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**Datasheet for the decision
of 13 April 2012**

Case Number: T 1486/11 - 3.3.05

Application Number: 05796821.6

Publication Number: 1799325

IPC: B01D 46/42

Language of the proceedings: EN

Title of invention:

Axial flow scan testable filter system

Applicants:

Camfil Farr, Inc.
Morse, Thomas C.
Huza, Mark

Headword:

Testable filter system/CAMFIL FARR ET AL.

Relevant legal provisions:

EPC Art. 108, 122(1)
EPC R. 112(1)(2), 136(1)(2)

Keyword:

"Appeal fee filed late (yes)"
"Request and fee for re-establishment of rights filed late (yes)"
"Appeal deemed not filed (yes)"
"Re-imburement of appeal fee (yes) and of the fee for re-establishment of rights (yes)"

Decisions cited:

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Catchword:

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Case Number: T 1486/11 - 3.3.05

D E C I S I O N
of the Technical Board of Appeal 3.3.05
of 13 April 2012

Appellant: Camfil Farr, Inc., et al.
(Applicant) 2121 Paulhan Street
Rancho Dominguez, CA 90220 (US)

Representative: Börlin, Maria
Albihns.Zacco
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 28 January 2011
refusing European patent application
No. 05796821.6 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: G. Raths
Members: H. Engl
S. Hoffmann

Summary of Facts and Submissions

I. European patent application EP 0579821.6 was refused by the decision of the examining division, dated 28 February 2011.

II. A notice of appeal was received by letter dated 23 March 2011, in which the applicant/appellant requested that said decision be set aside and that the patent be granted.

The statement of grounds of appeal was filed by a letter dated 19 May 2011. Under cover of the same letter was an authorisation to debit the appeal fee from the representative's account.

III. A communication noting a loss of rights pursuant to Rule 112(1) EPC was issued on 21 July 2011, stating that the appeal fee had been paid out of time and that the appeal was accordingly deemed not to have been filed (Article 108, second sentence, EPC).

IV. The appellant subsequently filed a request for re-establishment of rights under Article 122 EPC and paid the corresponding fee, all under cover of a letter dated 15 September 2011.

The appellant put forward arguments as to why the appeal fee had been paid late.

V. The board issued a communication dated 26 January 2012 concerning the noting of the loss of rights pursuant to Rule 112(1) EPC and the request for re-establishment of rights pursuant to Rule 136(1) EPC.

The board provisionally observed that the payment of the fee for re-establishment of rights had been made and the request itself had been filed on 15 September 2011, that is outside the legally prescribed time limits. Therefore, the request for re-establishment of rights was deemed not to have been filed.

VI. By letter dated 2 April 2012, the appellant requested that a decision under Rule 112(2) EPC be issued with respect to the notice of loss of rights. A previously filed auxiliary request for oral proceedings was withdrawn (facsimile dated 12 April 2012).

VII. The appellant essentially argued as follows:

The appellant did not contest that the appeal fee was paid late but argued that this was attributable to a defective smart card which was used in the on-line filing process to authorise and to debit fees from the attorney's deposit account at the EPO.

When the representative's secretary later (24 March 2011) filed the notice of appeal by facsimile, she had unfortunately omitted also to file an order to debit the appeal fee from the account at the EPO. Such an oversight, which constituted a single mistake in a well-functioning system, could only be attributed to the "human factor".

The representative had become aware of the omitted payment only after his return from his summer holiday, on 15 August 2011, when a communication from the EPO dated 25 July 2011 in respect of the loss of rights,

first came to his attention. Therefore, the request for re-establishment of rights was filed in good time.

VIII. Requests

The appellant requested that its rights in relation to the time limit for paying the appeal fee be re-established and that the contested decision be set aside and the European patent be granted.

Reasons for the Decision

1. The late filing of the appeal fee was not disputed by the appellant.

As regards the failure to meet the time limit for filing a request for re-establishment of rights, the following is to be noted:

- 1.1 The payment of the appeal fee had to be made on 7 April 2011, but was only made on 19 May 2011 along with the filing of the statement of grounds of appeal. It follows that the payment of the appeal fee was out of time and that the appellant must have been aware of the belated payment. This was not contested by the appellant.
- 1.2 The communication noting the loss of rights was dated 21 July 2011. The appellant received this communication on 25 July 2011.
- 1.3 Rule 136(1) EPC defines *inter alia* a general period for requesting re-establishment, which is two months from

the removal of the cause of non-compliance with the period.

The two-month period of Rule 136(1) EPC is triggered by the removal of the cause of non-compliance, *i.e.* by the event which causes the party to become aware that a loss of rights had occurred.

1.4 Rule 136(1) EPC lays down that a request for re-establishment must include the filing of a written request and the payment of a fee. Rule 136(2) EPC adds the requirement of completion of the omitted act. In the present case, the omitted act (*i.e.* non-payment of the appeal fee) was already completed on 19 May 2011 by payment of the appeal fee.

1.5 It follows that in this case the two-month limit for the request for re-establishment expired on 19 July 2011 (19 May 2011 + 2 months).

1.6 Apparently, the appellant considered the starting point of the two-month period pursuant to Rule 136(1), first sentence, EPC, to be either the day on which the representative personally took note of the content of the communication from the EPO concerning the loss of rights (15 August 2011) or, in any event, the date on which this communication arrived at his office (25 July 2011).

However, the start of the two-month period is the moment at which the appellant – exercising the due care stipulated by Article 122(1) EPC – was no longer prevented from performing the payment of the appeal fee (see M. Singer / D. Stauder (Editors), "*Europäisches*

Patentübereinkommen: Kommentar", 3rd edition, published by Carl Heymanns KG, Köln, Germany, Article 122, note 107). In the present case, the payment of the appeal fee was made on 19 May 2011. Had all due care been exercised, this payment could not have been made without its belatedness being noticed.

- 1.7 Accordingly, the two-month time limit for filing a request for re-establishment of rights expired on 19 July 2011 (19 May 2011 + 2 months). The period for paying the fee for re-establishment of rights expired on the same date.
- 1.8 Since both the payment of the fee for re-establishment of rights and the request for re-establishment of rights were only made on 15 September 2011, both acts were performed after the expiry of the prescribed time period. The request for re-establishment of rights is therefore deemed not to have been filed (Rule 136(1), last sentence, EPC).
2. It follows from point 1.8 above that the loss of rights pursuant to Rule 112(1) EPC, as communicated to the appellant by official letter dated 21 July 2011, cannot be remedied by way of *restitutio in integrum*. Consequently, pursuant to Article 108, second sentence, EPC, the appeal is also deemed not to have been filed.
3. As the appeal had not been validly filed, the appeal fee and the fee for re-establishment of rights have to be reimbursed.

Order

For these reasons it is decided that:

1. The request for re-establishment of rights is deemed not to have been filed.
2. The appeal is deemed not to have been filed.
3. The appeal fee and the fee for re-establishment of rights are to be reimbursed.

The Registrar

The Chairman

C. Vodz

G. Rath