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| Publication au Journal Officiel     | Oui/Non |

Aktenzeichen / Case Number / N<sup>o</sup> du recours : T 560/88-3.2.1  
Anmeldenummer / Filing No / N<sup>o</sup> de la demande : 83 201 583.8  
Veröffentlichungs-Nr. / Publication No / N<sup>o</sup> de la publication : 0 108 462  
Bezeichnung der Erfindung: Preserving tin  
Title of invention:  
Titre de l'invention :  
Klassifikation / Classification / Classement : B65 D1/40

**ENTSCHEIDUNG / DECISION**

vom / of / du 19 February 1990

Anmelder / Applicant / Demandeur : Thomassen & Drijver-Verblifa N.V.  
Patentinhaber / Proprietor of the patent /  
Titulaire du brevet :  
Einsprechender / Opponent / Opposant :

Stichwort / Headword / Référence :

EPÜ / EPC / CBE Article 116, 113(1) Rule 67

Schlagwort / Keyword / Mot clé : "Request for oral proceedings" - "adverse  
decision issued without oral proceedings"  
- "decision void" - "appeal fee reimbursed".

**Leitsatz / Headnote / Sommaire**



Case Number : T 560/88-3.2.1

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.1  
of 19 February 1990

**Appellant :** Thomassen & Drijver-Verblifa N.V.  
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**Representative :** Schumann, Bernard Herman Johan et al.  
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**Decision under appeal :** Decision of Examining Division 2.3.08.81  
of the European Patent Office  
dated 20 June 1988 refusing European  
patent application No. 83 201 583.8  
pursuant to Article 97(1) EPC

**Composition of the Board :**

**Chairman :** F. Gumbel  
**Members :** P. Alting van Geusau  
F. Benussi

## Summary of Facts and Submissions

- I. European patent application No. 83 201 583.8 was filed on 1 November 1983 and published on 16 May 1984.
- II. In the proceedings before the Examining Division, following a second official communication, the Appellant (Applicant) filed a response on 22 July 1986 containing in the last paragraph the Statement: "If the Examining Division would issue an unfavourable decision, I apply for oral proceedings".
- III. After a telephone call, a personal consultation and two further official communications the Examining Division refused the application by a decision dated 20 June 1988 without oral proceedings having been held.
- IV. In a telephone call dated 8 July 1988 the Primary Examiner explained to the Appellant's representative that
  - a) at the stage in the proceedings when the oral proceedings were requested, no unfavourable decision was issued and that
  - b) at every stage of the proceedings the Appellant had had the opportunity to present comments, so that no contravention of Article 113(1) EPC had occurred.

In this context the Appellant's representative referred to the decision T 19/87 of the Board of Appeal 3.4.1.

- V. Notice of Appeal was filed on 5 August 1988 and the appeal fee duly paid. On 20 October 1988 a Statement of Grounds of Appeal was filed.

The Appellant argued that, in accordance with the decision T 19/87 (OJ EPO, 1988, 268), the Examining Division had no power to issue an adverse decision without first appointing the requested oral proceedings, and that therefore, on the basis of Article 109(1) EPC, there were grounds for interlocutory revision.

VI. However, the appealed decision was not rectified by the Examining Division.

VII. The Appellant requests granting of a patent on the basis of the claims filed on 22 July 1986 and 6 July 1987. He also requests reimbursement of the appeal fee and that, in the case of an unfavourable decision, oral proceedings be held.

#### Reasons for the Decision

1. The appeal is admissible.
2. The first question to be considered is whether the Statement in the Appellant's letter of 22 July 1986 is a valid request for oral proceedings.

This question must, in the Board's view, clearly be answered in the affirmative. The Statement in the above letter represents a clear subsidiary request for oral proceedings, in the case that the Examining Division would conclude that the application should be refused. Unlike in the case of the above-cited decision T 19/87, there could not reasonably exist any doubt as to the meaning of this request.

Since clearly the final decision refusing the application is envisaged in this request, it is of no significance, in the Board's view, at what stage of the proceedings the request had been filed in order for it to be considered a valid

request for oral proceedings in accordance with Article 116(1) EPC.

Under these circumstances the argument put forward by the first Examiner in the telephone call dated 8 July 1988 (i.e. after the date of issue of the impugned decision) under point 2a "that no unfavourable decision was issued at that stage of the proceedings" cannot be considered a convincing reason for not having summoned the Appellant to oral proceedings at a later stage in the proceedings.

3. As is pointed out in the decision T 19/87, referred to by the Appellant, the Examining Division is obliged to arrange for oral proceedings if, upon proper interpretation of a written communication from a party, it must be considered to constitute a request for oral proceedings; the Examining Division then has no power to issue a decision without first having summoned the Applicant to oral proceedings.

For these reasons, which are supported by the deciding Board, the Examining Division has not taken due account of the procedural requirement of Article 116 EPC. As a consequence, the Decision dated 20 June 1988 must be set aside as void and of no legal effect.

4. Considering the question whether also Article 113(1) EPC has been violated, the Board draws attention to the decision T 209/88 (not published) of 20 December 1989.

In this decision this Board concluded that non-compliance with a request for oral proceedings deprives the party of an important opportunity of presenting this case in the manner he intended, according to the possibilities open to him under the EPC. In view of the request for oral proceedings, the party could rely on such proceedings being

appointed before the issue of an adverse decision and therefore had no reason to submit further arguments in writing. In this respect Article 116 EPC is considered to represent an essential part of the requirement of Article 113(1) EPC as regards the grounds of decision, to which the party must have had sufficient opportunity to present his comments.

By depriving the party of any possibility of presenting his case in oral proceedings, the Appellant lost the opportunity of presenting observations, which, in view of his request for oral proceedings, he had no need to present in writing. Therefore in the present case Article 113(1) EPC is also violated.

As a consequence, in the Board's judgment, the findings in paragraph 2b of the Examiner's phone call dated 8 July 1988 are in error when stating that Article 113(1) EPC had not been contravened.

5. Since the appeal has been allowed concerning the above question, the Appellant's request for reimbursement of the appeal fee under Rule 67 EPC must be considered.

In the Board's judgment the failure by the Examining Division to hold oral proceedings in response to a clear subsidiary request by the Appellant represents in the present case, of necessity, a substantial procedural violation justifying reimbursement of the appeal fee if this is otherwise equitable.

Given the fact that in the decision no reference is made to a request for oral proceedings, the Board can only assume that the request was overlooked.

In view of the fact that the Appellant was thereby denied the opportunity of submitting further arguments during such oral proceedings, which arguments and subsequent discussion might have had a decisive effect on the decision in question, reimbursement of the appeal fee is considered justified in the present case.

- 6. The Board notes that the Appellant also requests that a patent be granted on the basis of claims filed on 22 July 1986 and 6 July 1987. However, under the circumstances set out above leading to a void decision, the application must be remitted to the Examining Division, in order that oral proceedings may be held in accordance with the outstanding request. Under these circumstances a valid decision concerning the subject-matter of the application now lies within the responsibility of the Examining Division.

Order

For these reasons, it is decided that:

- 1. The impugned decision is set aside.
- 2. The case is remitted to the Examining Division with the order that oral proceedings under Article 116 EPC be conducted prior to decision.
- 3. The appeal fee shall be reimbursed.

The Registrar:

The Chairman:

*S. Fabiani*

S. Fabiani

*F. Gumbel*

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