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Bezeichnung der Erfindung:
Title of invention: Non-water wetttable granular material and method of
Titre de l'invention : preparing and using same

Klassifikation / Classification / Classement : A 01 K1/015

ENTSCHEIDUNG / DECISION

vom / of / du 10 July 1987

Anmelder / Applicant / Demandeur : CATTUS LIMITED

Patentinhaber / Proprietor of the patent /
Titulaire du brevet :

Einsprechender / Opponent / Opposant :

Stichwort / Headword / Référence : Repayment of examination fee/CATTUS

EPÜ / EPC / CBE 96(1) and (3) EPC, 6(3), 10 RFees

Kennwort / Keyword / Mot clé : Repayment of examination fee,
competence of Examining Division

Leitsatz / Headnote / Sommaire

- I. Paid fees are in principle not refundable after having fallen due.
- II. In the absence of any legal impediment to examination the examination fee is not refundable after the Examining Division has become competent to conduct the proceedings (decision dated 30 July 1987 J 14/85 OJ EPO, 49 followed).

Europäisches
Patentamt

Beschwerdekammern

Case Number : J 33/86

European Patent
Office

Boards of Appeal

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des brevets

Chambres de recours



D E C I S I O N
of the Legal Board of Appeal
of 10 July 1987

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Decision under appeal : Decision of the Head of Formalities Section of
the European Patent Office dated 4 June 1986.

Composition of the Board :

Chairman : P. Ford
Member : R. Schulte
Member : G. D. Paterson

Summary of Facts and Submissions

- I. On 26 July 1984 the appellant filed a European patent application, together with the request for examination under Article 94 EPC.
- II. By a communication of 7 June 1985 the European search report was transmitted to the appellant.
- III. By a communication of 10 July 1985 the Receiving Section informed the appellant that the application would be published on 4 September 1985.
- IV. In a letter of 2 September 1985 the appellant renewed his request for examination, paying the examination fee of DM 2 120.
- V. By letter of 20 February 1986 the appellant withdrew the application, requesting that since substantive examination had not started the examination fee be refunded. In a further letter of 21 April 1986 he requested a partial refund if a full one were not forthcoming.
- VI. By the decision under appeal, dated 4 June 1986, the request for a refund was refused on the grounds that fees are not refundable once they have fallen due. Only if an application was withdrawn before competence passed from the Receiving Section to the Examining Division was a refund in accordance with Legal Advice No. 1/79 possible, but this was here not the case.
- VII. By letter of 13 August 1986 the appellant filed notice of appeal against this decision and by letter of 13 October 1986 the statement of grounds, referring to Legal Advice

Nos. 1/1979 and 10/1981 (OJ 2/1979, p. 61 and OJ 9/1981, p. 349 respectively) and Legal Board of Appeal decisions J 06/83 of 25 September 1984 and J 08/83 of 13 February 1985 (both OJ 4/1985, pp. 97 and 102 respectively), which indicated that an examination fee could be refunded. Although competence for the application had passed from Receiving Section to Examining Division about three months before withdrawal of the application the fee could still be refunded, experience having shown that an Examining Division communication was not usually issued until four months after a valid request for examination. At least a partial refund was justified, as only minimal examination work had been involved. After all, the search fee - which was lower than the examination fee - was refundable under Article 10(4) of the Rules relating to Fees (RFees) if the Office had not yet begun drawing up the search report.

Reasons for the Decision

1. The appeal complies with Articles 106 to 108 and Rule 64 EPC and is therefore admissible.
2. Like the earlier Case J 14/85, decided on 30 July 1986 (OJ EPO, 1987, 49) it raises the question of whether and when an examination fee is refundable once paid, in which connection the EPC's general principle of non-refundability of fees paid before or when they fall due must be borne in mind. If this principle did not exist the special provisions for refunding certain fees would be superfluous. The special provisions governing refunds for example of the search fee (Article 10 RFees), the fee for a technical opinion (Article 10a RFees) or the appeal fee (Rule 67 EPC) thus support this general principle of the non-refundability of fees once paid.

3. The Convention makes no provision for refunding the examination fee; Rule 6(3) EPC in conjunction with Article 12 RFEes merely provides for a 20% reduction under certain conditions.
4. If the applicant files the request for examination and pays the examination fee before the European search report is transmitted to him, and fails to state within the period specified under Article 96(1) EPC whether he desires to proceed further with his application, under Article 96(3) EPC the application is then deemed to be withdrawn. Until that time the Receiving Section remains responsible for the examination of the application (cf. Article 16 EPC). The Examining Division does not become responsible (cf. Article 18(1) EPC) and, in such circumstances, Office practice is to refund the examination fee (cf. Legal Advice No. 1/1979, OJ EPO 1979, 61; Guidelines for Examination A-XI, 10.2.4; Gall, "Münchener Gemeinschaftskommentar", commentary on Article 51, para. 380 et seq.).

The Legal Board of Appeal has endorsed this practice (cf. Cases J 08/83, OJ EPO 1985, 102, paras. 3 to 6, and J 06/83, OJ EPO 1985, 97, para. 6).

5. However, this practice is not applicable in the present case, because after receiving the search report of 7 June 1985 the applicant clearly indicated, by paying the examination fee, that he wished to proceed with the application. Competence for it thus passed unequivocally to the Examining Division, pursuant to the provisions of Articles 16 and 18(1) EPC. Furthermore, it has previously been decided that once responsibility for examination has passed to the Examining Division, if the application is withdrawn before examination has in fact been commenced by

the Division, the examination fee cannot be repaid unless there is some legal impediment to the commencement of examination: Case J 14/85, OJ EPO 1987, 47. No such impediment existed in the present case.

6. Nor is there any other reason in law for refunding the fee. The applicant refers to Article 10 RFees concerning refund of the search fee, under paragraph (4) of which the search fee is refunded in full if the application is withdrawn at a time when the Office has not yet begun to draw up the European search report. The applicant argues that what applies to the search fee should also apply to the - higher - examination fee.

The Board does not agree. As explained in point 2 above, Article 10 RFees provides a specific exception to the general rule, and, applying general principles or interpretation, the scope of one exception cannot be extended to cover situations to which it does not apply. It would be necessary to add specific provisions to the RFees to achieve the result for which the appellant argues. Moreover, the fact that a refund might be "equitable" is not in itself a reason in law to make it, unless -like Rule 67 EPC for appeal fees - the applicable legal provisions make "equity" a criterion for the refund.

7. Since in the present case there is thus no reason in law to refund the examination fee, the contested decision of 4 June 1986 is upheld and the appeal dismissed.

Order

For these reasons, it is decided that:

The appeal is rejected.

The Registrar:



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The Chairman:

