC: C23C 14/35

Language of the proceedings: EN

Title of invention:

Apparatus for affixing a rotating cylindrical magnetron target
to a spindle

Applicant:

VANDERSTRAETEN E. BVBA, et al

Opponent:

-

Headword:

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Relevant legal provisions:

EPC Art. 116(2)

EPC R. 67

Keyword:

"Oral proceedings before the Receiving Section"

"Substantial procedural violation (yes)"

"Reimbursement of the appeal fees (yes)"

Decisions cited:

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Catchword:

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Case Number: J 0016/02 - 3.1.1

D E C I S I O N
of the Legal Board of Appeal 3.1.1
of 10 February 2004

Appellant: VANDERSTRAETEN E. BVBA
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Representative: Leeming, John Gerard
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Decision under appeal: Decision of the Receiving Section of the
European Patent Office dated 22 April 2002
rejecting as inadmissible the request for
reestablishment of rights pursuant to
Rule 69(2) EPC.

Composition of the Board:

Chairman: J.-C. Saisset
Members: E. Lachacinski
J. H. P. Willems

Summary of Facts and Submissions

- I. The present appeal lies against the decision of the Receiving Section dated 22 April 2002 rejecting as inadmissible the request for re-establishment of rights pursuant to Rule 69(2) EPC and maintaining that the application No. 96940410 is deemed withdrawn as from 3 May 1999 because of non-payment of the third renewal fee and the penalty fee.
- II. The applicant was informed in a communication dated 8 December 1998 that the renewal fee for the third year was due on 31 October 1998 and that the renewal fee, together with an additional fee, could be validly paid until 30 April 1999.
- III. In a communication dated 10 June, the applicant was informed under Rule 69(1) EPC of a loss of rights since the application was deemed withdrawn as the fee for the third year and the additional fee had not been paid in due time.
- IV. In a letter dated 20 October 1999, received by the Office on 21 October 1999, the applicant requested *restitutio in integrum* under Article 122 EPC. The fee for this request, the renewal fee for the third year and the surcharge for late payment of that fee were paid on 20 October 1999.
- V. The applicant filed an appeal against the above decision with its letter of 3 May 2002, received by the Office on 6 May 2002. The grounds for appeal were filed by letter dated 26 June 2002, received by the Office on 27 June 2002.

VI. The Board sent a communication dated 22 July 2003. The appellant requests mainly that *restitutio in integrum* be granted immediately or in the event this request cannot be granted that the case be remitted to the department of first instance. Moreover, he requests that oral proceedings be held if none of the preceding requests can be granted immediately.

Reasons for the Decision

1. The request of the appellant, to grant immediately the requested *restitutio in integrum* cannot be acceded to because a decision on this matter would at least necessitate further investigation.
2. The Board will however remit the case to the first-instance department because of a substantial procedural violation.

In his request for *restitutio in integrum* filed before the first instance the applicant had requested oral proceedings in the event that the Receiving Section were to take an adverse decision. The request for oral proceedings was repeated in letters from the appellant dated 6 April 2000, 9 August 2000 and 9 January 2001.

3. Although according to Article 116(2) EPC the Receiving Section is entitled not to grant a request for oral proceedings, the applicant has the right to a decision on that request.

The right to be heard encompasses the right to have a party's requests taken into consideration, i.e. are subject to a decision on whether or not they are allowable.

The file does not show that the Receiving Section took the repeated requests for oral proceedings into consideration or that it decided on these requests.

By virtue of his requests for oral proceedings, the applicant could rely on such proceedings being appointed before the issue of an adverse decision or, if they were not appointed, on having the opportunity to file in writing new, more detailed submissions.

Not deciding on requests put before the Receiving Section constitutes a substantial procedural violation because it leaves the applicant uncertain whether his submissions have been taken into account at all and, under the circumstances of this case, deprives him of an opportunity for presenting his case appropriately.

In the absence of any reasons for acting otherwise, such substantial procedure violation leads to a remittal to the first-instance department (Article 10 of the Rules of the Boards of Appeal).

4. The request for reimbursement of the appeal fees under Rule 67 EPC is equitable and will therefore be ordered.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.
3. Reimbursement of the appeal fees is ordered.

The Registrar:

The Chairman:

S. Fabiani

J.C. Saisset