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Datasheet for the decision of 20 September 2011

Case Number: T 1149/11 - 3.4.01

Application Number: 07706650.4

Publication Number: 1976056

IPC: H01Q 1/50

Language of the proceedings: EN

Title of invention:
Radio IC device and radio IC device part

Applicant:
Murata Manufacturing Co. Ltd.

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 122, 108

Relevant legal provisions (EPC 1973):
-

Keyword:
"Re-establishment of rights (no)"

Decisions cited:
J 0005/80, T 0439/06, T 1465/07

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 1149/11 - 3.4.01

D E C I S I O N
of the Technical Board of Appeal 3.4.01
of 20 September 2011

Appellant: Murata Manufacturing Co. Ltd.
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Decision under appeal: **Decision of the Examining Division of the European Patent Office posted 21 December 2010 refusing European patent application No. 07706650.4 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman: B. Schachenmann
Members: G. Assi
F. Neumann

Summary of Facts and Submissions

I. The European patent application No. 07706650.4 (publication number 1 976 056) was refused by the examining division with a decision dispatched on 21 December 2010.

II. The applicant filed a notice of appeal, received on 1 March 2011, against the decision of the examining division. The appeal fee was paid on the same day. The statement setting out the grounds of appeal was received on 2 May 2011.

III. With a communication of 12 April 2011 the applicant was informed that the notice of appeal had been received and the appeal fee had been paid after expiry of the time limit according to Article 108 EPC.

In reply to the communication, the applicant requested with a letter of 2 May 2011, received on the same day, re-establishment of rights under Article 122 EPC with regard to the time limit for filing the notice of appeal and for paying the appeal fee.

With summons dated 7 June 2011 the applicant was summoned to oral proceedings scheduled to take place on 20 September 2011. A Board's communication, annexed to the summons, dealt with the issue of re-establishment of rights only.

With a letter of 28 July 2011, received on 29 July 2011, the applicant made further submissions.

The oral proceedings took place on 20 September 2011 as scheduled. The applicant maintained the request for re-establishment of rights made with the letter of 2 May 2011.

IV. The revised version of the European Patent Convention or EPC 2000 entered into force on 13 December 2007. In the present decision, reference is made to "*EPC 1973*" or "*EPC*" for EPC 2000 (EPC, Citation practice, pages 4-6) depending on the version to be applied according to Article 7(1) of the Revision Act dated 29 November 2000 (Special Edition No. 1 OJ EPO 2007, 196) and the decisions of the Administrative Council dated 28 June 2001 (Special Edition No. 1 OJ EPO 2007, 197) and 7 December 2006 (Special Edition No. 1 OJ EPO 2007, 89).

Reasons for the Decision

1. Admissibility of the request for re-establishment of rights

1.1 The request for re-establishment of rights complies with the formal requirements of Article 122 EPC and Rule 136 EPC.

In particular, the cause of non-compliance with the time limit under Article 108 EPC having been removed with the receipt of the official communication dated 12 April 2011, the two-month time limit for filing the request for re-establishment of rights in writing was observed with the letter of 2 May 2011. On the same day, the omitted act, i.e. the filing of the notice of appeal, was completed and the fee for re-establishment

was paid. Furthermore, the request for re-establishment of rights states the grounds and facts on which it is based.

1.2 The request for re-establishment of rights is, therefore, admissible.

2. Circumstances of the present case

The specific circumstances of the present case, as presented by the applicant with the letter of 2 May 2011, are summarized as follows.

On 22 December 2010, Mr. X, a professional representative, was in charge of reviewing the incoming post. On that date, the decision of 21 December 2010 was received.

On the same day, Ms. Y, a paralegal assistant, was in charge of calculating and noting the relevant time limits. Thus, it was Ms. Y who calculated and noted the time limit for filing the appeal against the decision of 21 December 2010. According to her calculation, the time limit expired on 1 March 2011.

In the patent attorney firm for which Mr. X and Ms. Y work, the time limits are subdivided in "*blue*" time limits relating to internal administrative file management and critical "*red*" time limits including, for example, the time limits for filing an appeal and for paying the corresponding fee. The correctness of any "*red*" time limit is checked by the person in charge of the review of the incoming post, this person being one of the partners of the firm.

On 22 December 2010, Mr. X remarked that the noted time limit was incorrect and instructed Ms. Y to correct it from 1 March 2011 to 28 February 2011 in the computerized time limit monitoring system. This correction was to be performed immediately after she had finished reviewing, together with Mr. X, the remaining documents received on that day. Moreover, Mr. X instructed her to report to him as soon as the correction had been made. Later on the same day Ms. Y reported to Mr. X that she had corrected the time limit according to the received instruction. As a matter of fact, however, Ms. Y had, for some inexplicable reason, failed to correct the wrong time limit. This failure first came to the attention of Mr. X upon receipt of the official communication of 12 April 2011.

On 1 March 2011, Mr. Z, another professional representative from the same firm, signed the notice of appeal that was then filed on the same day, relying on the correctness of the noted time limit for the appeal as having been checked by Mr. X on 22 December 2010.

3. Article 122 EPC

Pursuant to Article 122(1),(2) EPC a request for re-establishment of rights shall be granted provided that an "*applicant*" was unable to observe a time limit vis-à-vis the European Patent Office, in spite of "*all due care required by the circumstances*" having been taken.

4. Jurisprudence of the boards of appeal

4.1 In the present case, the professional representative, Mr. X, acted for the applicant and entrusted the performance of routine tasks such as calculating and noting time limits to the assistant, Ms. Y.

4.2 Such a situation is considered in decision J 05/80 dated 7 July 1981 (OJ 1981, 343). The board held that "*When an applicant is represented by a professional representative, a request for restitutio in integrum cannot be acceded to unless the representative himself can show that he has taken the due care required of an applicant or proprietor by Article 122(1) EPC*" (J 05/80, Headnote, I). In other words, what Article 122 EPC requires from an applicant also applies to an applicant's representative.

Moreover, "*If the representative has entrusted to an assistant the performance of routine tasks such as ... noting time limits, the same strict standards of care are not expected of the assistant as are expected of the applicant or his representative*" (J 05/80, Headnote, II). This implies that a representative carries full responsibility for the work of an assistant entrusted with a task.

However, "*A culpable error on the part of the assistant made in the course of carrying out routine tasks is not to be imputed to the representative if the latter has himself shown that he exercised the necessary due care in dealing with his assistant. In this respect, it is encumbent [sic] upon the representative to choose for the work a suitable person, properly instructed in the*

tasks to be performed, and to exercise reasonable supervision over the work" (J 05/80, Headnote, III). Thus, responsibility of a representative entrusting an assistant with routine tasks is defined by the duty of care concerning the proper selection (cura in eligendo), instruction (cura in instruendo) and supervision (cura in custodiendo) of the appointed assistant.

4.3 These requirements are acknowledged in the established jurisprudence of the boards of appeal, for example in T 0439/06 dated 31 January 2007 (OJ 2007, 491). In this decision, the board held that "*complying with these requirements ... does not mean that with the proper selection, instruction and supervision of the assistant the representative's responsibility ends there once and for all, and that he need not take further care with respect to the delegated task*" (T 0439/06, Reasons, 6 and 7). The ongoing character of the representative's responsibility with regard to the work of an assistant is here underlined.

In the same decision T 0439/06 the board also drew attention to further issues.

A first one concerns the kind of time limit missed. In the board's view, "*... what all due care calls for depends on the specific circumstances of the case. In this respect, not only the individual circumstances of the person concerned have to be taken into consideration, but also the kind of time limit that needs to be observed and the legal consequences of missing it. It is clear from the Convention that not all time limits need the same attention. If further processing is available it might be sufficient to leave*

the monitoring of such a time limit completely to the assistants since there is no irrevocable loss of rights at stake. However, the time limits for filing an appeal provided for in Article 108 EPC against a decision revoking the patent are absolutely critical since if they are missed the patent remains revoked and there is no further ordinary remedy. Thus they need specific attention" (T 0439/06, Reasons, 8).

A second issue concerns the occurrence of an isolated mistake within a normally satisfactory system. The board held that "*Under the established case law of the boards of appeal, restitutio in integrum is intended to ensure that an isolated mistake within a normally satisfactory system does not result in an irrevocable loss of rights*" (T 0439/06, Reasons, 4, first sentence). This quotation concerns the lack of consequences of an isolated mistake made by a person entrusted by a representative with tasks, provided that the representative complied with the requirements of proper selection, instruction and supervision.

A third issue regards the need for an effective cross-check in a large firm in which a representative entrusts an assistant with tasks. In the board's view, "*It is further established case law ... that in a large firm where a large number of dates has to be monitored, in order to qualify as a normally satisfactory system, at least one effective cross-check has to be built into the system*" (T 0439/06, Reasons, 4, last sentence).

4.4 In T 1465/07 dated 9 May 2008 (unpublished) the board drew the consequences of non-compliance with the requirements of proper selection, instruction and

supervision mentioned above. The board held that "*If the representative has not complied with these requirements, and if the assistant commits a culpable error which results in the failure to observe a time limit, then the representative cannot establish that he took all due care required by the circumstances (see, by analogy, J 5/80, point 8)*" (T 1465/07, Reasons 18, last paragraph).

4.5 In summary, if a representative of an applicant delegates tasks to an assistant, the representative carries the duty of care concerning the proper selection, instruction and supervision of the assistant. This responsibility lasts as long as delegation of tasks is given.

The duty of care concerning supervision requires that an effective cross-check is implemented, at least in a firm where a large number of time limits have to be monitored. Only then can the monitoring system qualify as being normally satisfactory.

If the entrusted assistant makes a mistake which results in the failure to observe a time limit, it cannot be established that all due care required by the circumstances has been taken, if the representative has not complied with the duty of care concerning the proper selection, instruction and supervision. Re-establishment of rights, however, can be granted in case of an isolated mistake of the entrusted assistant within a normally satisfactory system.

5. Assessment of the present case

5.1 The assessment of the present case is made in agreement with the jurisprudence mentioned above, from which the Board has no reason to depart.

5.2 First, the Board holds that the requirements of cura in eligendo and cura in instruendo have been met by the representative. Indeed, there is no reason to cast any doubt upon the appropriateness of the selection of the assistant, Ms. Y, whose qualification is beyond question, or upon the instructions given by the representative, Mr. X.

5.3 Hence, the issue to be considered concerns whether the representative, Mr. X, has also complied with the requirement of cura in custodiendo with regard to the assistant's tasks of calculating and noting time limits. This issue is linked with the question whether an effective cross-check was implemented in the firm. Moreover, attention shall also be paid to the specific circumstances of the present case, in particular the kind of time limit missed.

5.4 As it can be inferred from the applicant's letter of 2 May 2011, on 22 December 2010 the assistant, Ms. Y, made a first mistake when calculating and noting the time limit for filing the notice of appeal and paying the appeal fee. The representative, Mr. X, checked as a routine matter the correctness of the time limit noted in the monitoring system of the firm, remarked that it was incorrect, instructed Ms. Y to correct it the same day and to report back to him once the correction was made.

It thus appears that, with regard to the occurrence of this first mistake, the monitoring system could be considered as normally satisfactory because an effective cross-check led to the identification of the mistake.

5.5 On the same day, however, Ms. Y made a second mistake. She reported to Mr. X the correction of the time limit although, for some inexplicable reason, she had failed to correct it. Manifestly, Mr. X did not consider it necessary to check whether the time limit had indeed been correctly recorded, as it should have been.

This is the crucial point. Complying with the requirement of cura in custodiendo does not mean that the representative's responsibility ends with giving the proper instruction to correct the time limit. In other words, it does not mean that the representative did not need to take further care with respect to the delegated task. Rather, in a system qualifying as normally satisfactory, as acknowledged above in relation to the identification of the first mistake made by Ms. Y, also the corrected date must be subjected to the same cross-check for the following reasons.

First, the risk that mistakes, for example a typing error, may occur while noting the time limit in the monitoring system cannot be excluded.

Moreover, the nature of the time limit concerned requires particular care. In fact, the time limit for filing a notice of appeal and paying the appeal fee

pursuant to Article 108 EPC is absolutely critical because, if it is missed, there is no further ordinary remedy and the contested decision has legal effect.

For these reasons, with regard to the occurrence of the second mistake made by Ms. Y, all due care required by the circumstances had not been taken because the representative, Mr. X, did not consistently comply with the requirement of cura in custodiendo in relation to the task entrusted to the assistant of correcting the wrong time limit noted in the monitoring system. A cross-check was indeed due, which, if carried out correctly, would have led to the identification of the second mistake.

5.6 Hence, the Board concludes that, with regard to the second mistake made by the assistant, Ms. Y, the representative, Mr. X. failed to carry out an effective cross-check. In such a case, it cannot be established that all due care required by the circumstances has been taken.

5.7 The applicant substantially argued that the assistant, Ms. Y, was an experienced paralegal who had calculated, registered and monitored thousands of time limits without any mistake. Moreover, her work was periodically checked by one of the partners of the firm. Thus, the requirements of proper selection, instruction and supervision were all met.

The above-mentioned first and second mistakes only amounted to a single mistake. Indeed, the fact that Ms. Y first calculated and noted an incorrect time limit was no longer relevant because this mistake had

been detected by the representative, Mr. X, who then gave an instruction to Ms. Y to correct it. Consequently, only one single isolated mistake occurred, namely the failure to correct the recorded time limit. In this respect, it should be considered sufficiently fail-safe to request Ms. Y to report back once she had corrected the mistake, and Mr. X should be able to rely on her statement. A cross-check would represent an undue burden considering the high daily workload with which a representative in the firm had to cope.

The nature of the time limit missed was also irrelevant because each time limit had, in principle, to be considered as important.

In summary, the missed time limit resulted from a single isolated mistake within a normally satisfactory system, so that an irrevocable loss of rights would be inappropriate.

5.8 These arguments are not convincing.

Complying with the requirement of cura in custodiendo does not mean that the representative's responsibility in this respect ends with giving the instruction to correct the time limit noted in the monitoring system. Rather, it means that a cross-check was also due once correction had been reported. This results from the representative's duty of care with regard to the work of the assistant. Indeed, the standard of a cross-check was respected in relation to the initial recording of the time limit in the monitoring system, but was not consistently maintained later on. This had the consequence that the final entry in the monitoring

system was not checked, meaning that any manner of mistake would have gone unnoticed.

Moreover, it is a questionable practice to consider each time limit equally important, independently of the legal consequences in the case that the time limit is missed, particularly in view of the fact that the jurisprudence warns of the importance of the time limit for filing an appeal (T 0439/06 cited above). At least after detection of the first mistake, the representative, Mr. X, should have been aware of this.

The non-compliance with the requirement of cura in custodiendo entails that the missed time limit did not result from an isolated mistake within a normally satisfactory system.

5.9 In conclusion, the request for re-establishment of rights with respect to the time limit for filing the notice of appeal and paying the appeal fee cannot be granted (Article 122(2) EPC) because the representative of the applicant failed to observe the time limit, as a result of all due care required by the circumstances not having been taken (Article 122(1) EPC).

6. Appeal

Since the request for re-establishment of rights is rejected, neither the notice of appeal has been filed not the appeal fee has been paid in due time. Therefore, the notice of appeal is not deemed to have been filed (Article 108 EPC).

7. Reimbursement of the appeal fee

Under said circumstances, reimbursement of the appeal fee is ordered ex officio because the legal basis for the payment fails.

Order

For these reasons, it is decided that:

1. The request for re-establishment of rights is rejected.

2. The notice of appeal is not deemed to have been filed.

3. The reimbursement of the appeal fee is ordered.

The Registrar The Chairman

R. Schumacher B. Schachenmann