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European Patent
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Boards of Appeal

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Case Number: J 01/ 85

02 5/85

DECISION
of the Legal Board of Appeal

of 20 February 1985

Appellant: WESTINGHOUSE ELECTRIC CORPORATION
Westinghouse Building
Gateway Center
Pittsburgh
Pennsylvania 15222
(US)

Representative: Marchant, James Ian et al
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Decision under appeal: Decision of the Head of Formalities Section of Directorate General 2 dated 3 July 1984 cancelling a decision of 11 April 1984 of the said Section which allowed a request for re-establishment of rights under Article 122(4) EPC in respect of European patent application No. 82300694.5.

Composition of the Board:

Chairman: R. Singer
Member: P. Ford
Member: O. Bossung

SUMMARY OF FACTS AND SUBMISSIONS

- I. On 11 February 1982, the appellant filed European patent application No. 82300694.5, claiming priority from a national patent application filed in the United States of America on 12 June 1981.

- II. The European search report was published on 22 December 1982 and a request for examination was filed on 24 May 1983. The representative who was acting for the appellant at that time sought to pay the examination fee by sending a cheque drawn on his firm's account to the London bank at which the European Patent Organisation has an account. The cheque was received by the bank on the last possible day for payment, 22 June 1983, and credited to the account of the European Patent Organisation on the same day. The European Patent Office subsequently received a written advice from the bank that the amount of the fee had been credited to the European Patent Organisation "under the usual reserve".

- III. On 13 July 1983, the bank debited the amount of the fee from the Organisation's account as an "unpaid item", the cheque having been returned unpaid with the answer "refer to drawer, please represent". On the same day, the bank represented the cheque and it was accepted. Hence the Organisation's account was again credited, on the same day, with the amount of the fee.

- IV. The representative who was acting for the appellant at that time was sent a communication on 12 August 1983 stating that the fee had been paid on 13 July 1983, i.e. after expiry of the period laid down in Article 94(2) EPC. The communication stated that the deficiency could be rectified in accordance with Rule 85 b EPC by payment of a surcharge within the appropriate time limit. The communication was sent by registered post but there is no proof that it was received by the representative concerned.

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- V. By a further communication dated 28 September 1983, the representative concerned was informed that the European patent application was deemed to be withdrawn because, within the time limits pursuant to Article 94(2) EPC and Rule 85 b EPC, no examination fee was paid. Reference was made to the earlier letter of 12 August 1983. The representative was informed that if he considered this finding was inaccurate he might apply for a decision on the matter under Rule 69(2) EPC. This communication was also sent by registered post but there is no proof that it was received by the representative concerned.
- VI. On 31 January 1984, the amount of the fee which had been paid by means of the cheque was refunded to the representative concerned.
- VII. On 19 March 1984, the European Patent Office received an Authorisation signed on behalf of the appellant appointing the representatives presently acting for the appellant and revoking the authorisation of the previous representative. In a letter received with this Authorisation, the present representatives requested re-establishment of rights in respect of the application and the letter was accompanied by detailed statements in support of the request. The fee for re-establishment of rights was paid on 15 March 1984.
- VIII. By a decision dated 11 April 1984, a Formalities Officer of Directorate General 2 purported to allow the request for re-establishment of rights but this decision was sought to be cancelled by the further decision dated 3 July 1984 which is the subject of the present appeal proceedings, on the ground that the decision of 11 April 1984 had been made by a department not competent to decide upon the omitted act. It was said that the competent department was the Receiving Section.
- IX. By letter dated 21 August 1984, received on 23 August 1984, the appellant's present representatives gave notice of appeal against the decision of 3 July 1984. The appeal fee was duly paid.

X. In the Statement of Grounds of the appeal, filed in due time on 2 November 1984 it was submitted that the decision of 11 April 1984 was final and could not be cancelled. Alternatively, it was submitted that the department concerned was competent to make that decision or that the Office had a discretion not to cancel a decision made by the wrong department. It was also submitted that if the examination fee was credited to the bank account of the European Patent Organisation on 22 June 1983, then the fee was paid by the due date, notwithstanding that the cheque was not met until 13 July 1983. Further, if the surcharge was due and payable, in the special circumstances of the case, failure to pay it could be overlooked in accordance with Article 9(1) of the Rules relating to Fees. The appellant reserved the right to request oral proceedings if the Legal Board of Appeal could not allow the appeal without them.

REASONS FOR THE DECISION

1. The appeal complies with Articles 106 to 108 and Rule 64 EPC and is, therefore, admissible.
 2. The appellant's present representatives have raised many alternative arguments and points in the Statement of Grounds. The Board finds it convenient to examine first the question whether the examination fee without surcharge can correctly be considered to have been paid in due time, notwithstanding that the payment was credited to the bank account "under the usual reserve" and that the cheque was only met at a later date.
 3. Article 5(1)(a), Rules relating to Fees, allows payment of fees due to the European Patent Office by payment to a bank account held by the Office. Article 8(1)(a) of the same Rules provides that the date of payment shall be the date on which the amount of the payment is entered in the bank account. "Payment" is a general term which includes payment by cheque. In a case in which a cheque is delivered to the Office, the date of receipt of the cheque at the Office will be considered as the date of payment "provided that the cheque is met". (cf. Articles 5(1)(d) and 8(1)(c) of the Rules).
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4. The appellant invites the Board to take the view that, having regard to the provisions of the Rules relating to Fees, where a payment is made to a bank account held by the Office by means of a cheque that is only met at a later date, the original date of entry in the account can be considered as the date of payment, notwithstanding that the amount paid is subsequently debited from and again credited to the account.
5. Under English banking practice, a cheque which is returned "refer to drawer, please represent" will normally be represented accordingly. In the present case, this was done and the cheque was met on first representation.
6. Enquiries made by the Board have elicited the information that the "usual reserve" mentioned by the bank in its payment advice to the Office is the reserve normal in English banking practice, namely, that if a cheque is not met, the amount credited can subsequently be debited from the customer's account. In the meantime, however, the credit is an effective cash credit. The customer can draw against it provided that he is prepared to accept the risk - which may well be theoretical rather than real in the case of a large organisation most of whose clients' cheques are met when first presented - of having to pay overdraft interest if the cheque is not met.
7. In the circumstances of the present case, therefore, it seems proper to consider that the fee due was paid in time according to Article 8(1)(a), Rules relating to Fees. The cheque was met when represented and since the account was debited and once again credited with the amount of the fee on the same day, in fact the European Patent Organisation was not financially at risk at any time. If the cheque had not been met, the situation would have been different. It might also be different if the legal relations between the bank and the European Patent Organisation were not the same as they were in this case.
8. It follows that no rights were lost by the appellant and that the communications of 12 August and 28 September 1983 were issued without cause. Furthermore, Article 122(1) EPC is so worded as to be applicable only where there is a loss of a right or of a means of redress (cf. Case No. J 01/80, OJ EPO 1980, 289).

Hence the application for re-establishment of rights was made without cause and the fee for re-establishment of rights was wrongly accepted by the European Patent Office and must be refunded to the appellant. It also follows that the decision purporting to re-establish rights was without effect and that it is unnecessary to consider any arguments relating to that decision or any of the other points raised by the appellant's present representatives.

9. Having regard to the special procedural difficulties of the present case, the Board does not consider that the procedure adopted constituted a substantial procedural violation within the meaning of Rule 67 EPC which justifies reimbursement of the appeal fee.

ORDER

For these reasons,

it is decided that:

1. The decision of the Head of Formalities Section of Directorate General 2 dated 3 July 1984 is set aside.
2. It is declared that European patent application No. 82300694.5 is not deemed to have been withdrawn in accordance with the provisions of Article 94(3) EPC.
3. Reimbursement of the fee for re-establishment of rights is ordered.