

Internal distribution code:

- (A) [] Publication in OJ
(B) [] To Chairmen and Members
(C) [X] To Chairmen

D E C I S I O N
of 20 December 1995

Case Number: T 0448/95 - 3.2.4

Application Number: 89306941.9

Publication Number: 0354661

IPC: A24F 47/00

Language of the proceedings: EN

Title of invention:
Improvements relating to smoking articles

Applicant:
BRITISH-AMERICAN TOBACCO COMPANY LIMITED

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 54, 111(1)

Keyword:
"Novelty (acknowledged)"

Decisions cited:
T 0204/83

Catchword:
-



Case Number: T 0448/95 - 3.2.4

DECISION
of the Technical Board of Appeal 3.2.4
of 20 December 1995

Appellant: BRITISH-AMERICAN TOBACCO COMPANY LIMITED
Millbank
Knowle Green
Staines
Middlesex TW18 1DY (GB)

Representative: Lomas, Geoffrey Michael
Barker, Brettell & Boutland
Prudential Buildings, room 24
97-101 Above Bar Street
Southampton SO14 7JW (GB)

Decision under appeal: Decision of the Examining Division of the European Patent Office posted 11 January 1995 refusing European patent application No. 89 306 941.9 pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: C. A. J. Andries
Members: R. E. Gryc
M. Lewenton

Summary of Facts and Submissions

I. The appellant lodged an appeal, received on 10 March 1995, against the decision of the Examining Division, dispatched on 11 January 1995, on the refusal of the application No. 89 306 941.9.

The fee for appeal was paid on 10 March 1995 and the statement setting out the grounds of appeal was received on 12 May 1995.

II. The Examining Division held that the subject-matter of Claim 1 did not meet the requirements of Article 54 EPC, having regard to the embodiment illustrated in Figure 8 of prior art document EP-A-0 212 234 (D1)

In the search report and during the examination proceedings the following other documents were cited:

- D2: GB-A-1 435 504,
- D3: US-A-3 368 566,
- D4: US-A-3 496 945,
- D5: GB-A-1 315 374 and
- D6: AU-B-287 594.

III. In his statement of the grounds of appeal, the appellant argued as follows:

D1 (Figure 8) would show only use of a tube and not of an orifice and it would be an elaboration of the disclosure of said document to contend that the entrance of said tube corresponds to an accelerating orifice in the meaning of the invention since, in particular, the internal dimensions of this tube have not been given.

The purpose of the tube (44) of the smoking article shown in Figure 8 of D1 would be to provide sufficient time for the hot aerosol to form and cool before it reaches the user and not, on the contrary, to accelerate the vapours of nicotine and aerosol like the accelerating orifice according to the invention.

- IV. In reply to a communication of the Board, the appellant filed new documents with letter dated 30 November 1995 and requested that the decision under appeal be set aside and a patent granted on the basis of the following documents:

Claims 1 to 17 filed with the letter of 30 November 1995;

Description, pages 1 to 4 filed with the letter of 30 November 1995 and pages 6 to 10 as originally filed to be renumbered as 5 to 9;

Drawing as originally filed.

- V. The wording of Claim 1 according to the single request on file at the time of the present decision reads as follows:

"A smoking article comprising a heating unit (2), aerosol generation means (5) in flow communication at a first end thereof with said heating unit (2), nicotine source means (12) in flow communication at a first end thereof with said heating unit (2), and a mixing space (17) with which said aerosol generation means (5) and said nicotine source means (12) are in flow communication at or via respective second ends thereof, and an orifice (20) in flow communication with the mixing space (17), characterised in that the orifice (20) is at least one velocity accelerating orifice (20)

disposed at the downstream end of said mixing space (17), so as to provide an outlet therefrom, said orifice (20) acting as a capillary press causing nicotine vapour to condense into combination with aerosol particles from said aerosol generation means (5)."

Reasons for the Decision

1. The appeal is admissible.
2. *Amendments of Claim 1 (Articles 84 and 123(2) EPC)*

Claim 1 has been amended in order to define the position and the function of the orifice (20) more properly, the added characteristics being supported by the description as originally filed (see for example page 8, lines 6 to 13 and the drawing).

The added last sentence of Claim 1 i.e.: "...said orifice (20) acting as a capillary press causing nicotine vapour to condense into combination with aerosol particles from said aerosol generation means (5)." also finds a support in page 9, lines 11 to 14 of the description of the application as originally filed.

Therefore the amendments made to Claim 1 fulfil the requirements of Articles 84 and 123(2) EPC and are allowable.

3. *Novelty (Article 54 EPC)*
 - 3.1 It should be emphasized that the dimensions obtained merely by measuring a diagrammatic representation in a document do not form part of the disclosure (see decision T 204/83, OJ EPO 1985, 310). Therefore the true

thickness of the wall of the plastic tube (44) of the smoking article shown in Figure 8 of D1 and the true diameter of the aerosol delivery passage (18) inside said tube (44) which are not explicitly indicated in the description of D1 cannot be determined just by measuring the drawings.

Furthermore, there is no indication in D1 to a specific function allocated to the entrance orifice of the aerosol delivery passage (18), so that in D1 there is no clear teaching relative to the influence of the diameter of said orifice on the mixed vapours going through it.

3.2 If nevertheless the thickness of the wall of the plastic tube (44) represented in Figure 8 of D1 were to be compared with the thicknesses of the layers of cigarette paper (85) and (89), it would appear to be about the same. It means that in comparison with the diameter of the mixing space located at the exit end side of the metallic capsule (90), the wall of the tube (44) should be very thin. Consequently, the very slightly reduced entrance orifice of the tube (44) cannot accelerate significantly the compound gas coming out of the mixing space and in no case such an orifice can be considered as acting in the sense of the invention to cause condensation of nicotine vapour into combination with aerosol particles. The subject-matter of Claim 1 therefore is novel over D1.

3.3 As far as D2, D3, D5 are concerned, the provision of an accelerating orifice between the vapour sources and the mouthend of the smoking article has even not been mentioned.

- 3.4 On the contrary, the use of a restrictive-flow orifice is disclosed in D4 (see the figures and Claim 1 - orifice 14) and D6 (see Figure 1 and Claim 1 - the aperture of flavour ring 13). However, the structure of the smoking article according to the invention differs completely from those of the cigarettes known from D4 and D6.
- 3.5 Therefore, in comparison with the cited prior art, the subject-matter of Claim 1 is new in the meaning of Article 54 EPC.
4. With the amendments made before the Board, the appellant has overcome the only ground for the refusal of the application namely lack of novelty of the subject-matter of the main claim.

Therefore, the decision under appeal must be set aside. However, a patent cannot yet be granted since the substantial examination of the application has not yet been completed. Under these circumstances, the Board makes use of its power under Article 111(1) EPC to remit the case to the first instance for further prosecution.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution (see above the request in Section IV).

The Registrar:



N. Maslin

The Chairman:



C. Andries

R.G.
