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**D E C I S I O N**  
of 19 March 1997

**Case Number:** J 0008/93 - 3.1.1

**Application Number:** 89913155.1

**Publication Number:** WO90/06072

**IPC:** A47B 65/00

**Language of the proceedings:** EN

**Title of invention:**  
A shelf construction

**Applicant:**  
Weise, Niklas

**Opponent:**  
-

**Headword:**  
Lost letter/WEISE

**Relevant legal provisions:**  
EPC Art. 150(2), 157(1)  
EPC R. 104b(1), 85b

**Keyword:**  
"Failure to make request - proof of posting cannot be treated  
as evidence of receipt by EPO"

**Decisions cited:**  
J 0020/85, T 0243/86, T 0069/86, T 0128/87, J 0010/91

**Headnote:**  
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Case Number: J 0008/93 - 3.1.1

**D E C I S I O N**  
of the Legal Board of Appeal 3.1.1  
of 19 March 1997

**Appellant:** Weise, Niklas  
Åsögatan 196, 2tr.  
S-116 32 Stockholm (SE)

**Representative:** Lindblom, Erik J.  
Flotthamn  
S-150 23 Enhörna (SE)

**Decision under appeal:** Decision of the Receiving Section of the European Patent Office dated 18 December 1992, deciding that Euro -PCT application 89 913 155.1 is deemed to be withdrawn as from 29 May 1991.

**Composition of the Board:**

**Chairman:** J.-C. Saisset  
**Members:** S. C. Perryman  
B. J. Schachenmann

## Summary of Facts and Submissions

- I. EURO-PCT No. 89 913 155.1 was filed on 24 November 1989 in the name of the Appellant, claiming priority from Swedish application No. 8804309 of 28 November 1988. The European Patent Office was the Elected Office, based on the demand received by the International Examining Authority on 23 March 1990.
- II. No request for examination was received by the European Patent Office by 28 May 1991, the limit set for such request laid down by Article 150(2) EPC in conjunction with Rule 104b(1) EPC (old version).
- III. On 6 August 1991 the communication under Rule 85b EPC (EPO Form 1218) was sent to the Appellant informing him that a valid request for examination was not made within the period laid down in Article 150(2) EPC in conjunction with Rule 104b(1) EPC (old version).
- IV. On 4 October 1991 a notification pursuant to Rule 69(1) EPC was sent to the appellant informing him that the application was deemed withdrawn because no valid request for examination had been made within the time limit of Articles 157(1), 150(2) and Rule 85b EPC.
- V. By letter of 7 November 1991 the representative wrote to the EPO saying that a cheque for the examination fee and the necessary form had been sent by letter dated and posted on 21 May 1991, in an envelope together with documents on another application, and the representative made an affidavit confirming that he had personally seen his secretary post the letter. Both the Receiving Section and subsequently the Board of Appeal

made investigations with the Post Room and the Cash & Accounts section, but no trace was found that the envelope posted on 21 May 1991 or its contents relating to the present application, or relating to the other application posted in the same envelope, were ever received by the European Patent Office.

- VI. In its decision of 18 December 1992 the Receiving Section decided that as there was no evidence showing that on balance of probability the missing letter and cheque had been lost by the EPO, the examination fee could not be deemed to have been paid in time and the Euro PCT application must be deemed to be withdrawn as from 29 May 1991.
- VII. The appellant appealed, essentially on the ground that the examination fee should also be deemed to have been paid in due time if the letter was lost at some stage between posting in Sweden and arrival at the EPO, and that the evidence provided showed conclusively that it was posted in Sweden.
- VIII. The renewal fee for the seventh year was not paid in the normal or the extended period, of which extended period the appellant had been informed by a communication dated 9 January 1996.

#### Reasons for the Decision

1. The appeal is admissible.
2. The European Patent Convention contains no provisions for deeming a document to have been received by the European Patent Office where the circumstances are that there is evidence that it has been sent by post to the European Patent Office, but no indication whatsoever

can be found that the document has been received by the European Patent Office. As has already been stated in case J 0010/91 of 11 December 1992 (Lost cheque/MARAM) even conclusive evidence that something has been *posted* cannot be treated as sufficient to prove that a document has been *received* by the European Patent Office, and this applies also to the evidence of posting in this case. If the post fails to deliver a document, the applicant will suffer the consequences for failing to file that document. This contrasts with the position in some member states, whose laws provide that proof of posting of a document is to be treated as evidence of receipt by the addressee. Thus, while it is not required by the European Patent Convention, applicants should in their own interests submit documents due within a set time limit, in a way which gives them positive confirmation that the document has been received by the European Patent Office before expiry of that time limit.

3. The jurisprudence of the Boards of Appeal allows a presumption that a particular document has been received by the European Patent Office, if there is evidence that something sent by the applicant at the same time as the missing document was received. (See cases J 0020/85 "Missing claims/ZENITH" (OJ EPO 1987, 102), T 0243/86 "Lost Statement of Grounds/AUDI" of 9 December 1986, T 0069/86 "Lost telex confirmation/RENK" of 15 September 1987, and T 0128/87 "Lost cheque/MULTIVAC). In this case however the investigations instigated by the Receiving Section and the Board have located no trace of the receipt of the envelope posted on 21 May 1991 or its contents. The request for examination cannot thus be treated as having been made in time, and the appeal must be dismissed.

4. The Board has deliberately delayed its decision in this case, as the missing letter might yet have come to light. The non-payment of a renewal fee, however, indicating that the proprietor is no longer interested in obtaining a patent, a negative decision means that the renewal fees paid since the deemed withdrawal of the application will be repaid.

**Order**

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

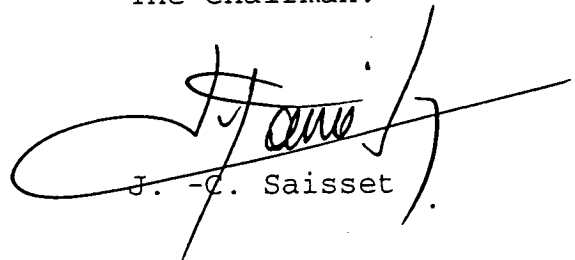
The appeal is dismissed.

The Registrar:



M. Beer

The Chairman:



J.-C. Saisset