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**Datasheet for the decision
of the Enlarged Board of Appeal
of 25 March 2011**

Case Number: R 0018/10
Appeal Number: J 0008/09 - 3.1.01
Application Number: 04025916.0
Publication Number: 1652485
IPC: A61B 17/64
Language of the proceedings: EN

Title of invention:
Tension guide fixator

Applicant:
Rodrigues da Costa Martins, José Manuel

Opponent:

-

Headword:

-

Relevant legal provisions:
EPC Art. 112a(4)
EPC R. 131(2), 126(2), 104, 133(1)
Rules relating to fees Art. 7(1)(3)(4)

Keyword:

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Decisions cited:

-

Catchword:

Petition for review not deemed to have been filed (yes).



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Case Number: R 0018/10

D E C I S I O N
of the Enlarged Board of Appeal
of 25 March 2011

Petitioner: Rodrigues da Costa Martins, José Manuel
(Applicant) Prta. Luis Camoes, 3
P-2815-152 Ch. Caparica (PT)

Decision under review: Decision of the Legal Board of Appeal 3.1.01 of
the European Patent Office of 23 August 2010.

Composition of the Board:

Chairman: B. Schachenmann
Members: M. J. Vogel
A. Ritzka

Summary of Facts and Submissions

I. The petitioner (appellant before the Legal Board of Appeal) filed a petition for review under Article 112a EPC on 19 November 2010 contesting the decision of the Legal Board of Appeal dated 23 August 2010 in case J 8/09. This decision was posted on 31 August 2010 and notified on 6 September 2010.

II. By a communication posted as registered letter on 29 November 2010 the Enlarged Board of Appeal informed the petitioner that it was to be expected that the petition for review would be rejected as inadmissible because the requirement of the two months time limit according to Article 112a(4) in conjunction with Rule 108(1) EPC has not been met.

Furthermore the Enlarged Board of Appeal pointed out that the fee for the petition was only credited to a bank account held by the EPO on 11 November 2010, the bank order, however, was given on the 10 November 2010. Under these circumstances the payment of the fee would be considered observed only if a surcharge of 150 Euro is paid within a time limit of two months from notification of the communication.

III. By a fax of 17 December 2010 the petitioner informed the Board that he had not received its communication due to fax and e-mail problems. By a further fax dated 20 December 2010 the petitioner submitted that he posted his request for review on 10 November 2010, that means - in his view - in due time because in Portugal the date of the receipt of a registered letter is considered the same as the date of posting.

- IV. The communication of 29 November 2010 setting a two months time limit for filing further observations was resent by post on 21 December 2010 and by fax on 20 December 2010. However, no reply was made.

Reasons for the decision

1. Pursuant to Article 112a(4) in conjunction with Rule 108(1) EPC a petition for review based on the grounds of violation of right to be heard (Article 113 EPC) or another fundamental procedural defect under Rule 104 EPC shall be filed within two months of the notification of the contested decision. Within the same period the prescribed fee has to be paid.

2. The calculation of periods in cases before the EPO is governed by the provisions of the EPC and not, as the petitioner seems to assume, by Rules of the national law of the Contracting States. Thus, Rule 131(2), last sentence EPC applies. This provision rules that where a procedural step is a notification, the relevant event shall be the receipt of the document notified, unless otherwise provided. According to Rule 126(2) EPC in cases where notification is effected by registered letter such a letter is deemed to be delivered to the addressee on the tenth day following its posting. The decision in case J 8/09 was posted on 31 August 2010 with the consequence that regardless of the fact that actual notification occurred on 6 September 2010 the two months time limit under Article 112a(4) EPC ended pursuant to Rule 126(2) EPC on 10 November 2010.

3. With respect to the Decision of the President of the EPO dated 14 July 2007 (OJ EPO Special Edition No. 3, 2007, I.1, p. 119) concerning the application of Rule 133(1) EPC on the late receipt of documents an exception is made in so far as a document is deemed to be received in due time if it was posted five days before the expiry of the relevant time limit.
4. The question, however, whether this is the case here and the petition for review dated 19 November 2010 has to be considered filed in good time and is therefore admissible or not can be left open, since the fee for the petition for review prescribed in Article 112a(4) EPC was not paid in due time.
5. It is acknowledged that the bank order was given by the petitioner on the last day of the period, but the money was only credited to a bank account of the EPO on 11 November 2011. Pursuant to Article 7(1) of the Rules relating to fees, when deciding whether a relevant act has been made in due time, it is to be considered that the date of payment is the date on which payment is actually received by the office and not the date the order was given. Thus, the payment effected by the petitioner is considered to be late.
6. The Enlarged Board of Appeal is aware that, according to Article 7(3)(b) of the Rules relating to fees, a payment effected within the period in which it should have been made may be considered to be effected in good time under the condition that a surcharge of 10% on the relevant fee, but not exceeding 150 Euro, is paid. However, the petitioner has not paid any surcharge. Thus, the legal consequence is, that the petition is

not deemed to have been filed (Article 112a(4) EPC, Article 7(4) of the Rules relating to fees).

7. It is clear from the file that the petitioner received the letter dated 21 December 2010 inviting him to file further observations within two months, but that he chose not to do so.
8. As the petition for review is not inadmissible but is not deemed to have been filed, the fee has to be reimbursed.

Order

For these reasons it is decided that:

1. The petition for review is not deemed to have been filed.
2. The fee for the petition for review is reimbursed.

The Registrar:

The Chairman:

P. Martorana

B. Schachenmann