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**Datasheet for the decision
of 15 May 2025**

Case Number: T 1768/23 - 3.2.01

Application Number: 17873695.5

Publication Number: 3545778

IPC: A24F40/05, A24F40/40

Language of the proceedings: EN

Title of invention:

ATOMIZER COMPRISING AN INCLINED ULTRASONIC ATOMIZING SHEET
STRUCTURE AND ELECTRONIC CIGARETTE

Applicant:

China Tobacco Hunan Industrial Co., Ltd.

Headword:

Relevant legal provisions:

EPC Art. 84

RPBA 2020 Art. 13(1), 13(2), 11

Keyword:

Claims - clarity - main request (yes)

Amendment after summons - exceptional circumstances (yes)

Amendment to appeal case - amendment overcomes issues raised
(yes) - amendment gives rise to new objections (no)

Remittal - special reasons for remittal - (yes)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 1768/23 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 15 May 2025

Appellant:
(Applicant)

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Decision under appeal:

**Decision of the Examining Division of the
European Patent Office posted on 12 June 2023
refusing European patent application No.
17873695.5 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman

J. J. de Acha González

Members:

A. Wagner

S. Fernández de Córdoba

Summary of Facts and Submissions

- I. The appeal was filed by the applicant against the decision of the examining division to refuse the European patent application No. 17873695.5 pursuant to Article 97(2) EPC.
- II. In the decision under appeal, the examining division concluded that claim 1 of both the main request and auxiliary request 1 on file was not clear contrary to the requirements of Article 84 EPC.
- III. With the statement of the grounds of appeal the appellant requested that the contested decision be set aside and that a European patent be granted on the basis of the main request or to auxiliary request 1 as present on file.
- IV. After a communication of the Board according to Article 15(1) RPBA, the appellant submitted with letter dated 5 January 2025 an auxiliary request 2.
- V. Oral proceedings by videoconference were held before the Board on 15 May 2025. During oral proceedings the appellant submitted a new main request.
- VI. The appellant (applicant) requested that the decision under appeal be set aside and that the case be remitted to the examining division for further prosecution on the basis of the (new) main request filed during oral proceedings before the Board.
- VII. Claim 1 of the new main request reads as follows (feature numbering added by the Board):

- 1 An atomizer, comprising
 - 1.1 a housing (18) comprising a bottom,
 - 1.2 an atomization cotton (14) and an ultrasonic atomizing sheet (16),
 - 1.3 wherein the atomization cotton (14) and the ultrasonic atomizing sheet (16) are arranged in the housing (18), characterized in that
 - 1.4 the ultrasonic atomizing sheet (16) is obliquely arranged in the housing (18) such that the ultrasonic atomizing sheet (16) is at different heights on two sides, and
 - 1.5a two ends of the atomization cotton (14) are connected to tobacco tar in a tobacco tar cavity via tobacco tar guide cotton (17), or
 - 1.5b the two ends of the atomization cotton (14) are directly provided in the tobacco tar cavity;
 - 1.6 and a lower surface of the atomization cotton (14), which faces the ultrasonic atomizing sheet (16), is in contact with an atomization surface of the ultrasonic atomizing sheet,
 - 1.7 so that the atomization cotton is arranged from a high side to a low side of the ultrasonic atomizing sheet (16) and excess tobacco tar on the atomizing sheet (16) is returned to the tobacco tar guide cotton (17) or the tobacco tar cavity through the atomization cotton (14) at the lower end of the inclined portion of the atomization sheet (16).

Reasons for the Decision

1. Admission of the main request

- 1.1 In accordance with Article 13(2) RPBA, the Board admitted the main request filed during oral proceedings before the Board into the proceedings. The following

circumstances were considered as being exceptional in the sense of Article 13(2) RBPA.

- 1.2 The main request is based on auxiliary request 1 underlying the impugned decision. The only amendment is the addition of the wording "*or the tobacco tar cavity*" in feature 1.7. The amendment was caused by a clarity objection raised by the Board for the first time during oral proceedings.
- 1.3 This objection concerned feature 1.7. Features 1.5a and 1.5b define two alternative connections between the two ends of the atomizing cotton and the tobacco tar cavity:
- or via tobacco tar guide cotton
 - or directly.
- Feature 1.7 of auxiliary request 1 underlying the impugned decision, however, only referred to the return of the excess tobacco tar to the tobacco tar guide cotton without considering the alternative of a direct connection.
- 1.4 As the oral proceedings was the first moment in time in which the appellant was confronted with this objection, and in view of fair appeal proceedings, the appellant was given the opportunity to react thereon. The amendment made to feature 1.7 adds the second alternative for the excess tobacco tar to be returned directly from the two ends of the atomizing cotton to the tobacco tar cavity and therewith clearly overcomes the objection of the Board. Furthermore, the amendment does not give rise to new objection, in particular as regards the requirements of Article 84 EPC and leads to an allowable appeal as explained below.

1.5 For these reasons the Board considered the admission of the new main request justified.

2. Article 84 EPC

2.1 Claim 1 of the main request meets the requirements of Article 84 EPC.

2.2 It is noted that the wording of the main request on file, which is relevant for the issue under discussion, is identical to the wording of auxiliary request 1 underlying the impugned decision but for the clarification mentioned above regarding the alternatives of the direct connection to the tar cavity or via the tobacco tar cotton.

2.3 The examining division was of the opinion that claim 1 of auxiliary request 1 failed to define a spatial reference in respect of which the heights on two sides (defined in feature 1.4) were to be considered. Claim 1 merely required an oblique arrangement of the ultrasonic atomizing sheet within the space delimited by a housing with a wall. The examining division argued that, for a specific arrangement of the ultrasonic atomizing sheet, the feature "*at different heights on two sides*" could be considered to be implemented and not implemented at the same time, depending on the orientation of the atomizer and where the sides were considered to be.

2.4 The Board does not agree. As argued by the appellant, the different heights defined in feature 1.4 have to be seen together with the other features in claim 1, in particular with the intended effect that the excess tobacco tar is returned at the lower end of the inclined portion of the atomization sheet (feature

1.7).

Therefrom the skilled person readily understands that because of the inclination, i.e. the oblique arrangement of the ultrasonic atomization sheet and of the atomization cotton (that faces the sheet and is in contact therewith, see feature 1.6), the tobacco tar is returned by gravity. To achieve this effect, it is clear for the skilled person that the ultrasonic atomizing sheet is at different heights on two sides with respect to a horizontal plane - otherwise a gravity-induced backflow of the tobacco tar would not be achieved.

Consequently, claim 1 implies the horizontal plane as an absolute spatial reference for the different heights defined in feature 1.4.

- 2.5 The Board notes that the atomizer as shown in figure 1 of the application as filed, can be turned to the left by the angle of inclination of the ultrasonic atomization sheet with respect to the horizontal plane, such that the ultrasonic atomization sheet is not at different heights on two sides with regard to the horizontal plane. However, this fact does not mean that claim 1 does not comply with Article 84 EPC. The claim does not require that features 1.4 and 1.7 are met for all orientations of the atomizer. The claim is broad in this sense and the skilled person can identify when an atomizer comprises an ultrasonic atomization sheet which is obliquely arranged according to feature 1.4 such that feature 1.7 is met.

3. Remittal

- 3.1 In accordance with Article 11, first sentence, RPBA and as requested by the appellant, the Board remits the case for further prosecution to the department of first

instance because special reasons present themselves for doing so.

- 3.2 The decision under appeal deals with a main request submitted after the examining division issued the annex to the summons including their preliminary opinion, and with an auxiliary request 1 filed during oral proceedings before the department of first instance. The sole reason for refusing the present patent application was lack of clarity of claim 1 of both requests. Thus, the examining division did not examine other requirements of the EPC, in particular those of Articles 123(2), 54 and 56 EPC for the requests underlying the impugned decision.
- 3.3 The same applies for the main request on file which is based on auxiliary request 1 underlying the impugned decision. For these reasons the remittal is justified, since under Article 12(2) RPBA the primary object of the appeal proceedings is to review the decision under appeal in a judicial manner.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the examining division for further prosecution on the basis of the main request filed during oral proceedings before the Board.

The Registrar:

The Chairman:



H. Jenney

J. J. de Acha
González

Decision electronically authenticated