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I N T E R L O C U T O R Y D E C I S I O N
of 24 March 1995

Case Number: T 0949/94 - 3.5.2

Application Number: 89830147.8

Publication Number: 0376895

IPC: G11B 23/113

Language of the proceedings: EN

Title of invention:

Continuous feed and discharge flow through cassette loading
apparatus and system

Applicant:

TAPEMATIC S.p.A.

Opponent:

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Headword:

-

Relevant legal provisions:

EPC Art. 122(1)(2)(3), 108

EPC R. 64

Keyword:

"Admissibility of an appeal"

"Notice of Appeal (late filed)"

"Restitutio in integrum"

Decisions cited:

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Catchword:

-



Case Number: T 0949/94 - 3.5.2

INTERLOCUTORY DECISION
of the Technical Board of Appeal 3.5.2
of 24 March 1995

Appellant: TAPEMATIC S.p.A.
Via Carlo Alberto, 11
I-20052 Monza (Milano) (IT)

Representative: Righetti, Giuseppe
Bugnion S.p.A.
Via Carlo Farini, 81
I-20159 Milano (IT)

Decision under appeal: Decision of the Examining Division of the European Patent Office dated 1 September 1994 refusing European patent application No. 89 830 147.8 pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: W. J. L. Wheeler
Members: W. M. Schar
R. G. O'Connell

Summary of Facts and Submissions

- I. European patent application No. 89 830 147.8 was refused according to Article 97(1) EPC by decision of the Examining Division dated 1 September 1994.
- II. On 25 October 1994 the appeal fee was paid.
- III. With a letter dated 3 November 1994 (received at the EPO on 4 November 1994) the Applicant's representative filed a copy of a receipt from a bank concerning an order to pay the appeal fee which mentioned the appeal, the application number and the Applicant; a payment list, namely EPO Form 1010 "Payment of fees and costs" mentioning the application number, the fee for appeal and the amount of the fee; and EPO Form 1037 "Acknowledgement of receipt of subsequently filed items for patent applications/patents at the European Patent Office" mentioning the aforesaid bank's receipt and payment list.
- IV. On 16 November 1994 the representative faxed a letter (dated 15 November 1994) to the EPO wherein he stated the application number, name and address of the Applicant/Appellant, referred to the documents enclosed with the letter dated 3 November 1994 and the contested decision, and said "to confirm you that Tapematic S.p.A. .. intends to appeal the Decision to refuse a European Patent Application .. in order to try to have the involved Application granted."
- V. On the same day (16 November 1994) the representative received a copy of the filed EPO Form 1037 bearing the perforation stamp of the EPO of 4 November 1994. The form bears another stamp reading

"Bugnion - Milano, 16 Nov. 1994", indicating receipt by the representative's office.

- VI. On 17 November 1994 the representative sent another telefax enquiring whether the papers sent put the prosecution of the appeal in order.
- VII. On 25 November 1994 the representative faxed again the documents already on file and asked whether the "involved" procedure was put in order.
- VIII. On the same day (25 November 1994) a formalities officer of the EPO informed the representative by telephone that no Notice of Appeal had been filed.
- IX. The Statement of Grounds of Appeal was received at the EPO on 1 December 1994.
- X. By written communication dated 23 December 1994 the Registry of the Boards of Appeal informed the representative that no Notice of Appeal had been filed in due time, that the mere payment of the appeal fee did not meet the admissibility requirements of the appeal according to Article 108 EPC and drew the attention of the representative to the possibility of filing an application for re-establishment of rights.
- XI. On 19 January 1995 the representative filed an application for re-establishment of rights accompanied inter alia by a copy of the faxed letter dated 15 November (see IV. above). The fee for re-establishment was paid on 17 January 1995.

The representative submitted the following arguments in support of the application for re-establishment:

- (a) He personally had prepared and signed the Notice of Appeal. The preparation of the necessary documentation was made in cooperation with his secretary, as was their customary practice.
- (b) It appeared that the secretary sent the payment documents but, by accident, left out the duly prepared and signed Notice of Appeal. The mistake made by the secretary on 3 November 1994 was the result of an unintentional oversight. On 15 November 1994, after having been temporarily absent from the firm, the representative checked the file and became aware of the fact that the original of the Notice of Appeal was still in the file.
- (c) The said secretary was responsible for preparing the correspondence. She had been working for 20 years with the representative's firm, and had been regularly instructed about her duties. She had never before made a mistake like this. She was considered to be a highly praiseworthy secretary, due to her capability, care and meticulousness.
- (d) An oversight of this type was not to be imputed to the representative.

Reasons for the Decision

A. On the application for re-establishment of rights according to Article 122 EPC:

1. *Competence*

The non-filing of the Notice of Appeal constitutes the omitted act under Article 122(4) EPC. Due to the fact that the present Board is competent to decide on the appeal (Article 21(1) and 21(3)a) EPC), it is according to Article 122(4) EPC also competent to decide on the request for restitutio in integrum.

2. *Admissibility*

2.1 The first point at issue is whether the application for re-establishment of rights filed on 19 January 1995 was received at the EPO within the 2 month time limit according to Article 122(2) EPC. This time limit runs from the removal of the cause of non-compliance.

Such removal is a matter of fact which has to be determined in the individual circumstances of each case (see also: J 07/82, OJ 1982,391). It occurs once a party can no longer be considered to be unaware of that fact that a loss of rights - here due to the non-filing of the Notice of Appeal - has ensued. This normally happens when it has been brought to the attention of the party or representative concerned, i.e. usually by a communication by the EPO, that a time limit has not been observed (J 27/90, OJ 1993, 422; see also: J 29/86 of 12 June 1987, Reasons 3 to 6, not published).

2.2 It appears from the telefaxes of 16, 17 and 25 November 1994 that the representative was uncertain as to whether the appeal was deemed to have been filed in view of the documents sent to the EPO. Notwithstanding the fact that the Applicant had sent three telefaxes and several documents but abstained from forwarding a copy of the original Notice of Appeal, the Board sees no reason to doubt the Applicant's account of the events. Furthermore the essential particulars of a Notice of Appeal were also filed by separate telefax (see point B below).

Since two documents, namely the bank's receipt and the payment list had in fact been filed on time and the representative had found the duly prepared and signed original of the Notice of Appeal in his file and in the light of the generally known office practice of making photocopies of all documents to be dispatched, the Board considers that he had reason to ask for confirmation by the EPO whether the filed papers were in order.

The fact that Form 1037, filed by the secretary, which was not compulsory and was not signed by the sender, mentioned two items but not the Notice of Appeal was part of the secretary's error. The receipt of its copy from the EPO on 16 November 1994 can therefore not be considered to be a reliable confirmation that no Notice of Appeal whatsoever - neither the original nor its copy - had in fact been received by the EPO. It may also be added that the copy of the bank's receipt, which was received in time, contained information which might in the representative's view perhaps have enabled it to have been regarded as a valid Notice of Appeal.

It was only on 25 November 1994 during a telephone conversation with the EPO that the representative was informed that no Notice of Appeal had been lodged. Therefore the last day of the two months time limit

according to Article 122(2) EPC was 25 January 1995. It is to be added that the information given by the EPO seems to have been, in fact, not entirely correct, because the telefax dated 15 November 1994 and received the next day contained the information required in a Notice of Appeal (see below). The representative should therefore have been informed that no Notice of Appeal had been filed **in time**.

As a result, all acts required under Article 122(2)(3) EPC, including the completion of the omitted act, have been carried out within the required two months time limit. The application for re-establishment of rights is therefore admissible.

- 2.3. In these circumstances it is not necessary to ascertain in the present case whether the omitted act must have been immediately apparent to the EPO, so that the Applicant should have been given an early warning of an impending loss of rights, so that he could have corrected it in due time (see: J 13/90, OJ 94,456).

3. *Allowability*

- 3.1. Re-establishment is open to an Applicant who can show that the time limit was missed "in spite of all due care required by the circumstances having been taken" (Article 122(1) EPC). In this respect, the Boards of Appeal have consistently admitted that a representative may delegate to an assistant routine tasks such as posting letters. In J 5/80 (OJ EPO 1981, 343) it was held that a request for re-establishment can be acceded to in the event of a culpable error on the part of an assistant such as a secretary. Such an error made in the course of carrying out routine tasks is not to be imputed to the representative if the latter has shown that he himself exercised the necessary due care in

dealing with the secretary. In this respect it is incumbent upon the representative to choose a suitable person, to properly instruct her in the task to be performed, and to exercise a reasonable supervision. In the light of that, Article 122 may also be understood as to ensure that the loss of rights does not result from an isolated mistake within a normally satisfactory system (J 2/86, J 3/86, OJ EPO 1987, 362).

- 3.2. Considering the arguments submitted in support of the application for re-establishment as well as the documents in the file, the Board is satisfied that, after having been working for 20 years in the same firm, the secretary was a suitable person for doing the job in question, and that she had been regularly instructed. The Board has no reason to doubt that, as pointed out in the representative's submissions, the work had been properly discussed with the secretary. As mentioned above a representative is expected to exercise a reasonable supervision over the work delegated. This does not mean that he must supervise the posting of every letter. Once he had signed a letter and ordered his secretary to post it, he was entitled to assume that it had been posted. In the light of that, the Board is satisfied that the representative has exercised due care in dealing with his secretary. Furthermore the fact that the secretary left out the original Notice of Appeal at the time she sent several other documents to the EPO and omitted to mention it on the non-compulsory and unsigned EPO form 1037 may be deemed an isolated mistake within a normally satisfactory system. Therefore the Applicants are granted re-establishment of rights.

B. On the admissibility of the appeal:

The Appellant's letter dated 15 November 1994 contained the necessary items required by Rule 64 EPC (see point IV. above). As exemplified in earlier decisions of the Boards of Appeal (e.g. in: T 32/81, OJ 1982,225 point 1; T 7/81, OJ 1983,98, point 1) the question of the validity of a Notice of Appeal has not to be answered on the basis of a single document alone but on the basis of all the circumstances surrounding a case. Therefore the aforesaid letter is in particular considered to contain the statement under Rule 64(b) EPC "identifying .. the extent to which cancellation of the decision is requested" because it included the statement to confirm the intention to appeal in order to have the application granted, which in the light of the additional fact that the appeal fee had already been paid (see: point II. above) has here to be understood as requesting the entire cancellation of the contested decision. The content of the aforesaid letter is therefore considered as a valid Notice of Appeal. Due to the fact that also the other requirements of Articles 106 to 108 and Rule 64 EPC are met the appeal is admissible.

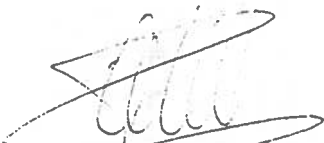
The considerations referring to the merits of the appeal shall be dealt with by separate decision.

Order

For these reasons it is decided that:


1. The application for re-establishment of rights in respect of the time limit for filing the Notice of Appeal is allowed.
2. The appeal is admissible.

The Registrar:



M. Kiehl

The Chairman:



W. J. L. Wheeler

