



T 30/81

DOK

DECISION of 17 March 1982

Applicant: JOHN ZINK COMPANY

Headword: Apparatus for vaporization of liquids

EPC Articles 111(1), 113(1), 123(2), Rule 67

Basis of decision - procedural violation - Reimbursement  
of appeal fees

Rechtliches Gehör - Wesentlicher Verfahrensmangel - Rückzahlung  
der Beschwerdegebühr

Fondement des décisions - Vice substantiel de procédure -  
Remboursement de la taxe de recours

Europäisches  
Patentamt

Technische  
Beschwerdekammern

European Patent  
Office

Technical Boards  
of Appeal

Office européen  
des brevets

Chambres de  
recours techniques



Case N°: T 30/81

DECISION

of the Technical Board of Appeal 3.2.2  
of 17 March 1982

Appellant:

JOHN ZINK COMPANY  
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United States of America

Representative:

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Decision under appeal:

Decision of the Examining Division 072  
of 13 April 1981 to reject European  
Patent Application N°. 79 300 046.4  
in accordance with Article 97(1) EPC

Composition of the Board:

G. Andersson	Chairman
L. Gotti Porcinari	Member
C. Maus	Member

## Summary of Facts and Submissions

- I. European patent application No. 79 300 046.4, filed on 11 January 1979, published under the number 0 003 395 and claiming priority of a previous application from 30 January 1978, was refused by decision of Examining Division 072 dated 13 April 1981. The decision was based on claims 1 to 7 received on 22 November 1980.

Claim 1 reads as follows:

1. An apparatus for vaporization of liquids having a boiling point lower than that of water, comprising a first, narrow planar plenum (12) having first (26) and second (28) walls orientated with their planes vertical, the first (26) and second (28) walls of the plenum (12) being of metal and of substantial horizontal length, a plurality of nozzles (39), spaced along the top of the first plenum (12), for injecting fuel gas downwardly thereinto, between the first (26) and second (28) walls and means to inject combustion air (34) downwardly thereinto, the bottom (30) of the plenum (12) being closed, second, narrow planar plena (14, 18), one (14) contiguous with the first wall (26) and another (18) contiguous with the second wall (28) of the first plenum (12), means to selectively flow the combustion products (46) through openings (48) adjacent the bottom (30) of the first plenum (12) into the bottom of the second plena (14,18), a third plenum (16) contiguous with one (14) of the second plena (14,18) and a fourth plenum (20) contiguous with the other (18) of the second plena (14,18), the outer walls (68,69) of the third (16) and fourth (20) plena being taller than the inner walls (60,61) of the third (16) and fourth (20) plena and including a top (22) and bottom (24) and end (71) closures attached to the outer walls (68,69) to confine all of the plena (12,14,16,18 and 20), the second (14,18), third (16) and fourth (20) plena being filled to a selected level with water, characterized in that a plurality of horizontally spaced pipes (86) are arranged in a zig-zag connection within the third (16) and fourth (20) plena for carrying liquid to be vaporized from an inlet (89) to the spaced pipes (86) in the third plenum (16) at the bottom thereof, through a cross-over pipe (87) connecting the top of the spaced pipe in the third plenum (16) with the top of the spaced pipe (86) in the fourth plenum (20), thence through an outlet (88) from the spaced pipe (86) in the fourth plenum (20) at the bottom thereof and at least one stack means (76) connected to the space above the second (14,18), third (16) and fourth (20) plena for the escape of cooled products of combination to the atmosphere.

- II. In its decision, the Examining Division stated that the present claim 1 comprises a feature which extends beyond the content of the application as filed. The other features, although new in combination, are however obvious to a person skilled in the art, having regard to German unexamined application 2 061 435, French patent specification 2 013 898 and US patent specification 3 368 548.
- III. On 6 June 1981, the applicant lodged an appeal against that decision, paying the fee for appeal simultaneously. The statement of grounds was received on 6 August 1981.
- The applicant is of the opinion that the subject-matter of claim 1 on which the decision was based is not obvious, having regard to the state of the art.
- IV. In a communication dated 5 November 1981, the Board directed the applicant's attention to the fact that he had not given his opinion on whether the feature objected to in the decision as an unallowable modification was justified by the original disclosure.
- V. In a letter, received on 29 January 1982, the applicant referred to those passages in the description from which, in his opinion, the feature in question followed when read in conjunction with the drawings.
- VI. Concerning the content of the original application reference is made to the published document No. 0 003 395.

Reasons for the Decision.

1. The appeal complies with Articles 106 to 108 EPC. Expressis verbis, the applicant has not provided a statement identifying the extent to which cancellation of the decision is requested; however, he has not changed the claims on which the decision is based. It follows that the applicant requests cancellation of the decision as it applies to those claims. Consequently, the appeal also complies with Rule 64 EPC and is, therefore, admissible.
2. The examination of whether claim 1, on which the decision is based, is supported by the original documents produces the following result:

.../...

- 2.1 For the features contained in that claim, protection was already sought in the original claims, except for the feature objected to in the decision. Indeed, as yet the Examining Division has raised no objection thereto. However, it was of the opinion that the statement in claim 1 "that the liquid to be heated (vaporized) passes into the bottom of the zig-zag pipes 86 flowing to the top of the third plenum thence across via element 87 (Figure 1) into the top of the pipes in the fourth plenum then downward and outward through the bottom thereof" was not supported by the original documents. This opinion the Board cannot share.
  
- 2.2 In support of its opinion the Examining Division cited, among other things, the sentence beginning with the word "however" on page 7, line 33 of the description. From this sentence a person skilled in the art learns indeed that the liquid to be heated has to flow in each one of the two plena from the bottom toward the top. However, the Examining Division disregarded the two preceding sentences. From them it follows that this behaviour of the liquid constitutes only one of several possibilities and that the example as well as the description (cf. page 7, line 31) and the figures (cf. particularly figure 1) show a horizontal pipe 87 joining the two rows of pipes 86 across one end of the vessel.
  
- 2.3 This construction, with a horizontal pipe i.e. a pipe joining the topmost pipes in the two plena, is not inconsistent with the additional passages of the description which the Examining Division has cited in its decision. These passages concern themselves only with the behaviour of the cold liquid introduced into the apparatus. However, these sentences contain no statement that in the case where the rows of pipes in the two plena are joined together, the liquid heated in the first plenum must also flow in the second plenum from the bottom to the top. Accordingly, no contradiction exists between the example and those passages of the description. The feature in question is therefore supported by the description.
  
- 2.4 Claim 1 thus meets in this respect the formal requirements of the Convention.
  
3. The Examining Division has not yet examined whether an apparatus according to claim 1 is patentable, which also shows the aforesaid discussed feature and which originally appeared only in the description. Under these circumstances, the Board deems it not timely to decide

this question, but makes use of the right, given to it by Article 111 (1) EPC, to remit the case to the Examining Division for further prosecution.

4. Concerning the feature discussed in paragraph 2 above the decision is based on Article 123 (2) EPC (amendment which extends beyond the content of the application as filed). This objection was raised by the Examining Division for the first time in the decision concerning the refusal of the application, therefore the applicant has not had the opportunity to present his comments on this ground, as it is stated by Article 113(1) EPC. Accordingly, the decision in this respect is not in accord with Article 113 (1) EPC.

The procedure before the Examining Division suffers therefore from a substantial procedural violation. Consequently, the reimbursement of appeal fees according to Rule 67 EPC is equitable.

For these reasons,

it is decided that

1. The decision of the Examining Division 072 dated 13 April 1981 is set aside.
2. The case is remitted to the Examining Division for further prosecution.
3. The reimbursement of appeal fees is ordered.

The Registrar

The Chairman

J. Ruckerl

G. Andersson