

Internal distribution code:

- (A) [] Publication in OJ
(B) [X] To Chairmen and Members
(C) [] To Chairmen
(D) [] No distribution

**Datasheet for the decision
of 26 June 2007**

Case Number: T 0046/07 - 3.2.04

Application Number: 97116697.0

Publication Number: 0904679

IPC: A01B 51/02

Language of the proceedings: EN

Title of invention:

Self-moving vehicle for agricultural and industrial uses

Applicant:

Oswaldo Silvestrin

Opponent:

-

Headword:

-

Relevant legal provisions:

EPC Art. 122, 108

Keyword:

"Restitutio in integrum"

"Late payment of the fee for re-establishment"

"Application for re-establishment deemed not to have been filed"

"Appeal deemed not to have been filed"

Decisions cited:

T 0473/91, J 0018/03, J 0016/82

Catchword:

"If the fee for re-establishment of rights is paid after expiry of the two-month period laid down in Article 122(2) EPC, the application for re-establishment of rights does not come into existence and therefore the fee must be refunded even without a respective request"



Case Number: T 0046/07 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 26 June 2007

Appellant: Osvaldo Silvestrin
via Padova 75
I-35026 Conselve , PD (IT)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 14 August 2006
refusing European application No. 97116697.0
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: M. Ceyte
Members: M. Poock
C. Heath

Summary of Facts and Submissions

- I. European patent application No. 97 116 697.0 was refused by the decision of the Examining Division dated 14 August 2006.
- II. In a letter dated 22 December 2006, the Applicant asked for "the possibility of re-admittance" in view of two reasons: first, an illness that prevented him from taking steps to save his rights, and second, a fruitless visit to a firm of patent agents.
- III. In the communication of 31 January 2007, the Board interpreted this statement as an application for re-establishment of rights according to Article 122 EPC and explained the requirements of this provision.

With the reply, the Applicant then filed documents of an appeal and paid, on 27 February 2006, the fees for the re-establishment of rights and the appeal. In order to explain the delay in filing the appeal, the Applicant mentioned that he had an accident on 6 October 2006 and as a consequence his upper right side was blocked. This turn of events was supported by a medical certificate, which, however, did not mention until what time the Applicant's illness persisted.

- IV. Therefore, the Board issued another communication. In the reply, the Applicant explained that his illness had persisted over one month and that he went to a patent agent's firm on 9 November 2006. Another medical certificate by the same doctor was attached that specified the time of the Applicant's illness as between 6 October 2006 and 10 November 2006. The tenth

renewal fee and its additional fee were paid on 1 April 2007.

Reasons for the Decision

1. Restitutio in integrum (Article 122 EPC)

1.1 Paragraph 1 stipulates that the Applicant who ... was unable to observe a time limit vis-à-vis the European Patent Office may, upon application, have his rights re-established if the non-observance ... has the direct consequence ... of causing the loss of any ... means of redress.

In the circumstances of this case, the applicant was unable to observe the time limit to file an appeal.

1.2 Paragraph 4 stipulates that the department competent to decide on the omitted act shall decide upon the application.

In this case, the non-filing of the notice of appeal constitutes the omitted act. Since the present Board would have been competent to decide on the appeal against the decision of the examining division (Article 21(1) and 21(3)a) EPC), it is also competent to decide on the application for re-establishment of rights. The appellate instance has exclusive jurisdiction over the application for re-establishment into a time limit relating to the appeal itself (T 473/91, OJ EPO 1993, 630, item 1.4).

1.3 Paragraph 2 stipulates that the application must be filed in writing within two months from the removal of the cause of non-compliance with the time limit.

1.3.1 The illness that prevented the Applicant from filing the appeal ended on 10 November 2006.

Thus, the application for re-establishment of rights should have been filed by 11 January 2007 at the latest.

1.3.2 The application shall not be deemed to be filed until after the fee for re-establishment of rights has been paid (Article 122(3), second sentence EPC).

This means in the context of paragraph 2 of this Article that the fee for the application for re-establishment of rights has to be paid within the time limit for filing the application (J 18/03, not published in the OJ EPO, section 3.3).

In the circumstances of this case, this would have required that the fee for re-establishment of rights had been paid by 11 January 2007 at the latest. Since this fee was only paid on 27 February 2007, it was paid late and the application for re-establishment of rights is deemed not to have been filed.

1.4 No other conclusions derive from the Applicant's visit to a patent agent on 9 November 2006 because, as a matter of fact, the fee mentioned above was not paid within the specified time limit.

1.5 As it is provided in Article 122(5) EPC that "the provisions of this Article shall not be applicable to the time limits referred to in paragraph 2 of this Article", there is no possibility to validate for any reason whatsoever a payment of a fee for re-establishment of rights made outside the prescribed time limit.

1.6 Consequently, the Applicant cannot be granted re-establishment of rights in respect of the time limit for paying the appeal fee.

1.7 The notice of appeal shall not be deemed to have been filed until after the fee for appeal has been paid (Article 108, second sentence EPC).

This means in the context of this Article that the appeal fee has to be paid within the same time limit for filing the appeal (J 16/82, OJ EPO 1983, 262, section 9) which, in this case, ended on 24 October 2006 (Article 108, first sentence in combination with Rule 78(2) EPC). Since it was also only paid on 27 February 2007, it was paid late and the notice of appeal is deemed not to have been filed.

2. Fees

2.1 Since the application for re-establishment of rights and the notice of appeal are deemed not to have been filed, they did not come into existence. Consequently, the fee for re-establishment and the appeal fee must be refunded even without a respective request.

2.2 Moreover, the impugned decision became final with the date it was delivered to the Applicant. Since the tenth renewal fee and its additional fee were paid later, these fees were paid without a legal reason and must be refunded either.

Order

For these reasons, it is decided that

1. The application for re-establishment of rights is deemed not to have been filed.
2. The notice of appeal is deemed not to have been filed.
3. The fee for re-establishment of rights, the appeal fee and the tenth renewal fee and its additional fee are to be refunded.

The Registrar:

The Chairman:

V. Commare

M. Ceyte