



Paper No. 12

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OFFICE OF PETITIONS

In re Patent No. 4,989,716 :  
Issue Date: February 5, 1991 : **DECISION ON PETITION**  
Application No. 07/535,531 :  
Filed: June 11, 1990 :  
For: Adjustable Angle Auger :

This is a decision is on the petition under 37 CFR 1.378(e), filed March 29, 2006, requesting reconsideration of a prior decision refusing to accept the delayed payment of a maintenance under 37 CFR 1.378(b) and reinstate the above-identified patent.

The request to accept the delayed payment of the maintenance fee and reinstate the above-identified patent is **DENIED**. This decision is a final agency action within the meaning of 5 U.S.C. § 704 for purposes of seeking judicial review. See MPEP 1002.02.

### **BACKGROUND**

The above-identified patent issued on February 5, 1991. The first and second maintenance fees were timely paid. The third maintenance fee could have been paid during the period from February 5, 2002 through August 5, 2002 or with a surcharge during the period from August 6, 2002 through February 5, 2003. Accordingly, the above-identified patent expired at midnight on February 5, 2003, for failure to timely remit the third maintenance fee.

On February 10, 2006, petitioner filed a petition under 37 CFR 1.378(b). On February 23, 2006, the USPTO informed petitioner that the Office would not decide the petition on the merits because petitioner did not pay the maintenance fee and surcharge. On March 3, 2006, petitioner filed a petition under 37 CFR 1.378(b), which was dismissed by the decision of March 16, 2006. On March 29, 2006, petitioner filed the present petition requesting reconsideration of the decision of March 16, 2006, refusing to accept the delayed payment of a maintenance under 37 CFR 1.378(b) and reinstate the above-identified patent.

**STATUTE AND REGULATION**

35 U.S.C. § 41(b) provides that:

The Director shall charge the following fees for maintaining in force all patents based on applications filed on or after December 12, 1980:

- (1) 3 years and 6 months after grant, \$900.
- (2) 7 years and 6 months after grant, \$2,300.
- (3) 11 years and 6 months after grant, \$3,800.

Unless payment of the applicable maintenance fee is received in the United States Patent and Trademark Office on or before the date the fee is due or within a grace period of 6 months thereafter, the patent will expire as of the end of such grace period. The Director may require the payment of a surcharge as a condition of accepting within such 6-month grace period the payment of an applicable maintenance fee. No fee may be established for maintaining a design or plant patent in force.

35 U.S.C. § 41(c)(1) provides that:

The Director may accept the payment of any maintenance fee required by subsection (b) of this section which is made within twenty-four months after the six-month grace period if the delay is shown to the satisfaction of the Director to have been unintentional, or at any time after the six-month grace period if the delay is shown to the satisfaction of the Director to have been unavoidable. The Director may require the payment of a surcharge as a condition of accepting payment of any maintenance fee after the six-month grace period. If the Director accepts payment of a maintenance fee after the six-month grace period, the patent shall be considered as not having expired at the end of the grace period.

37 CFR 1.378(b) provides that:

Any petition to accept an unavoidably delayed payment of a maintenance fee must include:

- (1) The required maintenance fee set forth in §1.20(e) through (g);
- (2) The surcharge set forth in §1.20(i)(1); and
- (3) A showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration

of the patent. The showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.

### OPINION

The Director may accept the late payment of a maintenance fee if the delay is shown to the satisfaction of the Director to have been unavoidable. See 35 U.S.C. § 41(c)(1).

Acceptance of a late maintenance fee under the unavoidable delay standard is considered under the same standard for reviving an abandoned application under 35 U.S.C. § 133. This is a very stringent standard. Decisions on reviving abandoned applications on the basis of “unavoidable” delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word ‘unavoidable’ . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present. In re Mattullath, 38 App. D.C. 497, 514-15 (1912) (quoting Pratt, 1887 Dec. Comm’r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 667-68 (D.D.C. 1963), aff’d, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm’r Pat. 139, 141 (1913).

In addition, decisions on revival are made on a “case-by-case basis, taking all the facts and circumstances into account.” Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was “unavoidable.” Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

Petitioner has failed to show to the satisfaction of the Director that the entire delay in paying the third maintenance fee for the above-identified patent was unavoidable within the meaning of 35 U.S.C. § 41(c) and 37 CFR 1.378(b)(3).

Petitioner asserted “a total lack of funds” as the cause of delay. In the prior decision of March 16, 2006, the Office explained to petitioner that in order to show “unavoidable” delay based upon financial difficulty, petitioner must establish that he lacked the financial resources to pay the third maintenance fee for the above-identified patent. The Office requested a detailed explanation and accounting of petitioner’s income, expenses, assets, credit and obligations, during the entire period from February 5, 2003, until the date of the filing of a grantable petition, which made the delay in payment of the maintenance fee unavoidable, as well as copies of any documents or records that would confirm the

financial difficulty. Additionally, the Office reminded petitioner that he should redact any personal and private information such as the bank account number from any documents sent to the USPTO as this information may become available to the public. *See Decision of February 13, 2006, p. 2.* Unfortunately, petitioner did not provide any detailed explanation or documentation to support a showing of unavoidable delay based on financial difficulty with the present petition. Rather, petitioner stated: "I am at a loss to know just what information I should send you." *Petition of March 28, 2005, p. 4.* Additionally, petitioner indicated: "If this information is not enough, I will not pursue it any further." *Id.*

### DECISION

The Office has reconsidered the prior decision refusing to accept the delayed payment of the third maintenance under 37 CFR 1.378(b) and reinstate the above-identified patent. For the reasons stated above, petitioner has failed to show to the satisfaction of the Director that the entire delay in paying the third maintenance fee for the above-identified patent was unavoidable within the meaning of 35.U.S.C. § 41(c) and 37 CFR 1.378(b)(3). Therefore, the Office is precluded from accepting the delayed payment of the maintenance fee for the above-identified patent. The Director will not undertake any further review or reconsideration of the matter. *See* 37 CFR 1.378(e).

As the above-identified patent will not be reinstated, the \$1,900.00 maintenance fee and the \$700.00 surcharge less the \$400.00 petition fee required under 37 CFR 1.378(e), for a total amount of \$2,200.00, will be refunded to petitioner by treasury check in due course.

The patent file is being forward to Files Repository.

Telephone inquiries should be directed to Senior Petitions Attorney Christina Tartera Donnell at 571-272-3211.



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Office of Petitions  
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for Patent Examination Policy