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**Datasheet for the decision
of the Enlarged Board of Appeal
of 16 September 2016**

Case Number: R 0004/15

Appeal Number: T 0746/12 - 3.2.07

Application Number: 05728441.6

Publication Number: 1777173

IPC: B65D 85/72, B65D 30/28,
B65D 17/00

Language of the proceedings: EN

Title of invention:
EASILY OPENED FLEXIBLE VACUUM PACKAGING FOR SINGLE PORTIONS OF
PASTY FLUIDS

Patent Proprietor:
Mora Negrin, Pedro Ramon

Opponent:
UNILEVER PLC / UNILEVER NV

Headword:
-

Relevant legal provisions:
EPC Art. 112a(2)(c) and (d), 112a(4), 122, 125
EPC R. 104, 126(2), 136(1), 152(8)

Keyword:
Petition for review - Fee paid out of time
Petition deemed not to have been filed
Reimbursement of the fee (yes)

Decisions cited:
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Catchword:

-



Case Number: R 0004/15

D E C I S I O N
of the Enlarged Board of Appeal
of 16 September 2016

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Decision under review: Decision of the Technical Board of Appeal
3.2.07 of the European Patent Office of
5 November 2014.

Composition of the Board:

Chairman: W. van der Eijk
Members: E. Dufrasne
J. Riolo

Summary of Facts and Submissions

- I. The petition for review concerns decision T 0746/12 of Technical Board of Appeal 3.2.07 of 5 November 2014, rejecting as inadmissible the patent proprietor's appeal against the decision of the Opposition Division to revoke European patent No. 1777173.
- II. The decision of the Board was sent on 10 November 2014 to the appellant's registered representative, who acknowledged its receipt by stamping and signing the corresponding form on 17 November 2014 and returning it to the European Patent Office (EPO).
- III. The petition for review was filed by the patent proprietor in Spanish on 28 May 2015 and a certified English translation was filed on 21 July 2015. The corresponding fee was paid on 28 July 2015.
- IV. The petition is based on the grounds under Article 112a(2)(c) and (d) EPC, namely that fundamental violations occurred in the appeal proceedings.
- V. On 8 September 2015, a communication on noting of loss of rights under Rule 112(1) EPC was notified to the petitioner and to his registered representative, indicating that the petition was deemed not to have been filed due to payment of the fee for petition out of time and that, should even the petition be deemed to have been filed, it would be rejected as inadmissible due to its late filing, under Article 112a(4) EPC in both cases.

- VI. With letter dated 12 November 2015, the patent proprietor's registered representative informed the EPO under Rule 152(8) EPC that his authorisation had terminated as from that date.
- VII. In the annex to the summons to oral proceedings dated 6 July 2016, the Enlarged Board expressed its provisional and non-binding opinion that due to the payment of the fee for petition out of time, it intended to decide that the petition was deemed not to have been filed and to order reimbursement of the fee for petition. It also indicated that, should even the petition be deemed to have been filed, it intended to reject it as clearly inadmissible, due to its filing out of time.
- VIII. The arguments of the petitioner relevant for the present decision are summarised as follows:

With letter dated 27 February 2013 to the Spanish Patent and Trademark Office (SPTO), with a copy to his representative, the petitioner revoked his representative's authorisation to act before the SPTO and the EPO.

By reply dated 5 March 2013, the SPTO notified the petitioner that representation had terminated.

Consequently, the representative ceased as from that date to be authorised also before the EPO, and the notification of the Board's decision to the representative and his acknowledgement of its receipt were not valid.

In fact, the petitioner was for the first time made personally aware of the decision of the Board when he inspected the online European Patent Register on 9 March 2015, and the first notification of this decision that he received from the EPO was the communication dated 24 June 2015 about the commencement of proceedings pursuant to Article 112a EPC.

On that basis, the fee for petition for review was paid in due time.

IX. Oral proceedings were held on 16 September 2016.

X. The petitioner requests that:

- the petition for review be deemed as filed on time, admissible and allowable,
- the decision be set aside and the proceedings be reopened,
- the members of the Board who participated in the decision be replaced,
- the fee for the petition for review be ordered to be reimbursed,
- the opposition be rejected,
- the European patent be declared granted, and
- all these statements be published in the European Patent Bulletin.

In his written submissions and during the oral proceedings, the petitioner also mentioned re-establishment of rights pursuant to Article 122 EPC and reference to general principles pursuant to Article 125 EPC.

Reasons for the Decision

Filing of the petition

1. Pursuant to Article 112a(4) EPC, a petition for review based on Article 112a(2)(c) and (d) EPC, i.e. the grounds of violation of the right to be heard (Article 113 EPC) or of another fundamental procedural defect under Rule 104 EPC, shall be filed within two months of the notification of the contested decision. Further, the petition shall not be deemed to have been filed until after the prescribed fee has been paid, which requires its payment within the same period.

Pursuant to Rule 126(2) EPC, in cases where notification is effected by registered letter, such a letter is deemed to be delivered to the addressee on the tenth day following its handover to the postal service provider.

2. In this case, the decision was sent by registered letter with advice of delivery on 10 November 2014 to the appellant's registered representative, who acknowledged its receipt by stamping and signing the corresponding form on 17 November 2014 and returning it to the EPO.

Therefore, pursuant to Rule 126(2) EPC, the decision is deemed to have been delivered on 20 November 2014 and the time limit for paying the prescribed fee under Article 112a(4) EPC was on 20 January 2015.

On that basis, the Enlarged Board is of the opinion that the payment of the prescribed fee by the petitioner on 28 July 2015 was out of time.

3. The petitioner submitted that, with letter dated 27 February 2013 to the Spanish Patent and Trademark Office, copied to his representative, he revoked his representative's authorisation to act before the SPTO and the EPO. Hence, his representative ceased to be authorised as from that date also before the EPO, and the EPO's notification of the Board's decision to the representative and his acknowledgement of its receipt were not valid.

The Enlarged Board does not share this view. It is undisputed that the representative was authorised by the petitioner and registered as such before the EPO until the petitioner's letter of 27 February 2013 revoking his authorisation. The issue to be decided is the effective date of termination of this authorisation before the EPO. Under Rule 152(8) EPC, a representative is deemed to be authorised until the termination of his authorisation has been communicated to the EPO. It appears from this provision that communicating the termination to the national office of a contracting state is not sufficient to have effect before the EPO. Also, the SPTO's reply of 5 March 2013 to the petitioner referred only to the termination of the authorisation before the SPTO. Further, the representative himself continued to act for the petitioner before the EPO by acknowledging receipt of the Board's decision on 17 November 2014, and he notified the EPO of the termination of his authorisation by letter of 12 November 2015, as from

that date, with explicit reference to Rule 152(8) EPC. Therefore, the Enlarged Board is of the opinion that the authorisation of the representative terminated only on 12 November 2015.

4. The petitioner further pointed out that when notifying the Board's decision the EPO did not provide information about the possibility of petitioning for review (e.g. time limits), as it did in connection with the possibility of appeal when notifying the first instance decision.

However, the petitioner has not substantiated that the absence of such information when the Board's decision was notified has infringed any legally binding provision related to filing the petition for review, and in particular to the time limit for paying the fee involved.

Re-establishment of rights

5. In his written submissions and during the oral proceedings on 16 September 2016, the petitioner referred to re-establishment of rights under Article 122 EPC. It is not clear whether such a request for re-establishment formed part of his petition for review.
6. Pursuant to Rule 136(1) EPC, a request for re-establishment of rights in respect of any of the periods specified in Article 112a(4) EPC, i.e. including the time limit for paying the fee for petition for review, shall be filed within two months of expiry of the period. Further, the request for

re-establishment of rights shall not be deemed to have been filed until the prescribed fee has been paid.

7. In the present case, the petitioner has never paid the fee for re-establishment of rights. This means that in any case any request for re-establishment would have to be deemed not to have been filed.
8. In the absence of re-establishment in respect of the period for paying the fee for petition for review, the time limit for doing so is confirmed as 20 January 2015.

General principles

9. In his submissions the petitioner also made reference to general principles pursuant to Article 125 EPC.

However, the above analysis does not show any absence of procedural provisions in the European Patent Convention which might have necessitated applying Article 125 EPC and accordingly taking into account, in the present case, the principles of procedural law generally recognised in the contracting states.

Conclusions

10. From the above, the Enlarged Board concludes that the fee for petition for review was paid out of time.
11. It therefore unanimously decides that the petition for review is deemed not to have been filed.

12. In the absence of a petition for review, there is no legal basis for paying the fee involved, which must therefore be reimbursed.
13. In view of these conclusions, there is no need to consider the further objections raised by the petitioner.

Order

For these reasons it is decided that:

1. The petition for review is deemed not to have been filed.
2. Reimbursement of the fee for the petition for review is ordered.

The Registrar:

The Chairman:

P. Martorana

W. van der Eijk