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**Datasheet for the decision
of 12 July 2024**

Case Number: T 1375/22 - 3.2.01

Application Number: 16165614.5

Publication Number: 3087852

IPC: A24B13/00

Language of the proceedings: EN

Title of invention:

ORAL POUCHED PRODUCT HAVING A RECTANGULAR SHAPE

Patent Proprietor:

Swedish Match North Europe AB

Opponents:

British American Tobacco (Investments) Ltd
Skruf Snus AB
JT International S.A.

Headword:

Relevant legal provisions:

EPC Art. 56

Keyword:

Inventive step - (no) - obvious modification

Decisions cited:

T 0230/07

Catchword:



Beschwerdekammern

Boards of Appeal

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Case Number: T 1375/22 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 12 July 2024

Appellant: British American Tobacco (Investments) Ltd
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Appellant: Skruf Snus AB
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Representative: Gulde & Partner
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Respondent: Swedish Match North Europe AB
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Party as of right: JT International S.A.
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
1 April 2022 concerning maintenance of the
European Patent No. 3087852 in amended form.

Composition of the Board:

Chairman G. Pricolo
Members: M. Geisenhofer
A. Jimenez

Summary of Facts and Submissions

I. Appeals were filed by opponent 1 (British American Tobacco (Investments) Ltd) and opponent 2 (Skruf Snus AG) against the interlocutory decision of the opposition division finding that, on the basis of the auxiliary request 8, the patent met the requirements of the EPC.

II. The opposition division decided that the subject-matter of this request was *inter alia* novel over documents

D1 WO 2011/129883 A1 and
D11 WO 2014/151477 A1,

and was not rendered obvious when starting from D1 or D11, respectively, as closest prior art.

III. The appellants request that the decision under appeal be set aside and the patent be revoked.

IV. Neither the respondent (patent proprietor) nor the party as of right (opponent 3) filed any submissions in these appeal proceedings.

V. The independent claim of auxiliary request 8 considered allowable by the opposition division reads as follows:

"An oral pouched smokeless tobacco product comprising a filling material and a saliva-permeable pouch enclosing the filling material, the filling material comprising tobacco material, the oral pouched smokeless tobacco product being non-post-moisturized, the product having a rectangular shape with a maximum length and a maximum width, characterized in that the maximum width of the

product is within the range of from 5 mm to 9.5 mm, the maximum length of the product is within the range of from 25 mm to 40 mm, the ratio of maximum length to maximum width is within the range of from 3 to 6, the oral pouched smokeless tobacco product has a weight within the range of from 0.3 g to 0.7 g, the oral pouched smokeless tobacco product has a moisture content within the range of 45 to 55 % w/w based on the total weight of the oral pouched smokeless tobacco product, and the product has a thickness in a direction perpendicular to the width of the product, said thickness being within the range of from 4 to 6 mm, wherein the thickness of the product at half the maximum length of the product is within the range of from 4 to 6 mm, and wherein the product has a width at half the maximum length of the product, said width at half the maximum length of the product being within the range of from 4 to 6 mm."

- VI. The appellants argued - inter alia - that the subject-matter of claim 1 of auxiliary request 8 was not inventive when starting from document D11 as closest prior art.

Reasons for the Decision

1. The subject-matter of claim 1 of auxiliary request 8 does not involve an inventive step (Article 56 EPC).
- 1.1 The opposition division held that document D11 is the closest prior art whereby the subject-matter of claim 1 differs from the product disclosed in D11 in that a width and thickness at half length is specified such that the product has a tapering shape. They considered

the subject-matter of claim 1 to be not obvious since choosing such a tapering shape goes beyond the routine work done by the skilled person (reasons 15.3).

1.2 The Board agrees to the opposition division's view that D11 is a suitable document to be used as closest prior art for an argument on inventive step.

1.3 D11 discloses an oral pouched smokeless tobacco product comprising a filling material and a saliva-permeable pouch enclosing the filling material (cf. paragraphs [0002] and [0003]).

1.3.1 The product is non-post-moisturized and has a weight within the range of 0.1 g to 1.0 g (cf. paragraph [0035]), hence covering the range from 0.3 g to 0.7 g given in claim 1.

(a) The opposition division stated in reasons 7.4.2 that "*the selection of a weight of 0.3 to 0.7 g within the range of 0.1 to 1.0 g could also be seen as novel*" but saw no need to elaborate on this feature as "*this had no bearing on novelty and inventive step*".

(b) The Board shares the view of appellant (opponent 2), as pointed out in their statement of grounds of appeal, that the range of 0.3 to 0.7 g cannot be considered to be narrow compared to the known range of 0.1 to 1.0 g since it covers about half thereof and thus fails the novelty test as outlined in T 230/07.

1.3.2 The product of D11 has a moisture content between 48 and 50 % w/w (cf. paragraph [0039]), hence falling within the range of 45 to 55 % w/w given in claim 1.

- 1.3.3 The product of D11 has a rectangular shape (cf. paragraph [0033]) with a length within a range of 20 mm to 35 mm (cf. paragraph [0034]), this range overlapping largely the range of 25 mm to 40 mm claimed in claim 1.
- 1.3.4 The thickness of the product of D11 is described to be within a range of 3 mm to 6 mm (cf. paragraph [0036]), hence being almost identical to the range of 4 to 6 mm claimed in claim 1 for the maximum thickness and the range for the thickness at half the maximum length.
- 1.3.5 The product known from D11, however, has a width of 10 mm to 20 mm (cf. paragraph [0034]), contrary to the product defined in claim 1.
- 1.4 The subject-matter of claim 1 hence differs from D11 in that
- the product has a maximum width of 5 mm to 9.5 mm; and
 - the product has a width of 4 mm to 6 mm at half the maximum length.
- 1.5 This has the effect that the product becomes slimmer. Modifying the product known from D11 to become slimmer is, however, obvious to the skilled person.
- 1.5.1 The skilled person knows that the size of an oral pouched smokeless tobacco product is limited since it is introduced between the user's gum and lip. It is obvious to the skilled person that a slimmer product may fit more discreetly and comfortably in the mouth of a user (as set out in the lower half of page 29 and in the last paragraph of page 33 of the statement of grounds of appeal of the appellant (opponent 1); and as confirmed by the patent on page 5, lines 17 - 19).

Accordingly the skilled person would be motivated to reduce the width of the product known from D11.

1.5.2 Reducing the product's width inevitably leads to the provision of a width falling within the range of 5 mm to 9.5 mm given in claim 1 for the maximum width, since the upper limit (9.5 mm) of the range defined in claim 1 almost corresponds to the lower limit (10 mm) of the range disclosed in D11.

1.5.3 As the appellant (opponent 1) explains in their statement of grounds of appeal with regard to prior art document D1 (but also applicable to D11), a rectangular pouch filled with material automatically takes a tapering shape, the width at half the maximum length being smaller than the maximum width at the ends of the pouch (cf. page 30, fourth paragraph). Albeit D11 does not explicitly mention the parameter "*width at half the maximum length*" - as correctly held by the opposition division (cf. reasons 15.3) - the tapering shape is, however, implicit to any rectangular pouch filled with material and hence also to D11. Choosing a maximum width of e. g. 7 mm will result in a width at half the maximum length of around 6 mm which is within the range of 4 mm to 6 mm given in claim 1.

1.5.4 Choosing a reduced width of 7 mm for the maximum width of the product while keeping the length within the range of 20 mm to 35 mm disclosed in D11 will furthermore result in a ratio of length to width of 2.9 to 5.0, this ratio anticipating the claimed ratio of 3.5 to 6.

Even if the width is only reduced to 9 mm, the resulting ratio of length to width would be 2.2 to 3.9,

the upper limit 3.9 still clearly falling within the claimed ratio.

- 1.6 By reducing the width of the product of D11, the skilled person hence arrives at the subject-matter of claim 1 according to auxiliary request 8 without any inventive step.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



H. Jenney

G. Pricolo

Decision electronically authenticated