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D E C I S I O N
of 20 January 2003

Case Number: T 0343/02 - 3.5.1
Application Number: 93918513.8
Publication Number: 0605717
IPC: H04N 1/00, H04N 1/32

Language of the proceedings: EN

Title of invention:
Automatically initiated scanning system

Patentee:
Primax Electronics Ltd.

Opponent:
Dov and Ophira Rosolio Aharonson

Headword:
Scanning system/PRIMAX

Relevant legal provisions:
EPC Art. 108, R. 65(1), 69(1)
Rfees Art. 2(11), 8(1)(a), 9(1)

Keyword:
"Payment of appeal fee by cheque into EPO's Euro-account in London - small amount lacking due to deduction of bank charges"
"Admissibility of appeal (yes)"

Decisions cited:
G 0002/97, J 0011/85, T 0130/82, T 0109/86

Catchword:

1. Overlooking an underpayment of the appeal fee of less than two percent is justified pursuant to Article 9(1), last sentence, Rules Relating to Fees if this underpayment is due to the unexpected deduction of bank charges from the correct amount paid by cheque into the Euro account of the EPO in a country not having adopted the Euro system.
2. The notice of appeal referring to details of payment of the appeal fee and the fact of paying more than 98 percent of the appeal fee in time give clear indications within the meaning of G 2/97 that payment of the appeal fee was intended so that the principle of good faith obliges the EPO to notify the appellants if there is sufficient time to react before expiry of the period for payment.



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Boards of Appeal

Chambres de recours

Case Number: T 0343/02 - 3.5.1

**INTERLOCUTORY DECISION
of the Technical Board of Appeal 3.5.1
of 20 January 2003**

Appellant: Dov and Ophira Rosolio Aharonson
(Opponents) 425 Wobum Street
Lexington, Massachusetts 02173 (US)

Representative: Allsop, John Rowland
MacLeod & Co.
Bledington Grounds
Bledington,
Gloucestershire OX7 6XL (GB)

Respondent: Primax Electronics Ltd.
(Proprietor of the patent) 6F, No. 159, Kang Ning Street
Hsi Chih Town,
Taipei Hsien (TW)

Representative: Zeitler & Kollegen
Herrnstrasse 15
D-80539 München (DE)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 17 January 2002
rejecting the opposition filed against European
patent No. 0 605 717 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: S. V. Steinbrener
Members: E. Lachacinski
R. Randes

Summary of Facts and Submissions

I. The present appeal lies against the decision dated 17 January 2002 of the opposition division rejecting the opposition against European patent 0 605 717. A notice of appeal was filed in due time on 18 March 2002, indicating that the appeal fee was to be paid into the Euro account of the EPO with Barclays Bank of London.

II. The appeal fee was received in the EPO's bank account on 19 March 2002.

The EPO noticed that the received amount was too small, being 1.002,07 instead of 1.020 Euros.

A communication of loss of rights pursuant to Rule 69(1) EPC dated 17 May 2002 was consequently sent to the appellants' representative.

This communication mentioned that the appeal was deemed not to have been filed.

III. A written statement of grounds of appeal was received on 17 May 2002.

IV. By letter dated 22 May 2002 the representative explained that the appeal fee amounting to 1.020 Euros was paid by cheque into the EPO's account at Barclays Bank in London on 8 March 2002 [sic].

He enclosed the following documents as evidence:

- a copy of a cheque dated 13 March 2002 from RUESCH International - BANCO SANTANDER CENTRAL HISPANO MADRID to the European Patent Office for 1.020 Euros,
- a copy of a letter dated 14 March 2002 sent by the representative to Barclays Bank enclosing a European fee voucher and the above cheque to be paid into the EPO's account No. 8698 7266,
- a copy of EPO Form 1010 dated 14 March 2001 [sic] for the payment of fees and costs amounting to 1.020 Euros. This copy bears the inked stamp of Barclays Bank PLC City Service Centre in London dated 18 March 2002.

V. By letter dated 24 May 2002 the EPO was asked to transfer the sum of 17,93 Euros from deposit account 2805 0150 to cover the shortfall in the previous payment.

VI. In a communication dated 25 June 2002 the Board informed the parties of its provisional opinion that despite the small amount of the appeal fee lacking the appeal was considered admissible.

VII. Both parties reacted to this communication by submitting arguments for and against the admissibility of the appeal, respectively.

Reasons for the decision

1. It is not in dispute that the appeal fee of 1.020 Euros was not correctly received by the EPO within the two month time limit pursuant to Article 108 EPC, first sentence, since the Office's account at Barclays Bank in London was only credited with 1.002,07 Euros.

According to Article 8(1)(a) of the Rules Relating to Fees, the date on which any payment shall be considered to have been made to the Office is the date on which the amount of the payment or of the transfer is **actually** entered in a bank account held by the Office.

According to Article 108 EPC, second sentence, the notice of appeal shall not be deemed to have been filed until the entire appeal fee has been paid in due time.

The consequence of not paying the full fee in due time leads to the inadmissibility of the appeal pursuant Rule 65(1) EPC if the deficiency has not been remedied before expiry of the relevant time limit laid down in Article 108 EPC.

This also follows from Article 9(1) of the Rules Relating to Fees which states that 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.

2. In principle, the appellants' representative could have paid the missing sum before 27 March 2002 in order to comply with the above cited time limit under Article 108 EPC.

Rule 9(1) of the Rules Relating to Fees gives the person making the payment the opportunity to pay the amount lacking insofar as time remains before the end of the period for payment.

It appears that the appellants' representative did not pay the missing sum before the end of the appeal period because he was only informed that the appeal fee was not paid in full in the communication of loss of rights dated 17 May 2002.

The representative paid the missing sum on 24 May 2002 immediately after receiving the above communication.

Hence, the representative seems to have faithfully believed that the cheque sent complied with the provisions of Article 108, Rule 65(1) EPC and Article 2(11) of the Rules Relating to Fees. He apparently expected that no charge would be deducted by the bank from the amount of the cheque.

In his opinion the amount of 1020 Euros as correctly stated on the cheque was exclusively destined for the Office.

3. In his written submissions dated 30 August 2002 the respondent contests this opinion and argues that the question of which party has to bear the bank charges is the responsibility of the sender, i.e. the appellants.

He adds that the appellants unfortunately failed to advise the bank that the charge was not to be deducted from the amount of the cheque. Even in view of the case law of the boards of appeal, the respondent does not consider overlooking of the underpayment to be justified.

4. The Board agrees with the opinion of the appellants. It cannot be contested that the sum of 1020 Euros was correctly stated on the cheque exclusively intended for the EPO. The appellants pertinently declare in their written statement dated 24 September 2002 that it did not occur to them that the bank would suddenly institute a system whereby bank charges were deducted from the value of the cheque deposited before it reached the EPO. In this manner the appellants unintentionally paid 17,93 Euros too little.

The arguments given by the appellants in said statement about the introduction of Euro payments in January 2002 and the unexpected consequences which that would have in relation to member states which are not part of the Euro system are convincing.

In particular, it appears that in the past no bank charges were deducted from the amount of the cheque deposited in Pounds Sterling before it reached the EPO account.

Despite these unexpected consequences it is clear that the appellants acted in good faith. It would be unfair and inequitable to deprive the appellants of their right to appeal since the responsibility for the deduction of bank charges did not lie directly with them.

In the present case the appellants' non-consideration of the fact that bank charges are frequently levied on money transfers does not have any influence on the application of Article 9(1), last sentence of the Rules Relating to Fees.

5. The boards of appeal have decided that it was justified to overlook an underpayment of about 10% (see T 130/82, J 11/85, T 109/86 - Case Law of the Boards of Appeal of

the European Patent Office, 4th edition 2001, VI.G.3), the short-fall of 1,75% of the appeal fee consequently seeming to constitute a very small amount in the sense of Article 9(1).

6. The respondent contests the application of the above cited decisions. However, in the Board's view, the amount of the underpayment in the present case may fairly be considered to be a very small amount within the meaning of the above Article.

Although the reason for the underpayment in the present case was not reliance in good faith on inaccurate information published by the Office, as in decision T 130/82, the Board considers it justified under the present circumstances to overlook the small amount lacking at the date of expiry of the time limit for paying the appeal fee and filing the appeal.

Moreover, contrary to the respondent's statement, there is no mention in T 109/86 that the Office gave inaccurate information to the appellant.

7. The respondent also argues that the late payment of the remaining appeal fee by the appellants is without effect, since this payment was made after the end of the appeal time limit.

However, according to Article 9(1), last sentence, the Office may overlook any small amounts lacking without prejudice to the rights of the person making the payment, the date of paying of the remaining appeal fee being immaterial. The only issue is whether the underpayment is justified.

In the present case, the Board considers that for the above reasons the overlooking of underpayment of the appeal fee corresponding to 1,75% of the total fee cannot lead to the loss of the right to lodge an appeal.

8. As decided by the Enlarged Board of Appeal in G 2/97, the principle of good faith does not impose any obligation on the Boards of Appeal to notify an appellant of a missing appeal fee when the notice of appeal is filed so early that the appellant could react and pay the fee in time **if there was no indication - either in the notice of appeal or in any document filed in relation to the appeal - from which it could be inferred that the appellant would, without such notification, inadvertently fail to pay the full appeal fee in due time.**

The respondent has relied on G 2/97 and concludes that the Office was not obliged to react when the notice of appeal was filed so early that the appellants' could have reacted and paid the fee in time.

However in the present case, the Board finds that the notice of appeal referring to payment of the appeal fee into the EPO's Euro account with Barclays Bank in London and the fact of paying 98,25% of the appeal fee in time give clear indications that payment of the appeal fee was intended so that the principle of good faith obliges the EPO to notify the appellants if there is sufficient time to react before expiry of the period for payment.

The notice of appeal was filed on 18 March 2002, 9 days before expiry of the time limit for lodging an appeal. The incomplete appeal fee was received by the EPO on 19 March 2002.

The Office did not immediately react. It could have pointed out that the appeal fee was not paid in full - which could have been detected, for instance by an automatic screening procedure in the Cash and Accounts Department. The Office did not inform the appellants' representative that he had to make up the very small amount before the time limit expired, i.e. before 27 March 2002.

Instead, after almost two months, the registry of the Board, becoming aware of the situation after expiry of the time limit, issued a communication of loss of rights dated 17 May 2002, by which time it was too late for the appellants' representative to remedy the problem.

Under these circumstances it seems to the Board that the Office should not have kept silent during the remainder of the period for payment where the consequence of failure to pay within the time limit was that the appeal would be deemed not to have been filed.

In view of an impending loss of rights due to a minor sum, the department which received the fee ought to have reacted rapidly before expiry of the appeal time limit and have drawn attention to such an easily remediable deficiency.

9. Consequently it appears to the Board that in addition to the finding under Article 9(1) of the Rules Relating to Fees, the principle of protection of parties' legitimate expectations is a second reason why the appellants should not lose their right to lodge an appeal.

Order

For these reasons it is decided that:

The appeal is admissible.

The Registrar:

The Chairman:

M. Kiehl

S. Steinbrener