Commissioner of Patents and Trademarks
Patent and Trademark Office (P.T.O.)

IN RE PATENT NO. 4,366,679
Serial No. 252,503
May 31, 1988
***1** Issue Date: January 4, 1983

For: EVAPORATOR PLATE FOR ICE CUBE MAKING APPARATUS
Filed: April 8, 1981

E. Mickey Hubbard

Hubbard, Theurman, Turner & Tucker

James E. Denny

Deputy Assistant Commissioner for Patents

ON PETITION

This is a decision on the petition, filed April 14, 1988, under 37 CFR 1.183, requesting suspension of 37 CFR 1.378(e) to permit reconsideration of a denial of a petition for acceptance of delayed payment of a maintenance fee.

The petition is denied.

BACKGROUND

(1) On January 4, 1983, Serial No. 252,503, matured into Patent No. 4,366,679.

(2) From January 4, 1986 through July 7, 1986 ('the window period') petitioner could have paid the maintenance fee without surcharge.

(3) From July 8, 1986 through January 5, 1987 ('the grace period') petitioner could have paid the maintenance fee along with the requisite surcharge under 37 CFR 1.20(k).

(4) On April 6, 1987, a Petition To Accept Delayed Payment Of Maintenance Fee Under 37 CFR 1.378(b) was filed.

(5) On August 11, 1987, a decision by this Office dismissing the petition was mailed.

(6) On September 24, 1987, a Petition For Reconsideration To Accept Delayed Payment Of Maintenance Fee Under 37 CFR 1.378(e) was filed.

(7) In October 1987, Petitions Examiner Jeffrey Nase, while reviewing the Petition for Reconsideration, called counsel E. Mickey Hubbard requesting information regarding the disposition of the Maintenance Fee

Reminder, mailed August 6, 1986.

(8) On November 5, 1987, in response to the telephone call, Affidavits by Neil M. Rose and Barbara A. Shapiro were filed.

(9) On December 24, 1987, a Final Agency Decision by this Office, granting the request for reconsideration to the extent that the prior decision was reconsidered, but denying the request for reconsideration with respect to making any change therein, was mailed.

(10) On April 14, 1988, a Petition Under 37 CFR 1.183 for Suspension of 37 CFR 1.378(e) to Permit Reconsideration Of Denial Of Petition For Acceptance Of Delayed Payment Of Maintenance Fee was filed.

DISCUSSION

In the petition filed April 14, 1988, petitioner requests that the Commissioner of Patent and Trademarks exercise his authority to suspend the rule as set forth in 37 CFR 1.378(e) and reconsider his refusal to accept delayed payment of the maintenance fee for Patent No. 4,366,679.

In support of the relief requested, petitioner cites Mobil Oil Corp. v. Dann 197 U.S.P.Q. 59, and Mobil Oil Corp. v. Dann 198 U.S.P.Q. 347.

***2** 37 CFR 1.183 sets forth the following:

'In an extraordinary situation, when justice requires, any requirement of the regulations in this part which is not a requirement of the statutes may be suspended or waived by the Commissioner or the Commissioner's designee, sua sponte, or on petition of the interested party, subject to such other requirements as may be imposed. Any petition under this section must be accompanied by the fee set forth in § 1.17(h).'

37 CFR 1.378(e) states in part that:

'After decision on the petition for reconsideration, no further reconsideration or review of the matter will be undertaken by the Commissioner.'

Upon review of the record, including Affidavits by E. Mickey Hubbard and Dorothy Burton, the decision mailed August 11, 1987 included the following paragraph:

'If reconsideration of this decision is desired, a petition for reconsideration under 37 CFR 1.378(e) must be filed within 2 months from the mail date of this decision. Any such petition for reconsideration must be accompanied by the petition fee set forth in 37 CFR 1.17(h). The petition for reconsideration should include an exhaustive attempt to provide the lacking item(s) noted above, since, after a decision on the petition for reconsideration, no further reconsideration or review of the matter will be underaken (sic) by the Commissioner.' (Emphasis added).

Upon reconsideration of the record, including Affidavits by E. Mickey Hubbard, Barbara A. Shapiro, and Neil M. Rose, the Final Agency Decision mailed December 24, 1987 included the following statement:

'As stated in 37 CFR 1.378(e), no further reconsideration or review of this matter will be undertaken.'

Patentee was informed in the August 11, 1987 decision that a petition for reconsideration had to include an exhaustive attempt to provide the missing items since after a decision on a petition for reconsideration, no further reconsideration or review will be undertaken by the Commissioner.

Petitioner in the present petition states he has additional information. The additional information includes declarations by E. Mickey Hubbard, Dorothy Burton, Neil M. Rose, Cynthia Ford, Pamela E. Flaherty, and Barbara A. Shapiro. E. Mickey Hubbard has filed affidavits along with the two (2) previous petitions. Dorothy Burton, Barbara A. Shapiro, and Neil M. Rose have also filed affidavits, along with a previous petition. Patentee has had two (2) opportunities to present, and for this Office to consider, the facts in question; 37 CFR 1.378.

37 CFR 1.378 refers to a petition and a request for reconsideration, with no further reconsideration or review of the matter being undertaken by the Commissioner. In the above identified application, petitioner filed a petition, which was dismissed, and then a request for reconsideration. Before a Final Agency Action was rendered by this Office, petitioner's counsel was called regarding the disposition of the Maintenance Fee Reminder. After submission of additional information by counsel, a Final Agency Action was mailed by this Office.

***3** Therefore, petitioner and his counsel had an opportunity to submit any and all necessary evidence to support the petition for acceptance of delayed payment of the maintenance fee. Thus, petitioner had the same opportunity as anyone else who has filed a petition under 37 CFR 1.378. Therefore, petitioner has not established any special circumstances or equities that would require suspension of the rules in the interests of justice.

This Office cannot overlook that Attorney Hubbard has filed the two (2) previous petitions in the above identified application. Patentee hired Attorney Hubbard to represent him. Therefore, Attorney Hubbard's petitions, although not as detailed as the present petition submitted by different counsel, must be imputed to patentee; Haines v. Quigg, 5 U.S.P.Q.2d 1130. Link v. Wabash Railroad, Co., 370 U.S. 626, 633-34, 82 S.Ct. 1386, 1390-91 (1962) ('Petitioner voluntarily chose his attorney as his representative in the action and he cannot now avoid the consequences of the acts or omissions of this freely selected agent . . . . Each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'').

CONCLUSION

Petitioner has not proven that in this instance an extraordinary situation exists. Patentee and Attorney Hubbard had sufficient notice to submit all relevant information concerning the handling of the Maintenance Fee Reminder. The failure to do so is not seen as being extraordinary. Further, petitioner has not shown that the interests of

justice requires suspension of the rules in the above identified application under 37 CFR 1.183.

Therefore, the relief petitioner seeks cannot be granted.

This is a FINAL AGENCY ACTION.

7 U.S.P.Q.2d 1740

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