

Newsalert

EU Direct Tax Group

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ECJ decision in the *Burda* case ([C-284/06](#))

Burda, a German resident company, which was owned by a Dutch resident shareholder (BV) to 50%, distributed dividends in 1998 mainly out of taxed equity. Under the former German imputation system, the distributable equity of a resident corporation was divided into equity baskets. Depending on which equity basket was utilised, the corporate tax of the distributing company was reduced (taxed basket) or uplifted (untaxed basket/EK02) to 30% or was not levied (shareholder contribution basket). In order to avoid double taxation, resident shareholders were granted a full imputation credit equal to the corporate tax paid. However, non-resident shareholders were not entitled to this imputation credit.

Due to a tax audit, the taxed equity basket was reduced retroactively. Although *Burda* had no other untaxed equity, it was not allowed to utilise its shareholder contribution basket, but suffered a tax uplift of 30%. The tax was uplifted in order to safeguard the matching of the imputation credit and the corporate tax burden, because *Burda* had issued an irrevocable certificate to its other 50% resident shareholder showing the imputation credit due on his part of the dividend. The uplift was calculated on the whole dividend. *Burda* appealed against the tax assessment. The German Supreme Tax Court referred to the ECJ and asked whether, after the ECJ's *Athinaiki* decision ([C-294/99](#)), the tax uplift was allowed under the Parent-Subsidiary-Directive (PSD) or infringing the fundamental freedoms.

On 26 June 2008, the ECJ gave its decision on this case. At first, the ECJ rejected a re-opening of the oral procedure that *Burda* applied for in order to correct both the facts of the case and the understanding of the underlying legal framework. The Court pointed out that only the referring court defines the factual and legal context.

Concerning the compliance with the PSD, the ECJ was of the opinion that the tax uplift did not fulfil the requirements of a withholding tax, because it was rather a tax burden of the subsidiary than of the parent company. In contrast to the *Athinaiki* case, the ECJ rejected an economical assessment of the corporate tax uplift mechanism. The Court came to the conclusion that the tax uplift was allowed under the PSD. Therefore, the principles of the *Athinaiki* decision seem to be overruled.

The ECJ supported the view that the freedom of establishment was applicable with regard to the 50% shareholding of BV in *Burda*. As *Burda*'s tax burden due to the tax uplift did not depend on the place of residence of the shareholders, the ECJ did not recognise an unequal treatment. Furthermore, the Court denied an infringement by an equal treatment of unequal situations; the Court held that the situation of a company with resident shareholders was comparable with the situation of a company with non-resident shareholders. In the Court's view, the mere fact that non-resident shareholders were not entitled to an imputation credit did not lead to another conclusion, because it was not for Germany to avoid economic double taxation but for the State of residence of the foreign shareholder. Thus, the ECJ concluded that the tax uplift did not infringe the freedom of establishment.

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