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D E C I S I O N
of 21 May 2003

Case Number: T 0795/02 - 3.4.3

Application Number: 94116733.0

Publication Number: 0652597

IPC: H01L 29/72

Language of the proceedings: EN

Title of invention:

Insulated gate semiconductor device and method of fabricating same

Applicant:

mitsubishi denki kabushiki kaisha

Opponent:

-

Headword:

Insulated gate semiconductor device/MITSUBISHI

Relevant legal provisions:

EPC Art. 122, 108

Keyword:

"Restitutio in integrum - granted"

"Isolated mistake in a normally satisfactory system"

Decisions cited:

J 0002/86, J 0003/86 (OJ 1987, 362), J 0005/80 (OJ EPO 1981, 343), T 1062/96

Catchword:

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Case Number: T 0795/02 - 3.4.3

D E C I S I O N
of the Technical Board of Appeal 3.4.3
of 21 May 2003

Appellant: MITSUBISHI DENKI KABUSHIKI KAISHA
2-3, Marunouchi 2-chome
Chiyoda-ku
Tokyo 100 (JP)

Representative: Winter, Brandl, Fürniss, Hübner, Röss,
Kaiser, Polte
Partherschaft
Patent- und Rechtsanwaltskanzlei
Alois-Steinecker-Strasse 22
D-85354 Freising (DE)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 29 October 2001
refusing European patent application
No. 94 116 733.0 pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: R. K. Shukla
Members: M. J. Vogel
V. L. P. Frank

Summary of Facts and Submissions

- I. European patent application No. 94 116 733.0 was refused by a decision of the Examining Division dated 29 October 2001.

- II. On 7 March 2002, that is well after the expiry of the inextensible time limit for the filing of the notice of appeal, the applicant appealed against the above decision. At the same time he filed the statement of grounds of appeal, paid the appeal fee and requested, paying the due additional fee for re-establishment, that his rights in respect of the missed time limit for filing the notice of appeal be re-established pursuant to Article 122 EPC. In this letter the professional representative set out in full the grounds on which the application for restitutio was based.

- III. The grounds for re-establishment were in essence, that the applicant failed to observe the two month time limit under Article 108 EPC despite all due care required by the circumstances. The time limit was however missed due to the fact that Mrs E., the person responsible for transporting the file between the Representative and the postal department responsible for the outgoing letters, failed for inexplicable reasons to hand over the notice of appeal together with the filled out sheet for Payment of Fees and Costs to the postal department. This happened although the system for monitoring the time limits of his office and the office itself are well organised and have been functioning satisfactorily since the last 25 years. Thus, the failure to observe the time limit in question was due to an isolated mistake in the context of a normally satisfactory system.

IV. As to the monitoring system of his office, he submitted in detail, that in cases of an incoming negative decision a member of the central unit of the office responsible for monitoring time limits records both the dates of the two month time limit for appealing the decision and the four month time limit for filing the statement of grounds under Article 108 EPC. Additionally an appropriate second date before the end of this legally fixed time limit is recorded as an internal precautionary measure. These dates are checked by another person of the central unit and then logged into the computer supported reminder system of the office. Finally the dates are noted on the cover sheet of the original copy of the respective decision. The recorded time limits are deleted only after two persons have checked that they have been complied with.

Furthermore, the Representative's office has a well organised structure. There are several central units responsible for the registration of the time limits and for the observance of the incoming and outgoing letters. Besides these central units, special units ("Fachsekretariate") exist which are responsible for further administration of the file. The transport of the files between the central units and the "Fachsekretariate" is done by well instructed persons ("Aktenholer") who know well the legal significance of time limits. All the staff is under the permanent supervision of the Representatives of the firm.

V. In the present case the applicant instructed the Representative to lodge an appeal against the decision refusing the application No. 94 116 733.0 and additionally to file a divisional application based on the parent application refused by the Examining

Division at the end of October 2001. Consequently 8 January 2002 was logged in the monitoring system, this being the last date for filing an appeal pursuant to Article 108 EPC. On 6 November 2001 the professional representative drafted both the divisional application and the notice of appeal, signed them and entrusted both files to Mrs E., his "Aktenholerin", for taking all necessary steps for dispatching these letters immediately. Mrs E. who knows the importance of the notice of appeal brought the files to the central unit for checking and deleting the recorded time limit of 8 January 2002. One hour later when this was done by two persons responsible for that task, Mrs E. took both files with the outgoing letters to the special postal unit. Although she handed over the divisional application documents, she failed to hand over the notice of appeal to the postal unit. For inexplicable reasons as Mrs E. has confirmed in a sworn declaration dated 5 March 2002 the letter containing the notice of appeal remained in the file. As she states in the declaration this was the first time that a mistake was made by her in her long carrier with the Representative's law firm.

- VI. Since the recorded time limit was already deleted in the reminder system, the procedural omission came to light when a further letter of the applicant came in. This was on 15 February 2002.

Reasons for the Decision

1. *Admissibility*

The decision dispatched on 29 October 2001 to reject

the European patent application in suit was deemed to have been delivered to the applicant on 8 November 2001 (Rule 78(2) EPC) The notice of appeal against the above decision was however filed on 7 March 2002, i.e. after the expiry of the non-extensible time limit stipulated in Article 108 EPC, and is accordingly considered to be inadmissible pursuant to Rule 65(1) EPC. In accordance with Article 122(1) EPC, in this situation the applicant can have his rights re-established.

The application for re-establishment is admissible. In particular the requirements of Article 122(2) and (3) EPC are complied with. The request for *restitutio* was filed on 7 March 2002, i.e. within two months after being aware of the omission (15 February 2002) and sets out the grounds on which it is based. The fee for re-establishment of rights was paid in due time. In addition the omitted act was completed by filing the notice of appeal, paying the appeal fee, and filing the grounds of appeal on 7 March 2002.

2. *All due care*

The application for *restitutio* meets also the requirements of Article 122(1) EPC, and is thus allowable since the time limit pursuant to Article 108 EPC was missed despite all due care required by the circumstances being taken.

First of all the omission was not caused by any deficiencies of the organisation of the work within the Representative's office. It follows from the detailed submissions and the supporting documents supplied by the Representative that a satisfactory system for monitoring the time limits is provided in his office.

In particular in the present case recording and deleting the time limits in a computer which is entrusted to two employees who are familiar with these tasks was carried out properly. Moreover, every employee in the office has clearly defined functions within the structure of the office, is thoroughly instructed in the tasks to be performed and is properly supervised. This is also the case with regard to the person (Aktenholerin) responsible for taking the files from the central store to various units within the office and between the units (e.g. the Representative, the time-monitoring and the postal unit).

The Board is thus convinced by the Representative's submissions that the missing of the time limit in the case at issue did not result from an unsatisfactory reminder system or an inappropriate organisation of the Representative's office.

In the present case, as described in detail by the Representative in his submissions, the notice of appeal along with the order for the payment of the appeal fee were prepared and signed by the representative on 6 November 2001. Additionally, documents in respect of filing of a divisional application based on the European patent application in suit were prepared and signed by the representative on the same day. Both these files, i.e. the appeal file and the divisional application file were sent with Mrs E. to the time limit monitoring unit for checking whether all the necessary documents to be dispatched were in the file. After the time-limit monitoring unit had established that all the necessary documents to be dispatched were in the files, the respective time limit was marked in the computer as "done" ("erledigt"). From the sworn

statement of Mrs E. it is evident that although she gave the documents in respect of the filing of a divisional application to the postal unit on 6 November she did not hand over the notice of appeal and the fee payment sheet to the postal unit. They were left in the appeal file.

Thus the omission of the time limit in question was caused by an unfortunate and inexplicable mistake by a normally reliable employee within a normally satisfactory system (J 2/86, J 3/86, OJ 1987, 362). As submitted in the sworn declaration of Mrs E. and confirmed in submissions of the appellant's Representative, Mrs E., had proven over years to be able to execute the work as "Aktenholerin" in the Representative's office and to be reliable in her daily work. Therefore in the case at issue, the Representative could reasonably expect that Mrs E. would comply with his order and after having been instructed about the importance of that letter, would give the notice of appeal to the postal unit (see J 5/80 OJ EPO 1981, 343). Under these circumstances the Board sees no need for further checks within the Representative's firm to ensure that the letter was in fact dispatched (see also T 1062/96). This would be beyond the standard of all due care under Article 122(1) EPC.

For the foregoing reasons, the Board comes to the conclusion that the reason for non-compliance of the time limit causing the loss of rights was an isolated mistake which cannot be excluded even in an effective system for observing the time limits. Article 122 EPC is intended to ensure that, in appropriate cases, a loss of rights does not result from such a mistake

(J 2/86 and J 3/86, OJ EPO 1987, 362, reasons 4).

Order

For these reasons it is decided that:

The rights of the Appellant are re-established in relation to the filing of the notice of appeal within the time limit prescribed by Article 108 EPC.

The Registrar:

The Chairman:

N. Maslin

R. K. Shukla