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

IN RE PATENT NO. 4,406,671
Serial No. 322,025
May 26, 1988
***1** Issue Date: September 27, 1983

For: ASSEMBLY AND METHOD FOR ELECTRICALLY DEGASSING PARTICULATE MATERIAL
Filed: November 16, 1981

Paul D. Hayhurst, The Dow Chemical Company

James E. Denny

Deputy Assistant Commissioner for Patents

ON PETITION

This is a decision on the petition, filed April 1, 1988, under 37 CFR 1.378 to accept the delayed payment of a maintenance fee for the above identified patent.

The Petition is denied.

The record establishes the following: (1) a petition under 37 CFR 1.378(a) and (b) to accept delayed payment of a maintenance fee was filed on October 22, 1987; (2) a decision refusing to accept the maintenance fee was mailed December 4, 1987; and (3) this petition was filed April 1, 1988 with a certificate of mailing of March 28, 1988.

Petitioner states that this petition should be considered a second petition under 37 CFR 1.378(b), not a petition for reconsideration under 37 CFR 1.378(e). In support of that position petitioner relies on 37 CFR 1.378(a) and (b), and 35 USC 41.

37 CFR 1.378 states:

(a) The Commissioner may accept the payment of any maintenance fee due on a patent after expiration of the patent if, upon petition, the delay in payment of the maintenance fee is shown to the satisfaction of the Commissioner to have been unavoidable and if the surcharge required by § 1.20(m) is paid as a condition of accepting payment of the maintenance fee. If the Commissioner accepts payment of the maintenance fee upon petition, the patent shall be considered as not having expired, but will be subject to the conditions set forth in 35 U.S.C. 41(c)(2).

(b) Any petition to accept the delayed payment of a maintenance fee filed under paragraph (a) of this section within six months of the expiration of the patent must include:

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(e) Reconsideration of a decision refusing to accept a maintenance fee upon petition filed pursuant to paragraph (a) of this section may be obtained by filing a petition for reconsideration within two months of, or such other time as set in, the decision refusing to accept the delayed payment of the maintenance fee. Any such petition for reconsideration must be accompanied by the petition fee set forth in § 1.17(h). . . . ..

This petition is a petition under § 1.378(e), not a petition under § 1.378(b). This petition was filed by petitioner to overcome the deficiencies of the original petition filed October 22, 1987. The deficiencies of the original petition were pointed out to petitioner in the decision mailed December 4, 1987. Since that decision refused to accept a maintenance fee upon petition pursuant to § 1.378(a) any subsequent petition filed to overcome that decision is considered to be a petition for reconsideration under § 1.378(e).

***2** Since this petition was filed more than two (2) months after the date of the decision refusing to accept a maintenance fee upon petition pursuant to § 1.378(a), the petition is barred; 37 CFR 1.378(e).

Further, the petition was not accompanied by the petition fee set forth in § 1.17(h) as required by 37 CFR 1.378(e).

Since the patent has not been reinstated and the period for filing a petition under § 1.378(e) has expired, it is appropriate to refund the maintenance fee and the surcharge fee submitted by petitioner on October 22, 1987. Petitioner can obtain a refund of these fees by submitting a request, accompanied by a copy of this decision, to the Office of Finance.

7 U.S.P.Q.2d 1742

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