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Bezeichnung der Erfindung: Inflatable air pump and method for making an  
Title of invention: air pump  
Titre de l'invention :

Klassifikation / Classification / Classement : A 47 C 27/08

### ENTSCHEIDUNG / DECISION

vom / of / du 13 February 1987

Anmelder / Applicant / Demandeur : Phillips, William E.

Patentinhaber / Proprietor of the patent /  
Titulaire du brevet :

Einsprechender / Opponent / Opposant :

Stichwort / Headword / Référence : Cash payment to Post Office/PHILLIPS

EPO / EPC / CBE Articles 5 and 8(1)(a) of the Rules relating to Fees

Kennwort / Keyword / Mot clé :

"Cash payment to Post Office on final day"- "legal equivalent to entry into account held by EPO"- "payment considered made in due time"

#### Leitsatz / Headnote / Sommaire

- I. If the actual date of entry of a payment is after expiry of a time limit for such payment but, at a date earlier than the actual date of entry of the payment and within the time limit, a situation exists which is legally equivalent to an entry of the payment into such account, then for the purpose of Article 8(1)(a) of the Rules relating to Fees, such earlier date should be considered as the date on which the amount of the payment is entered into the account held by the Office (Decisions J 26/80, OJ EPO 1/1982, page 7, T 214/83 Giro payment/Sigma OJ EPO 1/1985, page 10 and J 05/84, Computer Fault/Rippes OJ EPO/1985, page 306, followed).
- II. It is not necessary that evidence to establish such legal equivalence is received by the EPO before expiry of the time limit.

.../...

III. The question whether or not in a particular case the situation at the earlier date was legally equivalent to entry of the payment into the account held by the Office must be decided on an objective basis having regard to the particular facts of the case (Decision J 05/84 "Rippes", explained).

Europäisches  
Patentamt  
Beschwerdekammern

European Patent  
Office  
Boards of Appeal

Office européen  
des brevets  
Chambres de recours



Case Number : J 24/86

**D E C I S I O N**  
of the Legal Board of Appeal  
of 13 February 1987

**Appellant :** Phillips, William E.  
6015 Varna Avenue  
Van Nuys  
California 91401

**Representative :** Weydert, Robert  
Office Dennemeyer S.a.r.l.  
21-25 Allee Scheffer  
P.O. Box 41  
Luxembourg  
Luxembourg

**Decision under appeal :** Decision of the Receiving Section of the  
European Patent Office dated 23 April 1986.

**Composition of the Board :**

**Chairman :** P. Ford  
**Member :** G. D. Paterson  
**Member :** O. Bossung

### Summary of Facts and Submissions

- I. Publication of the European search report on European patent application No. 82 630 100.4 was mentioned in the European Patent Bulletin on 25 July 1984. The time limit for paying the examination fee expired in accordance with Article 94(2) EPC on 25 January 1985, a Friday. In a communication dated 26 February 1985 the Receiving Section informed the Appellant that the examination fee had not been paid, but that under Rule 85b EPC it could still be validly paid within a period of grace of two months together with a surcharge. The period of grace expired on Monday 25 March 1985.
- II. The examination fee and surcharge were paid in the correct amount, such payment being entered into the EPO account on 26 March 1985.
- III. The Receiving Section informed the Appellant in a communication under Rule 69(1) EPC on 19 April 1985 that the application was deemed to be withdrawn pursuant to Article 94(3) EPC because the examination fee and surcharge had not been paid by 25 March 1985 when the period expired. It was stated that the payment had not been entered into the EPO's account until 26 March 1985.
- IV. By letter dated 10 June 1985, the Appellant provided evidence in the form of a certificate issued by a Post Office in Luxembourg, which had been date-stamped to indicate that payment had been received by it on 25 March 1985. A letter from that Post Office was also enclosed, which had been signed by the "Inspecteur de Direction", and which stated that payment had been received by the Post Office on 25 March 1985, the date stamp providing authentic proof of that fact; and that such payment could not have been withdrawn after 5 p.m. when the

Post Office closed. The Appellant submitted that before expiration of the time limit, an irrevocable payment had been made to the Post Office in Luxembourg, and entry of such payment into the Post Office Account of the EPO was thereafter certain. Further submissions were contained in a letter from the Appellant dated 20 December 1985, signed by the representative of the Appellant, which also stated that the payment to the Post Office in Luxembourg on 25 March 1985 had been in cash.

V. The Receiving Section issued a Decision dated 23 April 1986, which held that the European patent application is deemed to be withdrawn pursuant to Article 94(3) EPC, owing to non-payment of the examination fee. As reasons for the decision it was stated:

- (i) The payment in cash to the Post Office in Luxembourg on 25 March 1985 did not constitute a "cash payment" in accordance with Article 5(1)(e) of the Rules relating to Fees, but a payment to a "Giro account held by the Office" in accordance with Article 5(1)(b) of such Rules.
- (ii) In accordance with Article 8(1)(a) of such Rules, "the date on which payment shall be considered to have been made to the Office shall be ... the date on which the amount of the payment ... is entered into a Giro account held by the Office"; i.e. in the present case on 26 March 1985.

VI. Notice of appeal was filed on 19 June 1986, and the appeal fee was paid on the same day. A Statement of Grounds of Appeal was filed on 12 August 1986, in which the Appellant submitted that, because the payment had been irrevocably made to the Post Office in Luxembourg, where the EPO holds an account, on 25 March 1985, this situation was legally

equivalent to the entry of such payment into the EPO Post Office Account. Reliance was placed upon decisions T 214/83 and J 05/84, and upon an earlier decision of the Receiving Section in relation to an earlier European patent application.

It was also submitted that the Rules relating to Fees in the EPC, being subordinate legislation to the EPC, are only binding insofar as they do not conflict with provisions of law; and that under the Code Civil of Luxembourg the payer was relieved of his debt to the EPO by paying the fee to the Post Office in Luxembourg on 25 March 1986. If and insofar as Article 8(1)(a) requires the date of payment to be considered as the date of entry, this is less favourable than the Code Civil, and the latter should therefore prevail.

Refund of the appeal fee was also requested.

#### Reasons for the Decision

1. The appeal complies with Articles 106 to 108 and Rule 64 EPC and is therefore admissible.
2. As the Decision of the Receiving Section held, the cash payment to the EPO Giro account at the Post Office in Luxembourg on 25 March 1985 constituted "payment to a Giro account held by the Office" as set out in Article 5(1)(b) of the Rules relating to Fees.

Article 8(1)(a) of such Rules sets out that "The date on which any payment shall be considered to have been made to the Office shall be ... in the case referred to in Article 5(1)(b): the date on which the amount of the payment ... is entered in a ... Giro account held by the Office".

3. There is no doubt that the payment in the present case was not, literally, entered into the EPO Giro account until 26 March 1985, and thus, on a strict literal interpretation of Article 8(1)(a) above, that is the date on which "payment shall have been considered to have been made to the Office". This is the essence of the Decision of the Receiving Section.
4. The Legal Board of Appeal first considered the question of the proper interpretation of Article 8(1)(a) above in J 26/80, OJ 1/1982, page 7.

In that case, also, the payment was made (to a bank which held an account of the EPO) before expiry of the relevant time limit, but the amount of the payment was not actually entered until after expiry. After considering the intention behind the wording used in Article 8(1)(a), the Board considered that a situation equivalent to entry into the account was created at the date when the bank could not permit the payer to revoke the payment and the EPO had the right to dispose of the money paid; and that Article 8(1)(a) should therefore be interpreted sufficiently broadly that the date of payment to the Office should be considered as the date when such an equivalent situation was created.

5. This broad interpretation of Article 8(1)(a) was followed by the Technical Board of Appeal in T 214/83, "Giro payment/Sigma", OJ/1985, page 10.
6. These two decisions were referred to in a subsequent decision of the Legal Board of Appeal, J 05/84, "Computer fault/Rippes" OJ 10/1985, page 306, where it is stated in paragraphs 5 and 6 as follows:

"The authors of the Convention intended that, in principle, payment should be considered to have been made only from the moment when the sum is virtually in the possession of the EPO and the issuer can no longer dispose of it. The provision whereby the date on which payment is considered to have been made is that on which it is "entered in a bank account or a Giro account ..." must be regarded as essentially of an administrative nature and designed to facilitate the efficient running of the EPO's accounts. The words "the date on which the amount of the payment or of the transfer is entered in a bank account or a Giro account" should not therefore be interpreted too narrowly.

6. This interpretation of the Rules relating to Fees does of course presuppose that the applicant has taken every reasonable step to ensure that payment was made in due time."

6. In that case, a fault in the computer of the bank to which payment was made by cheque caused a delay in the payment being entered into the EPO account. If the computer had been working properly, the entry into the account would have been made in time. Evidence was provided (after expiry of the relevant time limit) that during the period when the computer was not working, the payer would have been unable to withdraw his order and dispose of the amount due for payment.

In these circumstances, the Board considered that the payment had been made in due time.

7. This Board follows the broad interpretation of Article 8(1)(a) first set out in Decision J 26/80, namely that if at a particular date earlier than the actual date of entry, a situation is created which is legally



equivalent to an entry in the account, then for the purpose of Article 8(1)(a) that date should be considered as the date on which the amount of the payment is entered into the account held by the Office.

In the judgement of this Board, the question whether a payment can be considered as having been made in due time, having regard to the particular facts of a case, must be decided on an objective basis. The question is whether such facts create a situation which is legally equivalent to entry of the payment into the account. In general the onus is upon the payer to establish such equivalence to the satisfaction of the EPO, although the EPO may of course make its own enquiries in accordance with Article 114(1) EPC. It is not necessary, however, that evidence establishing such equivalence is received by the EPO before expiry of the relevant time limit.

In the present case, the Appellant provided evidence to the Receiving Section, as set out in IV above (in fact such evidence was provided after the expiry of the relevant time limit on 25 March 1986). In the Board's view, such evidence establishes that the payment to the Post Office in Luxembourg on 25 March 1986 was legally equivalent to entry into the EPO's account on that day. Therefore, in the Board's judgement, pursuant to Article 8(1)(a), the date on which the payment shall be considered to have been made to the Office shall be 25 March 1986 (instead of 26 March 1986, as was held by the Decision of the Receiving Section), and the appeal is accordingly allowed.

It is not therefore necessary for the Board to consider the Appellant's submissions concerning conflict with the provisions of the Code Civil of Luxembourg.

8. In the present case, the Appellant also provided evidence to the Receiving Section which was intended to establish that every reasonable step had been taken to ensure that payment was made in due time, presumably in view of that part of paragraph 6 of the decision in the Rippes case which is set out in paragraph 6 above. In the opinion of this Board, paragraph 6 of the Rippes decision<sup>4</sup> should not be understood as requiring subjective evidence of this nature, as a prerequisite to the application of a broad interpretation of Article 8(1)(a) of the Rules relating to Fees; thus such evidence was not necessary because it is not relevant to the question to be decided, which is set out above. As stated in paragraph 7 above, the question as to what date should be considered to be the date on which payment was made must be decided on an objective basis, having regard to the facts relating to payment, and without regard to the subjective intention and conduct of the party concerned.
  
9. The interpretation of Article 8(1)(a) of the Rules relating to Fees set out in the first sentence of paragraph 7 above constitutes a rather more broad and therefore different interpretation to that set out at A.XI, paragraph 3.1.3 of the "Guidelines for Examination in the European Patent Office". Having regard to Article 15(2) of the Rules of Procedure of the Boards of Appeal, this Board here states that the grounds for such broader interpretation are set out in paragraphs 4 to 7 above.
  
10. As the appeal is allowed, it is necessary to consider whether the appeal fee should be reimbursed under Rule 67 EPC. The first question is whether there has been a "substantial procedural violation". In this connection it is noted that in the section of the Decision of the Receiving Section headed "Reasons for the Decision", no mention is made of the evidence provided by the Appellant

as set out in IV above, or of the possible effect of such evidence as contended for by the Appellant. In the Board's view, the Appellant's contentions in this respect were the cornerstone of his submissions to the Receiving Section, and should therefore have been dealt with in the Decision of the Receiving Section. This aspect of the Decision could be considered to be a procedural violation. However, in the Board's judgement such procedural violation was not a substantial one, because the views of the Receiving Section in respect of the Appellant's contentions had already been communicated to the Appellant by a letter dated 15 November 1985. Therefore, there is no sufficient basis for ordering reimbursement.

#### Order

**For these reasons**

**it is decided that:**

1. The Decision of the Receiving Section dated 23 April 1986 is set aside.
2. The date on which payment of the examination fee shall be considered to have been made to the Office shall be 25 March 1986.

W.D.  
Be

J. R. G.

Reinhold