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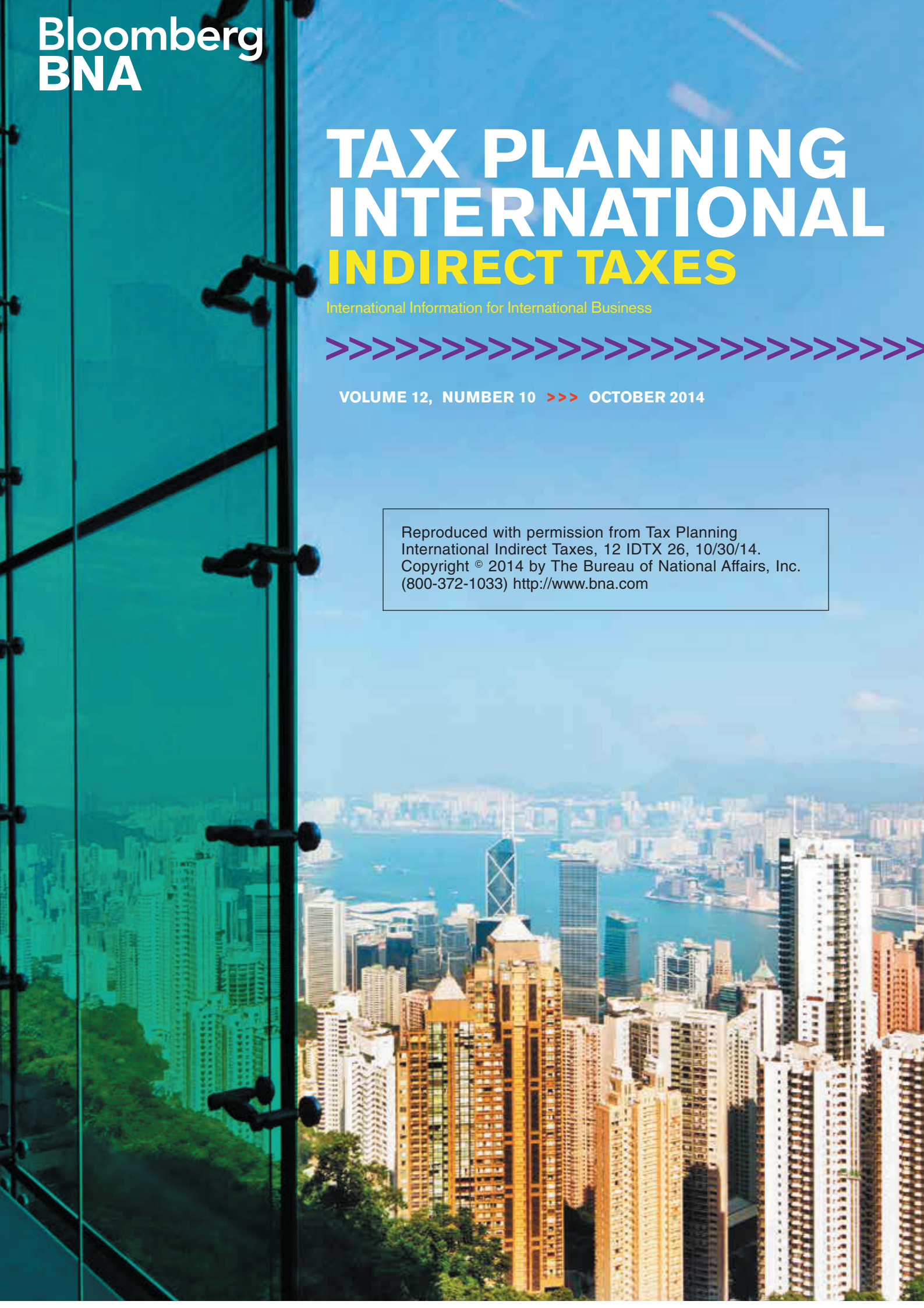

Viewpoint

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This is the first in a new series of articles called "Viewpoint" which will offer opinion-led insight on indirect tax topics of note. This article examines the recent *Skandia* case.

On September 17, 2014 the CJEU gave its judgment in Case C-7/13 *Skandia America Corp (USA) v Skatterverket* ("*Skandia*"). It is a judgment the significance of which, for the banking and insurance industries in particular, is hard to overstate.

For many years, across Europe, entities which make exempt supplies have limited the VAT cost of bought-in services through the use of VAT groups. Depending upon one's view of the judgment, that practice is now either unsustainable or perilously close to being so.

Skandia, a US company, was a member of a VAT Group in Sweden. More correctly, under Swedish law, only the Swedish fixed establishment of Skandia was a member of a VAT group.

Skandia supplied services from the USA to its branch in Sweden and the Swedish authorities contended that VAT was due on this supply as a consequence of the fact that the branch was a member of the Swedish VAT group and was, therefore, a separate person for VAT purposes. Skandia contended that, following *FCE*, supplies by a branch of a legal entity to another branch of the same legal entity were not supplies for VAT purposes – because the branches were not 'independent' – and the fact that one of those branches was a member of a VAT group did not alter that position.

It has long been settled law that when entities join a VAT group, they cease to exist individually for the purposes of administering VAT and become a single taxable person. The question which arose was whether, and if so how, this principle could create independence where none previously existed.

Unfortunately the Court simply says that "it follows" from the fact that VAT groups create a new taxable person that the supply from a head office to a branch is taxable where that branch is in a group.

The lack of any analysis as to why this is so makes the judgment difficult to analyze, and advice difficult to give. For instance, it is not clear what consequences, if any, flow from the fact that, under Swedish law it was expressly the branch alone which was a member of the VAT group. If, for instance, the national law of a Member State specifically provides that the entity – as opposed to only the branch – is a member of a VAT group, does that affect the analysis? Most commentators appear to assume that it does not, but it could not be said that the position is unambiguous. In my view this may be a distinction of importance when it comes to considering issues of application, retrospection and legislation.

As to application, it is not clear what approach Member States will take, either individually or collectively. If the judgment is interpreted broadly then this is likely to have a very significant effect on the ability of banking and insurance companies to outsource or centralize their administrative functions. If some Member States take this view and others do not, those in the latter camp will attract significant interest. In this regard it is understood that the VAT Committee is to meet next month and one would expect this judgment to be on the agenda.

As to retrospection this depends largely upon the state of the national legislation. One would assume that the Swedish authorities, for instance, might be inclined to seek to reap the rewards of their successful challenge but other Member States are likely to be conscious of the adverse effects such action could have on foreign direct investment. The state of the national legislation will be an important factor here because, of course, to the extent that the national legislation has unambiguously permitted the *Skandia* type arrangements, the national tax authorities will be bound by that legislation and the issue of retrospection will not arise.

In Member States where a legislative change is needed this is likely to take some time.

From a business perspective, what is required is a considered, measured and detailed response by the Member States as to the scope and effect of the judgment and it is hoped that those Member States which do not currently apply the cost-sharing exemption may do so in order to ameliorate the adverse effects of the judgment. From the perspective of the Member States they will need to ensure a uniform reaction if an exodus of investment to the less restrictive Member States is to be avoided.

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