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**Datasheet for the decision
of 28 February 2013**

Case Number: J 0028/10 - 3.1.01

Application Number: 02739322.2

Publication Number: 1396015

IPC: H01L 29/872, H01L 29/06,
H01L 21/329

Language of the proceedings: EN

Title of invention:
Two-mask trench Schottky diode

Patent Proprietor:
GENERAL SEMICONDUCTOR, Inc.

Headword:
Date of notification/GENERAL SEMICONDUCTOR

Relevant legal provisions:
EPC R. 126(2)

Keyword:
"Notification to the representative via an external mail
service"
"Proof of receipt of communication"

Decisions cited:
J 0009/05, J 0018/05, T 1535/10

Catchword:
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Case Number: J 0028/10 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 28 February 2013

Appellant: GENERAL SEMICONDUCTOR, Inc.
(Applicant) 10 Melville Park Rd.
Melville, NY 11747-3113 (US)

Representative: Jungblut, Bernhard Jakob
Jungblut & Seuss
Patentanwälte
Max-Dohrn-Strasse 10
D-10589 Berlin (DE)

Decision under appeal: Decision of the Examining Division dated 7 July
2010.

Composition of the Board:

Chairman: G. Weiss
Members: J. Geschwind
D. S. Rogers

Summary of Facts and Submissions

- I. Euro-PCT application 02739322.2 was filed as international application PCT/US02/16096 on 22 May 2002, claiming a priority of 22 May 2001.
- II. On 26 November 2003, the application entered into the European phase before the EPO.
- III. By communication of 12 May 2009 pursuant to Article 94(3) EPC, the Examining Division informed the applicant's representative that the application did not meet the requirements of the EPC and invited him to file his observations within four months. By letter of 10 September 2009 the applicant's representative requested an extension of this time limit. This was granted and the time limit was extended by another two months on 25 September 2009.
- IV. Since the applicant's representative did not reply in due time to the communication of 12 May 2009, a notification of loss of rights pursuant to Rule 112(1) EPC was issued by the Examining Division on 21 December 2009.

A request for further processing was filed by the applicant's representative on 3 March 2010 and the fee for further processing was paid and the omitted act was completed by the filing of observations in response to the Examining Division's communication of 12 May 2009.

- V. By a communication of 22 March 2010 pursuant to Article 113(1) EPC, the Formalities Officer acting on behalf of the Examining Division informed the

applicant's representative that the request for further processing has not been filed in due time, i.e. the time limit expired on 1 March 2010 (Rule 131 (4) and Rule 134(1) EPC ; 28 February 2010 is a Sunday).

No reply to the aforementioned communication was received by the EPO.

As a consequence the Formalities Officer acting on behalf of the Examining Division issued a decision dated 7 July 2010 in which it decided that the request for further processing was deemed not to have been filed, that the application was deemed to be withdrawn with effect from 24 November 2009 and that all fees paid after 23 November 2009 would be refunded once the decision became final.

VI. The applicant's representative lodged an appeal against this decision with notice of appeal of 17 September 2010 and paid the appeal fee on the same day. With letter of 9 November 2010 the appellant's representative filed a statement setting out its grounds of appeal.

VII. In the statement setting out the grounds of appeal the appellant's representative submitted that the communication of 22 March 2010 was never received by the office of the appellant's representative who thus has never had the opportunity to reply to the communication.

The appellant's representative gave further details as to the process in practice at his office concerning incoming mail as follows:

- The representative's office is located in a large building in a business-park. Incoming mail for the law firm is not delivered to the office door of the law firm but left at the doorman's desk located at the entrance of the building. For the case of certified letters, the postman provides a list of them to the doorman and, "depending on the practice of the day", either the doorman signs said list confirming the reception, or a secretary of the firm fetches the mail from the doorman. In any case the representative's office never gets a copy of the aforementioned list for cross-checking purposes.

- It can happen that the above process leads to letters being distributed to the wrong recipients. It cannot therefore be excluded that a certified letter addressed to the representative's law firm was received at the doorman's desk, signed by him and then passed to the wrong recipient.

The appellant referred also to decision J 9/05 of 21 December 2006, in particular as to the difficulty of providing evidence that something has not happened (e.g. the non reception of a registered letter).

VIII. With a communication of 2 August 2012, the Board informed the appellant's representative of its preliminary opinion that it saw no reason to deviate from the appealed decision.

IX. The appellant's representative answered this communication with a letter of 12 October 2012 by which it outlined the general implementation of the mail

distribution system to and within the representative's law office.

X. With the summons to oral proceedings dated 18 December 2012 the Board sent a further communication to the appellant's representative drawing its attention to the principles dealt with in decision T 1535/10 of 13 May 2011.

XI. The appellant's representative answered this further communication with a letter of 28 January 2013 where it made comments regarding the differences between the legal and factual situation of T 1535/10 and the present case.

It argued that :

- decision T 1535/10 is not applicable in the present case because there is no relationship between the representative's office and the business park other than a contract for the office rental, nor does the representative have any current account with a third party, nor is the representative an employee of a company.

- the doorman is not an employee of the representative's office and the doorman does not have any contractual relation with the representative. That the doorman accepts the delivery of postal mail on behalf of the law office does not change this situation.

- it should be "sufficient to have a letter box" which is accessible without restriction, as is the case at the representative's law office.
- XII. On 28 February 2013 oral proceedings took place before the Board. The appellant's representative requested that the decision under appeal be set aside and that the communication pursuant to Article 113(1) EPC, fixing a two month time limit for filing comments regarding the request for further processing, be re-notified.

Reasons for the decision

1. The appeal satisfies the requirements of Articles 106 to 108 and Rule 99 EPC and is therefore admissible.
2. The issue raised by the appeal is that of the proof of reception of a communication from the EPO by an addressee with regard to the requirements specified in Rule 126 (2) EPC.
3. In the present case the communication of the Formalities Officer acting on behalf of the Examining Division informing the appellant's representative that the request for further processing has not been filed in due time bears the date of 22 March 2010. This communication was sent by registered letter. According to Rule 126 (2) EPC this communication is deemed to have been delivered to the addressee on the tenth day following its posting, unless the letter failed to reach the addressee or reached him at a later date. In the event of any dispute, it is incumbent on the

European Patent Office (EPO) to establish that the letter reached its destination. In any case, the probative value of the evidence provided by the EPO should, if necessary, be balanced against the probative value of submissions and evidence by the appellant (applicant).

- 3.1 As submitted by the appellant's representative, a specific system for the reception of registered letters was implemented and accepted by the representative. This system involved the delivery of registered letters to the desk of the doorman of the business-park building in which the representative has his office. The doorman is the employee of a security company, this company having a contractual relation with the company that administrates the business-park where the representative rents office space. These letters are subsequently distributed either by the doorman or fetched by a secretary from the representative's office.
- 3.2 It results from the postal investigation carried out by the EPO before issuing the appealed decision that the communication of 22 March 2010 was delivered on 23 March 2010 and that the confirmation of receipt was signed by an identified recipient, i.e. Mr. Bodo Tröger.
- The same recipient is again mentioned on the advice of delivery of 8 July 2010 which concerns the notification of the appealed decision.
- This leads to the conclusion that a letter which is delivered to Mr. Tröger should be deemed delivered by the postman to an authorized recipient, acting within

the mail reception process implemented at the representative's office and accepted by him.

4. The processing of outgoing and incoming postal or electronic mail is a key point in the organization of a law office. It is a vital component of any office system that has to deal with time-limits that have legal consequences.

4.1 It is an established fact that the appellant's representative was fully aware of and accepted the system for the reception and distribution of postal mail in place at the business-park in which it rented office space.

The questions for consideration are, first, whether the above described system for the reception of postal mail is to be considered as a system falling under the organisational arrangements put in place, accepted and authorised by the representative, and second, whether this system enables the representative to know if mail has been received (see T 1535/10, Reasons No 1.5.2).

4.2 It is not contested by the appellant's representative that a third party, i.e. an employee of a security company hired by the park administration receives and accepts registered letters from the post administration on behalf of the representative's law office, even without any explicit authorisation to that effect. By the course of conduct of renting office space subject to this system of postal receipt, the representative has implicitly consented to such an arrangement.

Furthermore, it was confirmed that no special procedures are in place with regard to the forwarding of these letters to an employee of the representative or to the representative himself. Apart from mere considerations of the distance of the representative's office from the doorman's desk, there was no specific hindrance preventing the representative or any of its employees from having knowledge of incoming postal mail.

It therefore has to be concluded that the representative was fully aware of the details and functioning of this system of reception and distribution of postal mail, including any risk associated with this system. By using a service external to his office for receiving and dispatching postal mail as explained above, the representative accepted that this external service would be treated as if it were his own in matters relating to the delivery of communications subject to deadlines.

5. In the Board's opinion the situation of the present case is different to the one dealt with in decisions J 9/05 and J 18/05 of 21 December 2006. In these cases the only evidence provided by the examining division was a letter from the Deutsche Post referring to the information received from the foreign postal service, according to which the letter was delivered to an authorised recipient, who, however, was not specified. Thus, there was no evidence that the registered letter was delivered to an authorized recipient and it was even not possible to determine to which recipient the letter was notified since the information retrieved

from the postal services lacked detail and was extremely vague.

6. It follows from the above that the communication of 22 March 2010 shall be deemed as delivered to the addressee on the tenth day following its posting (Rule 126(2) EPC) without any response being given by the appellant's representative in due time.

Hence, the Board judges that there is no reason to deviate from the decision under appeal.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

C. Eickhoff

G. Weiss