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Datasheet for the decision of 23 November 2016

Case Number: T 2054/15 - 3.2.02

Application Number: 08842168.0

Publication Number: 2269508

IPC: A61B5/12, H04R25/00

Language of the proceedings: EN

Title of invention:
SYSTEM FOR REMOTELY OBTAINING AUDIOMETRIC MEASUREMENTS AND ADJUSTING HEARING AIDS VIA THE INTERNET

Applicant:
Caballero Catoira, Jose Benito

Headword:

Relevant legal provisions:
EPC Art. 108
EPC R. 101(1), 103(1)(a), 126
Real Decreto 1829/1999 Rules of Postal Services, Art.41 (Spain)

Keyword:
Notification by registered letter - Proof of receipt (yes)
Statement of grounds of appeal - Filing out of time (yes)
Admissibility of appeal (no)
Reimbursement of appeal fee (no)

Decisions cited:
J 0003/14, J 0014/14, T 0247/98, T 0172/04, T 0743/05, T 1535/10

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

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Case Number: T 2054/15 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 23 November 2016

Appellant: (Applicant)	Caballero Catoira, Jose Benito Avda. Finisterre, 14 Bajo 15004 La Coruña (ES)
Representative:	Sahuquillo Huerta, Jesús Apartado de Correos, 30 28300 Aranjuez (ES)
Decision under appeal:	**Decision of the Examining Division of the European Patent Office posted on 19 June 2015 refusing European patent application No. 08842168.0 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman	E. Dufrasne
Members:	D. Ceccarelli
	M. Stern

Summary of Facts and Submissions

I. The appeal concerns the decision of the Examining Division dispatched on 19 June 2015 refusing European patent application No. 08842168.0.

A postal acknowledgement of receipt of the decision, signed on 26 June 2015 by Ms. Beatriz Sanchez, "empleada", was returned to the European Patent Office (EPO) on 3 August 2015. EPO Form 2936 acknowledging receipt of the decision, signed on 2 July 2015 by Mr. Alberto Alvarez, was returned to the EPO on 8 July 2015.

II. The fee for appeal was paid by the opponent on 27 August 2015. The notice of appeal was said to have been filed by fax on 26 August 2015. A statement setting out the grounds of appeal was received on 30 October 2015.

III. In a communication annexed to the summons to oral proceedings dated 8 August 2016, the Board set out its preliminary opinion. It expressed its intention to reject the appeal as inadmissible and to decline to reimburse the appeal fee.

A postal acknowledgement of receipt of the summons and the annexed communication, signed on 16 August 2016 by Ms. Beatriz Sanchez Mendez, "335426857", was returned to the EPO on 13 October 2016. EPO Form 3936 acknowledging receipt of the same, signed on 23 August 2016 by Mr. Alberto Alvarez Flores, was returned to the EPO on 13 September 2016.

IV. Oral proceedings were held on 23 November 2016.

V. The appellant's arguments relevant for the present decision can be summarised as follows.

The effective date of notification of the decision was 2 July 2015, when the representative reviewed the European Register, discovered the refusal decision and signed the acknowledgement of receipt. Therefore, the time limit for filing the grounds of appeal was (4 months from the notification) 2 November 2015.

On 26 June 2015, the representative was out of his office for medical reasons (as established by medical certificate), and therefore unable to receive the notification of the decision in person.

The representative's only employee was Ms. Lago Cabado, a home employee without relationship with the professional activity of the representative. The representative did not know Ms. Beatriz Sanchez, who signed the acknowledgement of receipt on 26 June 2015 and a fortiori had not authorised her to receive notifications in his name.

Further, the postal address of the representative mentioned ALVAREZ REAL, but ALVAREZ REAL, SL was a separate law office owned by his family and located in the same building as the representative's office. The relationship between the representative and this law office company covered only few economic aspects (e.g. the use of the fax and the payments) and no one in this company was authorised to receive registered mail for him.

The acknowledgement of receipt signed 26 June 2015 did not comply with Spanish law (Real Decreto 1829/1999 Rules of Postal Services, Article 41), which required

that the date, the identity (name and two surnames) and the ID card number of the signatory be indicated on the advice of delivery. Under these provisions, only the acknowledgement of receipt signed by the representative on 2 July 2015 was valid.

Under Rule 126(2) EPC, it was incumbent on the EPO to establish the date on which the letter was delivered to the addressee. Furthermore, according to decisions J 3/14 and J 14/14, in cases where it was incumbent on the EPO to establish that a letter had reached its destination, the appellant had to be given the benefit of the doubt.

VI. The appellant requested that the case be remitted to the department of first instance for further prosecution or, in the alternative, that a patent be granted on the basis of the set of claims filed with letter dated 29 October 2015.

He also requested reimbursement of the appeal fee, due to a violation of Article 113(1) EPC.

Reasons for the Decision

Statement of grounds

1. The first question to be decided is whether the statement setting out the grounds of appeal was filed within the four-month time period as from notification of the decision under Article 108 EPC.

Pursuant to Rule 126 EPC, where notification is effected by registered letter, the letter is deemed to

have been delivered to the addressee on the tenth day following its handover to the postal service provider, unless it reached him at a later date. In the event of any dispute, it is incumbent on the EPO to establish the date on which the letter was delivered to the addressee.

2. The impugned decision was dispatched on 19 June 2015. It follows from the postal acknowledgement of receipt received at the EPO on 3 August 2015 that the letter containing the decision was delivered to the appellant's address, at Alvarez Real Patentes y Marcas, Avda A Coruña, 39-43, 27003 Lugo, on 26 June 2015. As recognised by the new representative during the oral proceedings, this acknowledgement of receipt was signed by Beatriz Sanchez, referred to on it as an employee.

3. The appellant argued first that the acknowledgement of receipt signed on 26 June 2015 was not valid because it was not personally signed by the representative.

In the Board's opinion, it is clearly not required that acknowledgements of receipt be personally signed by representatives. In representatives' firms, especially large ones, it is common and accepted practice that other persons are validly authorised to receive registered letters addressed to representatives (T 172/04 and T 743/05, cited in Case Law of the Boards of Appeal of the EPO, 8th edition 2016, III.O.2, page 787).

4. The appellant further stated that Ms. Beatriz Sanchez was not a representative's employee, that he did not even know her and that she was not authorised to receive the notification.

The Board holds the view that persons authorised to receive registered letters addressed to representatives are not required to formally be their employees. This corresponds to the actual situation in most representatives' firms. There is not even a legal requirement that these persons be personally known to the representatives. These elements therefore do not demonstrate that a person lacks authorisation to receive notifications addressed to the representatives.

Furthermore, the Board notes that the acknowledgement of receipt of the summons to oral proceedings and the annexed communication was also signed, on 16 August 2016, by Ms. Beatriz Sanchez.

5. The appellant also argued that the indication of ALVAREZ REAL in the postal address of the representative had to be distinguished from ALVAREZ REAL, SL, a law office owned by his family, with which he only shared a few economic aspects.

The Board first notes that the representative himself chose to mention the name ALVAREZ REAL as part of his contact address. In addition to sharing the same postal address, fax number and bank account with the corresponding company, the name ALVAREZ REAL also featured in the letterhead of many submissions made by the representative himself, including the notice of appeal. Moreover, and even more to the point, all communications from the EPO to this address reached the representative, with the sole exception, allegedly, of the notification dispatched on 19 June 2015.

6. The appellant also argued that the acknowledgement of receipt signed 26 June 2015 did not comply with Spanish law (Real Decreto 1829/1999 Rules of Postal Services,

Article 41), which required specific information to be indicated. Under these provisions, only the acknowledgement of receipt signed by the representative on 2 July 2015 was valid.

However, the acknowledgements of receipt signed on 26 June 2015 and 2 July 2015 both contain the same indications, i.e. a date, a name, one surname and a signature. On that basis, even if Spanish law had to be applied, as also argued by the new representative, the Board could see no basis for reaching a different conclusion on the validity of the two documents. From a factual point of view, there is no problem identifying Ms. Beatriz Sanchez as the signer of the acknowledgement of receipt dated 26 June 2015, as recognised by the new representative during the oral proceedings and corroborated by her signature of the further acknowledgement of receipt dated 16 August 2016.

7. Lastly, the appellant referred to Rule 126 EPC and decisions J 3/14 and J 14/14 in support of his contention that it was incumbent on the EPO to establish the date on which the letter was delivered to the addressee and that, in cases where the EPO bore the burden of proof of receipt of a document, the appellant had to be given the benefit of the doubt.

Pursuant to Rule 126(2) EPC, in the event of a dispute, it is incumbent on the EPO to establish the date on which a letter was delivered to the addressee. However, the party seeking application of this legal provision has to set out the facts justifying it. The burden of proof on the EPO cannot be taken to mean that the party is under no obligation to help clarify the circumstances within its own sphere of responsibility

(e.g. T 247/98, cited in Case Law of the Boards of Appeal of the EPO, 8th edition 2016, III.G.5.1.2. e), page 698). The EPO is liable for risks arising both in its own sphere and during "transport", but the recipient is liable for those within its own sphere of organisation and influence (e.g. T 1535/10, cited in Case Law of the Boards of Appeal of the EPO, 8th edition 2016, III.O.4, page 789). When a registered letter has been delivered to the address of the representative, it is incumbent on him to establish that the letter was not received by a person authorised to take delivery of it, or did not actually reach him for some other reason.

In the present case, it has been established by the EPO that the letter was delivered to the address of the representative. This essential aspect distinguishes the present case from the facts underlying decisions J 3/14 and J 14/14 cited by the appellant, where there was no proof that any named individual had signed a document acknowledging receipt of the letters. Hence, the analysis and the conclusions reached in those decisions are not decisive for the present case.

In the present case, the Board considers that the appellant has not discharged his burden of showing why the letter did not reach him personally once it was within his own sphere of control. The mere indication that Ms. Beatriz Sanchez was not his employee and that he did not know her is not sufficient in that respect. No further declaration or other evidence has been provided. On the contrary, it appears that the further notification dated 8 August 2016 and sent by the EPO to the representative at the same address, of which the acknowledgement of receipt was also signed by Ms. Beatriz Sanchez, did indeed reach him without any

problem. In this context, it also remains unclear to the Board why on 2 July 2015 the representative signed an acknowledgement of receipt of the notification dated 19 June 2015, which he says he never received, on the mere basis of inspecting the European Register and finding there the refusal decision and accompanying forms.

8. From the above analysis, the Board concludes that the decision of the Examination Division dispatched on 19 June 2015 was delivered to the addressee on 26 June 2015.

Pursuant to Rule 126(2) EPC, it is consequently deemed to have reached the addressee ten days after its handover to the postal service provider, i.e. on 29 June 2015. This date is the starting point for calculating the time limit for filing the statement setting out the grounds of appeal under Article 108, third sentence, EPC. On that basis, that time limit is 29 October 2015.

The date of 2 July 2015, on which the acknowledgement of receipt (Form 2936) was personally signed by the representative and returned to the EPO, is not relevant in that context.

The written statement of grounds of appeal filed on 30 October 2015 was therefore out of time.

9. The appeal is therefore inadmissible pursuant to Article 108, third sentence, EPC, in conjunction with Rule 101(1) EPC.

Reimbursement of the appeal fee

10. Rule 103(1)(a) EPC stipulates as a precondition for reimbursement of the appeal fee that the appeal must be allowable.

Since the present appeal is not admissible, it cannot be allowed.

Hence, the above precondition is not fulfilled and the requested reimbursement is refused.

Order

For these reasons it is decided that:

The appeal is rejected as inadmissible.

The Registrar: The Chairman:

D. Hampe E. Dufrasne

Decision electronically authenticated