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D E C I S I O N
of 20 May 1994

Case Number: J 0027/92 - 3.1.1

Application Number: 89913194.0

Publication Number: 0446250

IPC: G06F 13/10

Language of the proceedings: EN

Title of invention:
Control for a rotating media storage system

Applicant:
Maxtor Corporation

Opponent:
-

Headword:
Media Storage System/MAXTOR

Relevant legal norms:
EPC Art. 113(1), 114(1)
EPC R. 85b
Art. 9(1), fourth sentence, Rules relating to Fees

Keyword:
"Good faith - EPC courtesy services - EPO oral communications - small amount lacking"

Decisions cited:
J 0011/85, J 0020/85, J 0002/87, J 0003/87, J 0012/87, J 0001/89, J 0003/90, D 0006/82, T 0130/82, T 0290/90, T 0905/90, T 0473/91

Headnote:

I. The principle of good faith governing relations between the EPO and applicants applies to courtesy services provided by the EPO. Where such service has been rendered, an applicant is entitled to rely upon its content if the communication from the EPO was the direct cause of the action taken and, on an objective basis, it was reasonable for the appellant to have been misled by the information. These principles apply not only to written communications but also to oral communications by the EPO (paragraphs 3.1 to 3.3 of the Reasons for the Decision).

II. Rule 85b EPC does not take precedence over application of Article 9(1), fourth sentence, of the Rules relating to Fees (J 11/85, OJ EPO 1986, 1) followed; see paragraphs 4.1 and 4.2 of the Reasons for the Decision).

III. It is reasonable to define the concept of a "small amount lacking" in Article 9(1), fourth sentence, Rules relating to Fees, as a fixed proportion of the amount of the particular fees to be paid. At most 20% of the fee to be paid may be regarded as small within the meaning of the said provision (T 290/90 (OJ EPO 1992, 368) followed; T 905/90 (OJ 1993 Special Edition, 69) distinguished; see paragraph 5.6 of the Reasons for the Decision).

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: J 0027/92 - 3.1.1

D E C I S I O N
of the Legal Board of Appeal 3.1.1
of 20 May 1994

Appellant: Maxtor Corporation
211 River Oaks Parkway
San Jose, CA 95134 (US)

Representative: Zenz, Joachim Klaus, Dipl.-Ing.
Patentanwälte Zenz, Helber & Hosbach
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D-45133 Essen (DE)

Decision under appeal: **Decision of the Receiving Section of the European Patent Office dated 20 February 1992 refusing a request for refund of the surcharge on the examination fee in relation to European patent application No. 89 913 194.0.**

Composition of the Board:

Chairman: R.L.J. Schulte
Members: G. Davies
J.C.M. de Preter

Summary of Facts and Submissions

I. The Applicant filed international application PCT/US 89/05033 on 7 November 1989, claiming the priority of a national patent application filed in the United States of America on 10 November 1988. This application was given the European patent application number 89 913 194.0. The international search report with respect thereto was published on 17 May 1990. International preliminary examination was requested on 8 June 1990, electing the EPO.

II. The Applicant's representative filed Form 1200 for entry into the regional phase before the EPO on 10 May 1991, including a request for examination and paid on the same day 80% of the examination fee, i.e. DM 2240, instead of the full amount of DM 2800. The Receiving Section notified the representative that a valid request for examination had not been filed within the period prescribed in Article 94(2), read together with Articles 150(2) and 157(1) EPC and Rule 104b(1) EPC, which had expired on 10 May 1991, since the full examination fee had not been paid. He was invited to remedy the deficiency by paying the remainder of the fee together with a surcharge in accordance with Rule 85b EPC. On 8 June 1991, the representative duly paid the remainder of the fee and the surcharge.

III. In a letter dated 18 June 1991 and filed on 20 June 1991, the representative requested the refund of the surcharge. He based his request on two main grounds.

First, he stated that he had been misled by information voluntarily given to him on the telephone by an officer of the EPO on 10 May 1991 to the effect that a 20%

reduction in the examination fee was available for cases under Chapter II PCT. He stated that this information had been supplied in the course of a telephone call that he had made, in the presence of an assistant, to the enquiry office of the EPO in Munich to check his recollection that the examination fee had to be paid within the 30 month deadline, i.e. that day. The lady to whom he spoke had checked this point with a colleague prior to confirming that the fee was due that day but had gone on to draw his attention to the 20% reduction. Thereafter, the representative had checked the information given with the EPC (Article 14(2) and (4), Rule 6(3) and Article 12 of the Rules relating to Fees) but, due to pressure of time, he had not checked up on further references in these provisions and had mistakenly believed these to confirm that the 20% reduction was available. He had not made a note of the name of the person with whom he had spoken.

Second, he asked the EPO to exercise its discretion under Article 9(1), fourth sentence, of the Rules relating to Fees according to which the EPO may, where this is considered justified, overlook any small amounts of fees lacking without prejudice to the rights of the person making the payment.

Finally, if a refund of the surcharge was not possible, the representative stated that he would be prepared to file a request for re-establishment of rights.

IV. By fax dated 12 July followed by a letter dated 26 July 1991, the Receiving Section rejected the representative's request, finding that Article 9(1) of the Rules relating to Fees was not applicable in this case because the underpayment in question was not a "small amount", according to the decision in case J 11/85 (OJ EPO 1986, 1). Moreover, there was

insufficient evidence that the representative had been given wrong information by an employee of the EPO. It was said that re-establishment of rights was not an appropriate remedy because the required fee and surcharge had been paid within the period of grace and there were therefore no lost rights to be re-established.

V. On 19 August 1991, the representative requested reconsideration of the communication in the light of the following additional arguments:

In Decision J 11/85, referred to in the communication, the underpayment had been 12½%; 10% was not an upper limit and Article 9(1), fourth sentence, Rules relating to Fees, gave the EPO a discretion to be exercised when considered justified by the circumstances of a particular case.

The evidence put forward concerning the telephone conversation between the representative and an officer of the EPO was reasonable and supported by the evidence of his assistant who had been a witness to the conversation which she had listened into over a loud-speaker system. The conversation had taken place in German; hence, his assistant had been able to understand even the details thereof. The enquiry had been made as information from the enquiry office was deemed to be the safest and most reasonable way to check up on the deadline. The representative had been under time pressure, because he had received orders to enter the European national phase in relation to the present application and three other PCT applications only the previous day, 9 May 1991, a public holiday. Any payment due on 10 May 1991, therefore, had to be made by telegraphic order. He asked the EPO to investigate the matter, by checking with the EPO personnel who had been

on duty in the enquiry office on the day in question as he had been misled in relying on the information volunteered about the 20% discount. In this letter, the representative gave the date of the telephone conversation wrongly as 10 **June** 1991 instead of 10 **May** 1991.

VI. On 12 September 1991, for the first time, the Receiving Section asked the enquiry office of the EPO to investigate and provide evidence relating to the telephone conversation. The request did not mention the date on which the conversation was said to have taken place, i.e. 10 May 1991, but copies of the two letters dated 18 June 1991 and 19 August 1991 were enclosed with the request. On 9 October 1991, the Principal Directorate, Patent Information, EPO, located in Vienna, replied to the effect that it was not possible that wrong information could have been given to the representative's office. On 10 **June** 1991 the information desk in Munich had been normally staffed and the instructions to provide information only from trained staff members had been followed. The report suggested that the representative had misinterpreted the information received. It also stated that the representative was "looking for any reason to justify a claim for reimbursement of the surcharge and avoid to accept his own mistake".

It is noted that the investigation was carried out in relation to the wrong date, i.e. 10 **June** 1991 and not 10 **May** 1991.

The report was not made available to the representative who therefore had no opportunity to present comments on the evidence contained therein before the decision of the Receiving Office was issued.

VII. By Decision dated 20 February 1992, the Receiving Section rejected the request for refund of the surcharge. Throughout the decision, the date of the alleged telephone conversation was given as 10 **June** 1991. The decision was based on the following grounds:

Having failed to pay the examination fee in full within the time limit laid down in Article 150(2) EPC, three alternative remedies were available to the Applicant, namely, either the application of Article 9(1), fourth sentence, of the Rules relating to Fees, or the payment of the shortfall together with a surcharge under Rule 85b EPC, or, finally, the filing of an application for re-establishment of rights under Article 122 EPC. These were alternative and not cumulative remedies. Because the representative had already made use of one of the three possible and parallel remedies, by paying the missing amount of the examination fee together with the surcharge, he could no longer avail himself of the other two parallel remedies.

As regards Article 9(1), fourth sentence, of the Rules Relating to Fees, according to the jurisprudence of the Legal Board of Appeal, an underpayment of about 10% may be considered to be a small amount (J 11/85, *supra*). The Receiving Section was of the opinion that the missing amount in the present case, DM 560, i.e. 20% of the sum due, did not constitute a small amount and that an underpayment of 20% could not be considered to fall within the limits set by the Legal Board of Appeal in J 11/85.

Rule 85a EPC and Article 122 EPC had been held to be immediately available alternative remedies against the permanent loss of rights (J 12/87 (OJ EPO 1989 366)). Re-establishment of rights was not an appropriate remedy because the required fee and surcharge had been paid

within the period of grace provided for by Rule 85a EPC and thereafter there were no lost rights to be re-established. According to J 12/87, if the representative had wished to keep open the option of proceeding under Article 122 EPC, he should have filed an application for re-establishment of rights before making the payment under Rule 85b EPC and/or notify the EPO at the time of payment that the payment under the Rule was a supplementary measure and that he would prefer re-establishment of rights under Article 122 EPC.

So far as the information given to the representative by an unidentified officer of the EPO, which it was alleged had misled him into paying the wrong amount, the onus of proving the facts was on the representative and the Receiving Section was not satisfied that he had discharged this burden. His submissions were mere assertions, lacking any factual backing. The EPO had carried out detailed internal enquiries into the circumstances prevailing in the enquiry office on 10 **June** 1991. The information office had been normally staffed on that day and no unusual circumstance had been reported to support the representative's allegations. The submissions made by the representative were insufficient to establish that a telephone conversation had taken place between the representative and the enquiry office of the EPO and, if it had, that any oral information given by the EPO had been incorrect and not merely misunderstood.

The Receiving Section also stated that the representative was expected by reason of his qualification and professional capacity as a European professional representative to know the EPC and the Implementing Regulations thereto. The representative had failed to check adequately the relevant provisions of the Convention before acting on the information he said

he had received. According to the Disciplinary Board of Appeal, a mistake of law was not as a general rule a ground for re-establishment of rights (D 6/82, OJ 8/1983, 337).

VIII. On 21 April 1992, the Appellant filed a notice of appeal against this decision, paying the appeal fee on the same day. The statement of grounds of appeal was filed on 24 June 1992, requesting that the decision of the Receiving Section be set aside, and that both the surcharge paid pursuant to Rule 85b EPC and Article 2 of the Rules relating to Fees and the appeal fee be refunded.

IX. In support of the request, the Appellant put forward the following arguments:

The Receiving Section had failed to apply the provisions of Article 9(1), fourth sentence, of the Rules relating to Fees correctly and had misinterpreted the decision of the Legal Board of Appeal in J 11/85 (*supra*). In the Appellant's view, the "small amount" referred to in Article 9(1), fourth sentence, Rules relating to Fees, should be interpreted as covering cases where there existed "a reasonable relationship between the owed amount and the fine". This had been the criterion applied by the Legal Board in J 11/85 when finding that in the particular case the underpayment of 12.3% was considered a small amount. The Board had declared that 10% was as a rule a small amount, i.e. such percentage should be overlooked without detailed consideration of the circumstances. The Receiving Section, however, had wrongly applied the 10% as an upper limit, irrespective of the circumstances.

The Appellant further pointed out that all the fees due upon entering the regional phase before the EPO in this

case, amounted to over DM 7,000.00 (including the examination, search, designation, claims and national fees). The missing DM 560 in respect of the examination fee was indeed a "small amount" in relation to that total amount due.

With regard to the Receiving Section's argument that a professional representative is expected to know the law and practice relating to the EPC, the Appellant argued that a representative cannot be expected to have the entire Convention, implementing regulations and case law of the Boards of Appeal at his fingertips. It was submitted that, in certain circumstances, e.g. time pressure, as in the present case, it was too time consuming to check the Convention and case law of the Boards of Appeal and that it was reasonable, therefore, to try to overcome any uncertainty by making use of the enquiry office of the EPO. It was pointed out that the representative had contacted the enquiry office to obtain confirmation that the examination fee was due that same day, i.e. 10 May 1991. He had not asked the amount of the fee but only whether that day was the last day for payment of the examination fee without fine. To check such a gap "in active knowledge" was well in line with the care requirements to be expected of a representative.

The Appellant's representative also declared that the account he had given in previous communications to the Receiving Section of the facts relating to the conversation with the EPO enquiry office on 10 May 1991 was true. He reiterated the facts as follows: the person to whom the representative had spoken in the EPO enquiry office had not been sure whether the deadline expired that day or one month later and had checked the matter with a colleague or supervisor. Thereafter, she had confirmed that the deadline expired that day. She had

also volunteered the [false] information that, in the case of Euro-PCT applications, the examination fee was reduced by 20%. The representative's assistant, Ms. Milana Kovac, had been a witness to the conversation.

The fact that the Receiving Section's enquiries had failed to find evidence substantiating the facts described by the Appellant as having taken place in the morning of 10 **May** 1991 was not surprising since such enquiries had not been instituted immediately after the EPO had been informed thereof, about one month later, but only three months after the event.

The Appellant's representative considered the officer's findings under paragraph 14 of the contested decision to be a personal attack implying a conscious manipulation of the truth on his part. The present appeal had been lodged for this reason.

The Appellant also raised the question of principle whether European representatives are entitled to rely on the advice given by the enquiry office of the EPO.

Reasons for the Decision

1. The appeal is admissible.

2. *Issues of fact*

2.1 In this case, an issue of fact has arisen between the EPO and the Appellant. The Receiving Section in its decision stated that the onus of proof of the facts fell upon the Appellant's representative and that his

submissions in this respect were mere assertions lacking any factual backing.

2.2 Article 114(1) provides that, in proceedings before it, the EPO shall examine the facts of its own motion; it shall not be restricted in this examination to the facts, evidence and arguments provided by the parties. The Legal Board of Appeal has held in case J 20/85 (OJ EPO 1987, 102) that, when an issue of fact arises between the EPO and a party to proceedings before it, evidence relating to it should be taken as soon as the issue of fact arises. The Board finds, therefore, that the Receiving Section was obliged to examine the facts in this case of its own motion.

2.3 Moreover, Article 113(1) EPC provides that decisions of the EPO may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments. As stated by the Legal Board of Appeal in its decision in J 20/85, already referred to, " Article 113(1) EPC is of fundamental importance for ensuring a fair procedure between the EPO and a party to proceedings before it, especially when such an issue [of fact] arises. A decision against a party to proceedings upon such an issue of fact can only properly be made by the EPO after all the evidence on which such decision is to be based has been identified and communicated to the party concerned." In J 3/90 (OJ EPO 1991,550), the Legal Board of Appeal held further that Article 113(1) EPC is not observed in a case in which the EPO has made an examination of the facts unless the parties concerned have been fully informed about the enquiries made and the results thereof and have then been given sufficient opportunity to present their comments before any decision is issued. In that case it was also held that, when the EPO investigates facts, it must do so in a wholly objective manner.

2.4 The Appellant has maintained from the outset that its representative had made a mistake in paying only 80% of the examination fee due on 10 May 1991 as a direct result of misleading information given to him on the telephone by a member of the staff of the enquiry office at the EPO in Munich. According to the Appellant, the representative's assistant, Ms. Milana Kovac, had listened to the conversation over a loudspeaker system and corroborative evidence thereof could therefore have been made available. The Board finds that the Receiving Section committed a substantial procedural violation in the manner in which it dealt with the issues of fact in this case. Firstly, the Receiving Section has the duty to examine facts of its own motion (Article 114(1) EPC) as well as the power to take evidence under Article 117 EPC (see J 20/85). However, although the Appellant had offered to submit evidence from the alleged witness, Ms. Kovac, it did not respond to that offer. The office also failed to take evidence relating to the issue of fact from the enquiry office as soon as that issue arose. Although the Appellant had first raised the issue in a letter dated 18 June 1991, it was not until 12 September 1991 that the Receiving Section asked the EPO enquiry office to investigate the matter. The report of the enquiry office was dated 9 October 1991. Secondly, the enquiry office in its report stated that it had undertaken the requested investigation in relation to 10 **June** 1991. The fact that this was the wrong date and that the investigation was required in relation to 10 **May** 1991 was not noticed by the Receiving Section, which then relied on the report in its decision. Although the Appellant in the letter dated 19 August 1991 had given the date of the telephone conversation as 10 June 1991, this does not excuse the error on the part of the Receiving Section and the enquiry office because the correct date had been given in the original letter of 18 June 1991. This letter of

18 June 1991 was made available to the enquiry office and the Board considers that both the enquiry office and the Receiving Section were at fault in dealing with this matter, the former for investigating the facts in relation to the wrong day and the latter for basing its decision on the report of that investigation without noticing that it was based on a wrong date. Thirdly, the Receiving Section should have made the report of the enquiry office available to the Appellant, who should have been given sufficient opportunity to present comments thereon before any decision was issued. Finally, the Board observes that, when official investigations are made by an authority, it should make them in a wholly objective manner (c.f. case J 3/90, OJ EPO 1991, 550). In the opinion of the Board, both the enquiry office in its report dated 9 October 1991 and the Receiving Section in its decision of 20 February 1992 demonstrated a lack of objectivity in casting doubt on the motives and evidence of the Appellant's representative.

2.5 In conclusion, the Board finds that substantial procedural violations occurred during the handling of this case by the first instance.

3. *Good faith*

3.1 The Appellant has raised the question of principle whether European representatives are entitled to rely on the advice given by the enquiry office of the EPO. In this regard, the Board draws attention to the decision of the Legal Board of Appeal in case J 1/89 (OJ EPO 1992, 17), according to which the principle of good faith governing relations between the EPO and Applicants also applies to courtesy services provided by the EPO. Although the EPO tries to render voluntary services to Applicants whenever it is in a position to do so,

Applicants are not entitled to expect them. Only where such service has in fact been rendered is an Applicant entitled to rely upon its content, to the effect that, if erroneous information misled the Appellant into an action to the detriment of the proper processing of the application, he may not suffer any disadvantage therefrom (see also J 3/87, OJ EPO 1989, 3 and J 2/87, OJ EPO 1988, 330).

3.2 However, the above decisions referred also to the principle that parties to proceedings before the EPO - and their representatives - are expected to know the relevant provisions of the EPC, even when such provisions are intricate. Thus, for an Appellant to be able to rely on misleading information, it must be established that the communication from the EPO was the direct cause of the action taken and that, on an objective basis, it was reasonable for the Appellant to have been misled by the information (cf. J 3/87, *supra*). This will depend on the circumstances of each case.

3.3 The relevant communications in the cases referred to were written communications. The Board considers, however, that the same principles apply in the case of oral communications by the EPO, save that, in the case of an alleged oral communication, the question of whether the communication was or was not made is an issue of fact, which needs to be investigated and established in conformity with the EPC and the case law of the Boards of Appeal.

4. *Parallel Remedies*

4.1 The Receiving Section in point 11 of its decision stated that, because the representative had already made use of one of the three possible and parallel remedies available to him (i.e. payment of the remainder of the

fee together with a surcharge under Rule 85b EPC, re-establishment of rights under Article 122 and relief under Article 9(1), fourth sentence, of the Rules Relating to Fees), by paying the missing amount and the surcharge, he could no longer avail himself of the other two parallel remedies. According to the Receiving Section (point 4 of the decision), the three remedies are alternatives. On this point, the Board draws attention to the decision of the Legal Board of Appeal in case J 11/85 (OJ EPO 1986, 1). In that case, the Board recognised that the said three possible remedies are alternatives but also expressly decided that the EPC does not stipulate that the three legal provisions, i.e. application of Article 9(1), fourth sentence, of the Rules relating to Fees, payment of a surcharge under Rule 85b EPC and filing of an application for re-establishment of rights, rank in a specific order which has to be observed. Nowhere does the EPC indicate that application of Article 9(1), fourth sentence, of the Rules relating to Fees is out of the question so long as the possibilities under Rule 85b or Article 122 EPC are available. Rather the EPC provides the Applicant with the said three possibilities as alternatives. This is moreover appropriate since each of the said possibilities is intended to prevent the same detrimental effect, but each has different pre-conditions (point 8 of the reasons for the decision).

4.2 In this connection, the Board finds that Rule 85b EPC does not take precedence over application of Article 9(1), fourth sentence, of the Rules relating to Fees. Until Rule 85b EPC came into being by decision of the Administrative Council of 4 June 1981 (OJ EPO 1981, 199), Article 9(1), fourth sentence, of the Rules relating to Fees, was applicable in all cases where only a small amount was lacking at the time of payment of the examination fee. Such underpayment

therefore could be overlooked without prejudice to the rights of the person making the payment. The Administrative Council's decision of 4 June 1981 was clearly not intended to change the legal position obtaining prior to that date, since as a result of that Decision an additional possibility was to be created in the event of failure to file a request for examination in time (point 10 of the reasons for the decision).

5. *Article 9(1), fourth sentence, of the Rules relating to Fees*

5.1 According to Article 9(1) of the Rules relating to Fees, a time limit for payment shall in principle be deemed to have been observed only if the full amount of the fee has been paid in due time. However, the fourth sentence of that provision gives the EPO the discretion, where this is considered justified, to overlook any small amounts lacking without prejudice to the rights of the person making the payment.

5.2 In the present case, the request for examination was filed in due time on 10 May 1991, but the examination fee was not paid in full within the time limit. The Appellant has submitted that the 20% shortfall, amounting to DM 560, was a "small amount" within the meaning of Article 9(1) of the Rules relating to Fees, which in the particular circumstances of the case could be overlooked by the EPO. This submission was rejected by the Receiving Section on the ground that the underpayment of 20% could not be considered to be a small amount as defined by the Legal Board of Appeal in its decision in case J 11/85, already referred to.

5.3 In J 11/85, the Legal Board of Appeal stated *inter alia* that underpayments of the order of just over 10% could be considered to be small within the meaning of

Article 9(1), fourth sentence, of the Rules relating to Fees (point 7 of the reasons for the decision). The Board also expressed the opinion that 25% was not a small amount (point 3 of the reasons for the decision).

5.4 The justification for overlooking a small amount of a fee which is lacking has been considered in three further cases of the Boards of Appeal. In T 130/82 (OJ 1984, 172), the Board decided it was justified to overlook the amount lacking (which it found to be "small") since the reason for the underpayment was reliance in good faith on inaccurate information published by the EPO. In T 290/90 (OJ EPO 1992, 368), the Board found that the question whether it is justified to overlook such a small amount must be decided on an objective basis (having regard to all the relevant circumstances of the case), and not on a subjective basis. In reaching its decision that, in the circumstances of that particular case, 20% of the opposition fee could properly be regarded as a small amount for the purpose of Article 9(1) of the Rules relating to Fees, the Board took account of the fact that it was inappropriate to punish the Appellant for contending he was entitled to a reduction in the opposition fee and that the missing 20% in fact had been paid promptly after the due date.

5.5 In T 905/90 of 13 November 1992 (OJ EPO, 7/1993, xiii, headnote only, and see OJ EPO Special Edition 1993, 69), the Board held that the meaning of smallness in this context can best be determined by comparing the shortfall with the amount of the full fee and that arithmetically a shortfall of 20% could not be regarded as small. However, the Board also found that the question could not be decided in an absolute sense. Referring to the discretion conferred on the EPO by Article 9(1), Rules relating to Fees, to overlook small

amounts when this is considered justified, the Board held that such justification could validly stem from the Appellant having been misled by EPO practice, on the grounds of the equities being on the Appellant's side.

5.6 In the present case, the Applicant paid only DM 2240 of the examination fee of DM 2800. The sum outstanding is therefore DM 560, which amounts to 20% of the examination fee. Whether such an amount may be overlooked under Article 9(1), sentence 4, of the Rules relating to Fees, without prejudice to the rights of the person making the payment, depends on whether both the conditions of this provision are fulfilled, that is, the amount must be "small" and to disregard it must be considered justified.

"Small amounts" within the meaning of Article 9(1), sentence 4, of the Rules Relating to Fees, cannot be taken to be trifling amounts. If a trifling amount is missing, then it is EPO practice to overlook it in the interests of administrative economy. It is only when the amount is more than trifling that one can speak of a "small amount" within the meaning of Article 9(1), fourth sentence, Rules relating to Fees.

Hitherto, EPO practice has set the level of a small amount at the same level as the fees for further processing and re-establishment of rights, which at present are DM 150 (see Gall, **Münchner Gemeinschaftskommentar**, Article 51, no. 251). There is no doubt that an amount of DM 150 may be regarded as small in the light of the level of fees to be paid for a European application. However, the Board does not consider it useful to set a fixed upper limit on the definition of a small amount lacking, for that would lead to those paying fees being treated differently in a way it would be hard to justify. A missing amount of

DM 150, for example, would represent 20% of the third renewal fee (DM 750), 10% of the eighth renewal fee (DM 1500), approximately 5.4% of the examination fee (DM 2800), approximately 43% of the designation fee (DM 350) and 25% of the application fee (DM 600).

It seems reasonable to the Board, therefore, to define the concept of a "small amount lacking" in Article 9(1), fourth sentence, Rules relating to Fees, as a fixed proportion of the amount of the particular fees to be paid. The Board considers that at most 20% of the fee to be paid may be regarded as small within the meaning of the said provision. This percentage represents more or less a midpoint between the percentages 5.4% to 43%, if, following EPO practice to date, the fixed upper limit of DM 150 is taken as a basis. Moreover, the choice of 20% as the percentage to be considered a "small amount" will achieve the desirable end of making it possible to apply Article 9(1), fourth sentence, Rules relating to Fees, to cases where a party paying fees mistakenly seeks to take advantage of the 20% reduction in fees available in relation to Article 14(2) and (4) EPC under Rule 6(3) EPC and Article 12 of the Rules relating to Fees.

5.7 In the present case, it is justified to overlook the amount lacking in accordance with Article 9(1), fourth sentence, Rules relating to Fees, as the Applicant not only paid the amount lacking without delay, but would appear also to have been misled into paying only 80% of the fees as a result of information provided by the EPO. In exercising its discretion to overlook small amounts under that Article, the Board must consider whether to do so is justified having regard to all the relevant circumstances, including the equities of the case. In the present case, if the evidence of the Appellant's representative is correct, the shortfall occurred as a result of his having relied in good faith on inaccurate

and misleading information supplied by the EPO. The Board takes the view that it was reasonable in the circumstances for him to have relied on that information.

Moreover, the Receiving Section in this case failed to properly investigate issues of fact, thereby committing a substantial procedural violation. With regard to the Appellant's evidence, the Board finds that the Appellant is entitled to be given the benefit of the doubt. In a case such as this, where a period of three years has elapsed since the events at issue took place, making the preparation of evidence more difficult, the delay ought not to count to the detriment of the Appellant (cf. T 473/91 (OJ 1993, 630). As a matter of principle, considerably more weight should be attached to the evidence of the Appellant's representative contained in a contemporaneous account written when the matter was fresh in his memory, than to any new evidence which might result from any fresh enquiries held several years after the event.

Reimbursement of the Appeal Fee

6. The Board has considered whether, in accordance with Rule 67 EPC, the reimbursement of the appeal fee should be ordered as requested by the Appellant in the grounds of appeal. As stated in paragraphs 2.4 and 2.5, above, there was a substantial procedural violation of Articles 113(1) and 114(1) EPC by the Receiving Section in this case. In these circumstances, the Appellant is clearly entitled to reimbursement of the appeal fee.

Order

For these reasons,it is decided that:

1. The Decision of the Receiving Section dated 20 February 1992 is set aside.

2. Reimbursement of the surcharge and of the appeal fee is ordered.

The Registrar: The Chairman:

M. Beer R. Schulte