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**D E C I S I O N**  
**of 29 February 1996**

**Case Number:** J 0006/93 - 3.1.1

**Application Number:** 89 830 451.4

**Publication Number:** 0 426 928

**IPC:** B25D9/26

**Language of the proceedings:** EN

**Title of invention:**

Device to adjust the functional parameters of a percussion apparatus to the hardness of the material to crumble

**Applicant:**

Vitulano, Mauro

**Headword:**

Restitutio/VITULANO

**Relevant legal norms:**

EPC Art. 122

**Keyword:**

"Renewal fee not paid despite due care"

**Decisions cited:**

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**Headnote:**

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Case Number: J 0006/93 - 3.1.1

**DECISION**  
of the Legal Board of Appeal  
of 29 February 1996

**Appellant:** Vitulano, Mauro  
Via Amendola, 170  
70126 Bari (IT)

**Representatives:** Russo, Saverio, Dott. Ing.  
Via Ottavio Serena, 37  
I-70126 Bari  
Italy

- and by subauthorization

Meister, Wolfhard  
Grünecker, Kinkeldey, Stockmair & Schwanhäusser  
Maximilianstrasse 58  
D - 80538 München

**Decision under appeal:** Decision of the Examining Division of the European Patent Office dated 5 November 1992, refusing the application for re-establishment of rights into the period for paying the third year renewal fee.

**Composition of the Board:**

**Chairman:** R. L. J. Schulte  
**Members:** S. C. Perryman  
J. P. B. Seitz

### Summary of Facts and Submissions

- I. European patent application No. 89 830 451.4 was filed on 18 October 1989 in the name of the Appellant. The third year renewal fee was due by 31 October 1991, but was not paid by that date. On 10 December 1991, a notice was sent by the EPO pursuant to the provisions of Article 86(2) EPC and Article 2(5) of the Rules relating to Fees, drawing attention to the possibility of paying the third year renewal fee late with a surcharge, provided this was done within six months of the due date. Such payment was not received within that period by the EPO.
- II. A communication pursuant to Rule 69(1) EPC was sent to the Appellant on 16 June 1992 informing him that his application was deemed withdrawn because of failure to pay the renewal fee for the third year in due time.
- III. The third year renewal fee plus surcharge, and the fee for restitutio were paid on 22 June 1992. A request for restitutio in integrum was filed in Italian on 29 June 1992 with the translation being filed on 13 July 1992. A communication was sent to the representative on 4 August 1992 indicating that the information so far supplied was inadequate for establishing that all due care required had been taken. The representative submitted further comments by letter dated 17 September 1992 received 24 September 1992.
- IV. By decision dated 5 November 1992 the application for re-establishment of rights was refused, essentially on the ground that the information supplied was not adequate to make out a case that the failure to pay the fee had occurred despite all due care required by the circumstances having been used.

- V. The Appeal fee was paid on 15 December 1992, and by letter of 15 December 1992 received 22 December 1992 Notice of Appeal was given. The statement of Grounds of Appeal dated 18 January 1993 was received on 26 January 1993. Further information and evidence including a statement by an accounts clerk, was filed by letter dated 27 September 1993, received on 28 September 1993.
- VI. In a communication dated 15 December 1994, the Board indicated aspects where the case for reinstatement was still considered to be unsatisfactorily made out. By letters dated respectively 11 January, 7 April and 10 April 1995 further submissions were made on behalf of the Appellant. A further communication dated 25 July 1995 from the Board indicated aspects of the case for restitutio which had or respectively had not yet been adequately made out. By letter of 14 September 1995, received 15 September 1995, further information was provided as well as sworn evidence by the representative and the person in charge of supervising computer entries.

#### **Reasons for the Decision**

1. The appeal is admissible.
2. The request for restitutio was filed within a few days of the failure to pay being noted, thus meeting the requirement of Article 122(2) EPC.
3. The circumstances in which the third year renewal fee was not paid, as they emerged from all the evidence filed were the following:

Instructions were received to pay the third year renewal fee and surcharge. The Italian representative instructed his accounts clerk to do this, and she duly completed all the necessary documentation, but did not physically deliver the order to the bank. This had to be done by hand as there were then no facilities for instructing the bank directly via computer.

The accounts clerk was appropriately qualified for her position, had been given training for it, and had performed her duties satisfactorily for several years, under the supervision of the representative and the computer consultant who made periodic checks that the system was working properly.

Some days after the representative had instructed payment of the renewal fee, the accounts clerk resigned suddenly and with immediate effect for personal reasons. Her duties were taken over by another qualified accounts clerk who had been working in the representatives office for over five years, who checked that all the work that should have been done by the clerk had been done. On the documentation this appeared to be so.

The fact that delivery of the payment order to the bank was the only omitted step, emerged only in the periodic check made by the representative on bank statements received, and the request for reinstatement was then filed within a few days. No other error by the accounts clerk had occurred.

4. On the evidence ultimately available to the Board, it has been shown that the renewal system operated by the Italian representative was properly organised, and that the failure to pay the renewal fee with surcharge was due to an isolated mistake by the accounts clerk, which

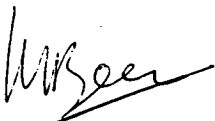
the reasonable precautions that were taken could not be expected to disclose. This, in the view of the Board, establishes that the failure to pay occurred despite all due care required in the circumstances having been taken. The requirement of Article 122(1) EPC is thus fulfilled, and the application for restitutio can be granted.

**Order**

**For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The request for restitutio into the period for filing the third year renewal fee with surcharge is granted.
3. The case is remitted to the Examining Division for further processing.

The Registrar:



M. Beer

The Chairman:



R. L. J. Schulte

