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D E C I S I O N
of 12 July 2001

Case Number: T 0656/00 - 3.2.3

Application Number: 94480134.9

Publication Number: 0712692

IPC: B24C 1/00, H01L 21/00, B24C 3/22

Language of the proceedings: EN

Title of invention:
An improved aerosol cleaning apparatus

Applicant:
International Business Machines Corporation

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 111(1), 113(2)
EPC R. 67

Keyword:
"Basis of decision - patentee (agreement of)"
"Decision re appeal - remittal (yes)"
"Reimbursement of the appeal fee (yes)"

Decisions cited:
T 0089/94

Catchword:
-



Case Number: T 0656/00 - 3.2.3

D E C I S I O N
of the Technical Board of Appeal 3.2.3
of 12 July 2001

Appellant: International Business Machines Corporation
Armonk
N.Y. 10504 (US)

Representative: de Pena, Alain
Compagnie IBM France
Département de Propriété Intellectuelle
F-06610 La Gaude (FR)

Decision under appeal: Decision of the Examining Division 2.3.02.097 of
the European Patent Office dated 10 February 2000
refusing European patent application
No. 94 480 134.9 pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: C. T. Wilson
Members: F. Brösamle
J. P. Seitz

Summary of Facts and Submissions

- I. The examining division summoned the applicant - appellant in the following - to attend oral proceedings pursuant to Rule 71(1) EPC to be held on 21 January 2000 with communication of 10 August 1999.
- II. The appellant informed the examining division with letter of 14 December 1999, received on **15 January 2000**, "that he will not be able to attend the oral proceedings on January 21 2000". He requested that a new claim 1 filed with the above letter be considered.
- III. With decision of 10 February 2000 the examining division refused European patent application No. 94 480 134.9 on the basis of claims 1 to 10 filed with the letter **of 5 May 1999, received on 12 May 1999**.
- IV. On 7 March 2000 the appellant lodged an appeal against the decision of the examining division paying the appeal fee on the same day and filing the statement of grounds of appeal on 3 June 2000. He pointed out that the examining division had not taken into account his letter of 14 (not 15 as mentioned in paragraph 2 of page 1 of the statement of grounds of appeal) December 1999 for the oral proceedings of 21 January 2000 and the written decision to refuse European patent application No. 94 480 134.9 of 10 February 2000.
- V. The appellant requested that the decision under appeal be set aside and that the case be remitted to the examining division - by implication - for further prosecution on the basis of claim 1 submitted with the letter of 14 December 1999, see last but one paragraph of the statement of grounds of appeal.

Reasons for the Decision

1. The appeal is admissible.
2. For the present decision it is of no relevance whether the appellant posted his letter of 14 December 1999 together with the amended claim 1 on 14 December 1999 or not. It is relevant that the EPO received this letter and claim 1 on 15 January 2000, (i.e. before the oral proceedings held on 21 January 2000), as can be seen from the perforation of the four pages of this letter and its enclosed claim 1 and also from "Avis de réception d'un envoi international" filed as "Copy (2)" by the appellant as evidence.
3. The examining division were therefore obliged to decide on the application in the form based on the new claim 1, (see in this respect decision T 89/94 of 5 July 1994, not published).
4. The above decision of the examining division - contrary to the provisions of Article 113(2) EPC - was therefore, objectively, not based on the text submitted to the EPO or agreed by the applicant (appellant), and must be set aside.
5. In these circumstances, the Board considers it appropriate to exercise its power under Article 111(1) EPC, and to remit the case to the examining division for further prosecution.

6. Since the violation of Article 113(2) EPC in the proceedings before the examining division constitutes a substantial procedural violation reimbursement of the appeal fee is ordered, Rule 67 EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the examining division for further prosecution.
3. Reimbursement of the appeal fee is ordered.

The Registrar:

The Chairman:

A. Counillon

C. T. Wilson