

**Internal distribution code:**

- (A) [ ] Publication in OJ  
(B) [ ] To Chairmen and Members  
(C) [X] To Chairmen  
(D) [ ] No distribution

**D E C I S I O N**  
**of 18 December 2003**

**Case Number:** T 0314/01 - 3.5.1

**Application Number:** 90120680.5

**Publication Number:** 0434926

**IPC:** G05D 23/19

**Language of the proceedings:** EN

**Title of invention:**

A programmable thermostat with a temperature display

**Patentee:**

B.P.T. S.p.A.

**Opponent:**

VEMER S.P.A

PERRY ELECTRIC S.r.l.

**Headword:**

Re-establishment of rights/B.P.T.

**Relevant legal provisions:**

EPC Art. 108, 122

EPC R. 78(2)

**Keyword:**

"Re-establishment of rights of appellant opponent where payment of the appeal fee and filing of the notice of appeal were late (no)"

**Decisions cited:**

G 0001/86, T 0128/87, T 0323/87, T 0210/89

**Catchword:**

-



Case Number: T 0314/01 - 3.5.1

**D E C I S I O N**  
**of the Technical Board of Appeal 3.5.1**  
**of 18 December 2003**

**Appellant:** VEMER S.P.A.  
(Opponent 01) via Belvedere, 11  
I-20047 Brugherio (Milano) (IT)

**Representative:** Modiano, Guido, Dr.-Ing.  
Modiano & Associati SpA  
Via Meravigli, 16  
I-20123 Milano (IT)

**Respondent:** B.P.T S.p.A.  
(Proprietor of the patent) Via Roma, 41  
I-30020 Cinto Caomaggiore (Venezia) (IT)

**Representative:** Cantaluppi, Stefano  
Cantaluppi & Partners S.r.l.  
Via Matteotti 26  
I-35137 Padova (IT)

**Party as of right:** PERRY ELECTRIC S.r.l.  
(Opponent 02) Via Milanese 11  
I-Veniano (Como) (IT)

**Representative:** Klunker, Schmitt-Nilson, Hirsch  
Winzererstrasse 106  
D-80797 München (DE)

**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 13 December 2000  
rejecting the opposition filed against European  
patent No. 0434926 pursuant to Article 102(2)  
EPC.

**Composition of the Board:**

**Chairman:** S. V. Steinbrener  
**Members:** P. Mühlens  
R. Randes

## Summary of Facts and Submissions

- I. The appeal lies against the decision of the opposition division of 13 December 2000 rejecting the oppositions against European patent No. EP-B-0 434 926 (proprietor: B. P. T. S. p. A., Caomaggiore (Venezia), Italy). The oppositions had been filed by the appellant (opponent 1) and by PERRY ELECTRIC S. r. l. (opponent 2). The notice of appeal dated 28 February 2001 was received by the European Patent Office on 28 February 2001, and the appeal fee was paid on the same day. In a communication of loss of rights pursuant to Rule 69(1) EPC, the appellant was informed by the registry of the Board that it appeared from the file that the notice of appeal was not filed in due time. The same applied to the payment of the appeal fee. Hence, the notice of appeal was deemed not to have been filed.
- II. The appellant requested re-establishment of his rights. He submitted that, due to exceptional circumstances, the cover sheet of the decision sent by the EPO was stamped in the office of its representative with the wrong date (29 December 2000 instead of 23 December 2000). Among these circumstances were not only the usual delays in mail delivery during the Christmas period, but also the maternity leave of the most experienced secretary and a particular local situation of the office rooms in the building.
- III. In a communication dated 4 January 2002, the Board explained that it was not inclined to allow reestablishment of rights because the appellant's representative could not rely on the correctness of the stamp on the cover sheet of the decision due to the

problems he had explained. Furthermore, the representative had not demonstrated that he had taken measures to overcome these problems.

- IV. In his answer to the Board's communication, the appellant's representative repeated his reasoning. He emphasized that his most experienced secretary had been on leave at the relevant time as well as the fact that, due to the way he had organised his office, no problems with the monitoring of time limits other than in the present case had ever occurred. Thus, the error with the date was only due to several exceptional circumstances, among these the problems of mail delivery by inexperienced postmen during the Christmas period.

#### **Reasons for the decision**

1. It follows from the "Acknowledgement of receipt" in the file that the decision of the Opposition Division was delivered to the appellant on 19 December 2000. As it had been posted on 13 December 2000, it is, according to Rule 78(2) EPC deemed to have reached the addressee ten days later, i.e. on 23 December 2000. The actual delivery date, being less than ten days after the date of posting, Rule 78(2), second alternative does not apply. The starting point for the calculation of the time limit for filing the appeal was thus 23 December 2000. As the notice of appeal and the appeal fee only reached the European Patent Office on 28 February 2001, the time limit of 2 months under Article 108 EPC was not met.

2. According to Article 122 EPC, "the applicant for or the proprietor of a European patent" may have his rights re-established if he was, in spite of all due care required by the circumstances having been taken, unable to observe a time limit. This is what the appellant, who is an appellant-opponent, requests.

2.1 It is expressly stated in Article 122(1) EPC that the right to restoration of rights may only be available for an applicant for or a proprietor of a European patent. However, decision G 1/86, OJ EPO 1987, 447, by the Enlarged Board of Appeal established that it may be also available for an opponent. Although the Headnote may appear more general ("Article 122 EPC is not to be interpreted as being applicable only to the applicant and patent proprietor. An appellant as opponent may have his rights re-established under Article 122 EPC if he has failed to observe the time limit for filing the statement of grounds of appeal"), it follows from the reasons of the decision that this departure from the clear and express wording of Article 122(1) EPC is strictly limited to the delayed filing of the grounds of appeal, thus during pending appeal proceedings (see, for instance, points 7 to 11 of the decision).

2.2 As a consequence, the subsequent case law established in that respect by the Boards of Appeal strictly limits the applicability of Article 122(1) EPC to cases where an appellant-opponent missed the time limit for filing the grounds of appeal. Thus, an appellant-opponent who misses, as in the present case, the time limit for filing the notice of appeal and/or for paying the appeal fee, is not entitled to have his rights re-established ( T 210/89, OJ EPO 1991,433; cf. also

T 323/87, OJ EPO 1989,343; T 128/87, OJ EPO 1989, 406). In such a case, an opponent(appellant) cannot rely on the principle of "equality before the law". His legal position differs from that where an appeal is pending, but the statement of grounds is filed out of time (T 210/89, Headnote).

- 2.3 The Board sees no reason to deviate from this established case law. Consequently, the request for re-establishment of rights of the appellant-opponent is to be refused in respect of the notice of appeal as well as of the appeal fee.
  
3. Although this legal point alone is sufficient for the refusal of the request, the Board notes that the appellant has also not demonstrated that he missed the time limit in spite of all due care having been taken. The reasons given for the failure - maternity leave of the most experienced secretary, mail delivery problems, a particular local situation within the office building - belong to the difficulties in any office, thus also an attorney's office. These problems may arise at least from time to time and have to be overcome by organisational measures. In this context it has to be mentioned that in December 2000 the maternity leave of the most experienced secretary had already lasted several months (the child was born in September). Moreover, the reception date appearing from the stamp on the decision was 16 days after its posting, which should have given rise to serious doubts about the correctness of this date.

4. As the appeal fee was not paid in due time, the appeal is deemed not to have been filed, Article 108 2nd sentence EPC, and thus not to exist. Consequently, the appeal fee is to be reimbursed.
  
5. Oral proceedings have not been requested in the present proceedings, which are, limited to re-established of rights. Such oral proceedings are also not considered expedient by the Board in the present case.

### **Order**

#### **For these reasons it is decided that:**

1. The request for re-establishment of rights is refused.
  
2. The appeal is deemed not to have been filed.
  
3. The appeal fee is to be reimbursed.

The Registrar:

The Chairman:

M. Kiehl

S. Steinbrener