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D E C I S I O N
of 15 September 2004

Case Number: J 0027/03 - 3.1.1

Application Number: 00830271.3

Publication Number: 1146027

IPC: C05F 17/02

Language of the proceedings: EN

Title of invention:
Treatment of organic wastes

Applicant:
BIOE S.R.L.

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 79(2)(3), 94(2)(3), 122(5)
EPC R. 78(2)

Keyword:
"Failure in postal delivery within the time period set out by
Rule 78(2) EPC (no)"
"Request for restitutio in integrum for payment of examination
fee and designation fee (no)"

Decisions cited:
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Catchword:
-



Case Number: J 0027/03 - 3.1.1

D E C I S I O N
of the Legal Board of Appeal 3.1.1
of 15 September 2004

Appellant: BIOE S.R.L.
Viale Zara, 52
I-20100 Milano (IT)

Representative: Gandini, Claudio
Via Durini 23
I-20122 Milano (IT)

Decision under appeal: Decision of the receiving section of the
European Patent Office dated 22 April 2003
refusing the request of restitutio in integrum
concerning the European patent application
No. 00830271.

Composition of the Board:

Chairman: J.-C. Saisset
Members: M.-B. Tardo-Dino
A. Pignatelli

Summary of Facts and Submissions

- I. The appeal is from a decision of the Receiving Section dated 22 April 2003 to refuse the request of *restitutio in integrum* of the applicant because of the non payment, within the time limit for payment, of the examination fee (Article 94(2) EPC) and the designation fee (Article 79(2) EPC) concerning the application filed under No. 00830271.
- II. The relevant facts and steps in the procedure of the case are the following:
- the applicant was informed by a letter dated 5 September 2001 from the Receiving Section that its application would be published on 17 October 2001
 - with a communication pursuant to Rule 50 EPC dated 23 October 2001 the Receiving Section informed the applicant that the date of the European search report was 17 October 2001 and drew the attention of the applicant to the fact that the examination fee and the designation fee must be paid according respectively to Article 94(2) and (3) EPC and Article 79(2) and (3) EPC within six months after this publication date
 - on 21 June 2002 the Receiving Section issued a communication pursuant to Rule 85a and 85b EPC noting that the examination fee and designation fee had not been paid within the time limit specified and informing the applicant that he could still validly pay them within a period of

grace of one month after the communication provided that the surcharge under Rule 85b EPC and under Rule 85a EPC was paid at the same time.

- with a communication dated 19 September 2002 the Receiving Section gave the applicant notice of loss of rights pursuant to Rule 69(1) EPC
 - with a fax of 15 November 2002 confirmed by a letter received on 19 November 2002, the applicant requested reestablishment of rights, arguing that he paid the fees under discussion immediately after he opened the "stamped" envelope containing the communication of 21 June 2002, namely on 2 August 2000 (sic).
- III. The Receiving Section refused the request for *restitutio in integrum* because the time limit for payment of the examination and designation fees was excluded from *restitutio in integrum*.
- IV. The applicant filed an appeal against this decision and paid the appeal fee on 26 June 2003.
- V. He requested that:
- the decision of the Receiving Section be set aside,
 - he be allowed to pay the missing amount of the examination fee and seven designations fees including the 50% surcharge
 - the case be remitted to the Examining Division for further prosecution.

Auxiliarly he requested that oral proceedings be held should the Board not accept his request.

VI. The appellant's arguments supporting his request can be summarised as follows:

- he paid the fees under discussion immediately after opening the stamped envelope of the communication dated 21 June 2002, namely on 2 August 2000 (sic)

- he intended to pay the examination fee and seven designation fees with surcharge of 50% but the assistant who was responsible therefor omitted both to pay the surcharge and to prepare the letter as he was instructed to do, to inform the EPO of the late payment due to the late receipt of the communication of 21 June 2002 setting the time limit of one month.

- he further indicated that at first sight he did not understand the meaning of the communication dated 21 June 2002 and by this time was relying on the application of the principle of good faith by the EPO in the case where the amount paid on 2 August 2002 would be insufficient.

He argued that he should have been requested by the EPO according to Rule 7(2) relating to Fees to select the states he wished to designate, and that the EPO did not apply the principle of good faith because of the above mentioned omission of his assistant.

Because this amount is actually not sufficient he suggests that given the established case-law (T 130/92) (J 11/85) the amount paid (€ 2180) could be considered an underpayment of €2400 covering the examination fee + 50% surcharges and at least two or three designations.

VII. Since the appellant in his last letter in response to the Board's communication expressed his intention to support his request and arguments and did not withdraw his request for Oral proceedings the Board scheduled Oral proceedings on 15 September 2004. On this date the Board, in the absence of any letter or fax or telephone call from the appellant announcing that he would not attend the oral proceedings, as the parties intending not to appear at the hearings usually do, the oral proceedings were actually held and the decision announced at the close of proceedings.

Reasons for the Decision

1. The appeal is admissible since the requirements of Article 106 to 108 EPC and Rule 64 EPC have been met.
2. The appellant has never disputed that the examination fee (Article 94(2) EPC) and designation fee (Article 79(2) EPC) at stake in the present case were excluded from the benefit of the *restitutio in integrum* by Article 122(5) EPC

His main argument relies on the assumption that the actual date of reception of the communication dated 21 June 2002 which set the time limit of one month was

2nd August 2002 according to Rule 78(2) EPC, and the only deficiencies were the omission of the letter informing the EPO about the reasons of the late payment due to the late received communication and the non payment of the surcharge of 50%.

3. However as already indicated in the communication, the only date stamp showing this date of "2 August 2002" is a personal stamp from the office of the Representative and not a stamp applied by the official postal services to the envelope. This serves only to prove that the mail was opened on this date but not when it was received.

The Board cannot accept the appellant's argument put forward in response namely that this fact was not dependent upon voluntary factors but was based on objective facts.

The appellant cannot pretend not to understand the difference between the circumstances taken into account by Rule 78 EPC in order to protect the parties against the possible hazards of the postal services and the holidays in a representative's office planned by the representative.

In fact Rule 78(2) EPC mentioned by the appellant to justify the delay in the payment - in so far as this rule provides exceptions in certain circumstances to the principle that the notification by registered letter is deemed to be delivered to the addressee on the tenth day following the posting -, does not apply in this case since the opening of the mail depends solely on the voluntary actions of the addressee or to

put it in other words on the organisation of his office, and cannot be considered to be "the later date" meant by this rule aiming at protecting the addressee against a delay independent of his own planned working time. Interpreting this rule in the sense suggested by the appellant would result in it lacking any sense.

Accordingly it is established that the examination and designation fees were not paid within the month after the communication dated 21 June 2002, the deadline according to Rule 78(2) EPC being the 1 August 2002.

As the Receiving Section stated, the examining fee and the designation fee are excluded by Article 122(5)EPC as soon as it is verified that the fee was not paid within the time limit.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

M. Fabiani

J. C. Saisset