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PERMANENT ESTABLISHMENT

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- Operations through a Subsidiary

Foreign State

FCO

Source State

100%

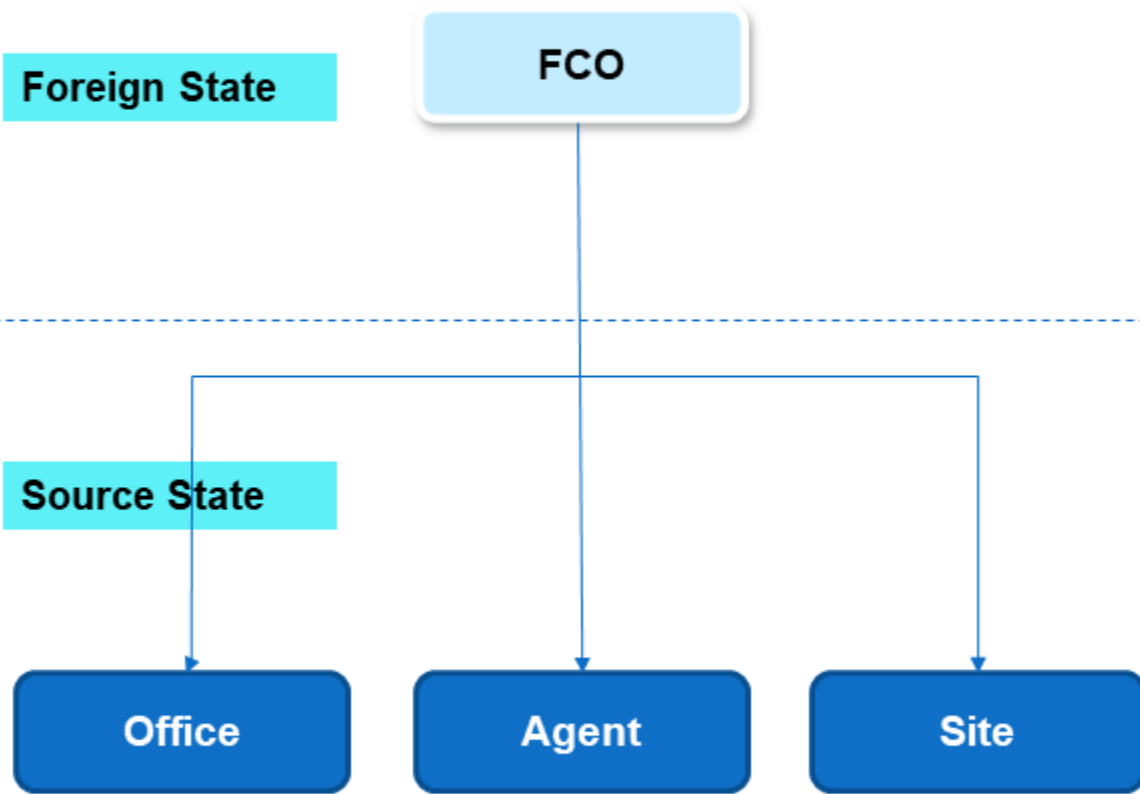
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WHEN CAN A PE ARISE IN SOURCE STATE - OFFICE, SITE OR AN AGENT ?



▪ When a foreign company operates through an

- Office
- Agent
- Business Site

Permanent Establishment (under local laws or applicable Treaty needs to be examined)

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IMPORTANCE OF PE CONCEPT

Determine right of Source State to tax profits of a Foreign Enterprise

Profits of a Foreign enterprise cannot be taxed unless it carries on its business through a PE in Source State

Impact of BEPS Action plan 7 PE definition should be considered

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5(1)	5(2)	5(3)	5(4)	5(5)	5(6)	5(7)	5(8)
Fixed Place of Business resulting in a PE	Specific inclusion in PE definition	Building or construction or installation PE	Specific exclusion	Dependent agent PE	Independent Agent	Holding Subsidiary – Not necessarily PE	Closely related enterprise

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Right and Quantum to tax Business Profits

Determine right of Source State to tax business profits attributable to a PE

Independent Personal Services

Income from professional services and other activities of an independent character

VAT Registration

Not determinative of existence or otherwise of a PE

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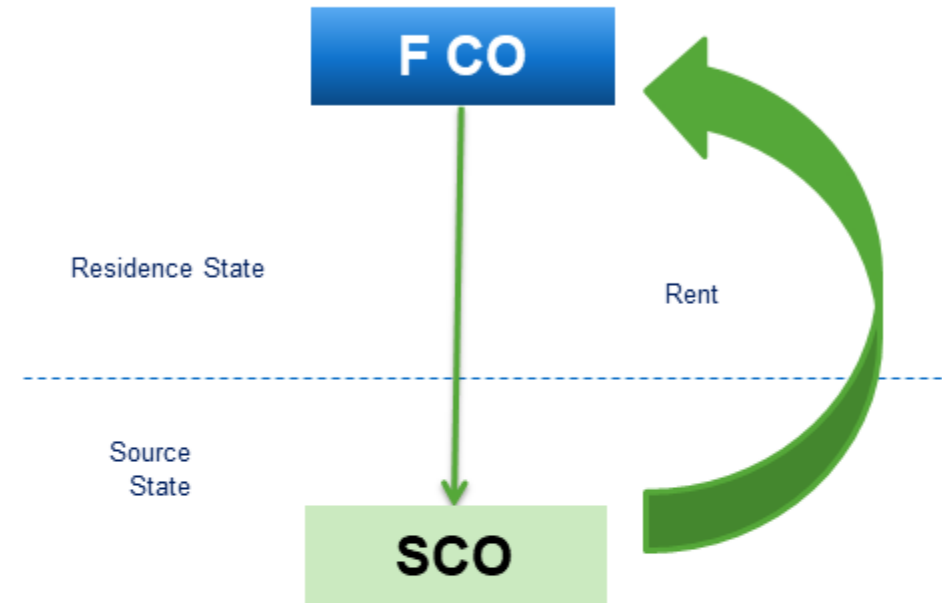
ARTICLE 5(1) – FIXED PLACE PE

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For the purposes of this Convention,
the term "permanent establishment" means
a fixed place of business
through which
the business of an enterprise is
wholly or partly carried on



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1 Definition of PE is exhaustive

2 The foreign enterprise should have a fixed place of business in the Source State

3 The business of Foreign enterprise should be carried from such place

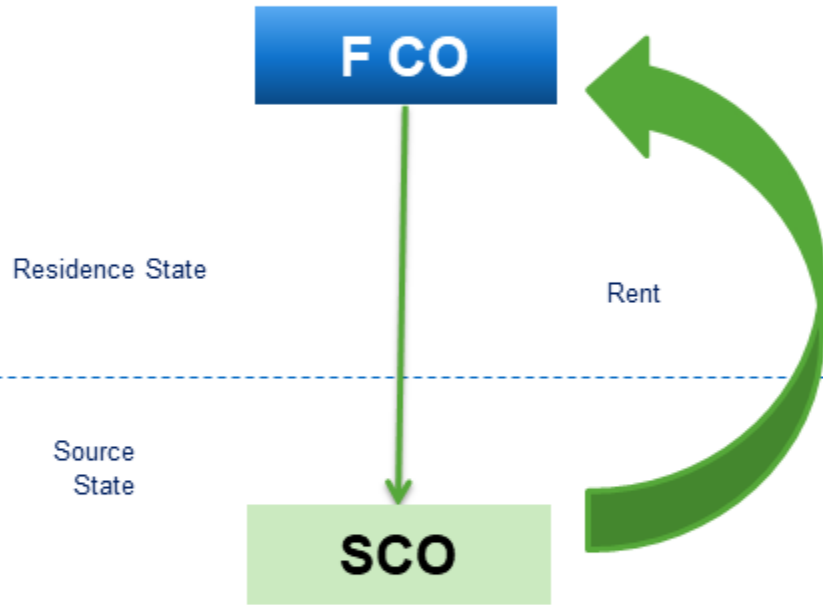
4 Foreign enterprise business may be carried on wholly or partly through such place

5 PE determination is an annual exercise

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Facts:

- FCO owns an immovable property in Source State
- Rent from such property is taxable under Article 6
- Part of property is also used by FCO employees, when rendering services to their clients in Source State

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Pitch in a market place

Certain permanently used
area in a customs depot

Business facilities of
another enterprise.

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ARTICLE 5 (2) – SPECIFIC PLACES INCLUDED IN FIXED PLACE PE

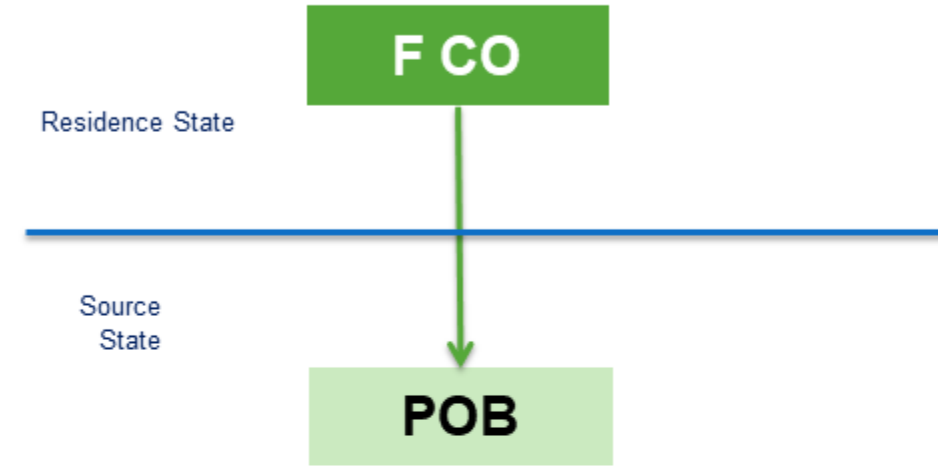
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The term "permanent establishment" "includes" especially:

- (a) a place of management;
- (b) a branch;
- (c) an office;
- (d) a factory;
- (e) a workshop, and
- (f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.



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Place of management

Branch

Office

Factory

Workshop

A mine, an oil or gas well, a quarry, or any other place of extraction of natural resources.

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ARTICLE 5(3) – BUILDING SITE, CONSTRUCTION OR INSTALLATION PROJECT

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A building site or construction or project

constitutes a permanent establishment

only if it lasts

more than twelve months.



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Building site or construction project or an installation project

Activities should continue for a period of more than 12 month in the other contracting State period – Single vs multiple projects ?

Supervisory activities in connection therewith are covered

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Construction of buildings , roads, bridges or canals,

Renovation (involving more than mere maintenance or redecoration) of buildings, roads, bridges or canals,

Laying of pipe-lines

Excavating

Dredging.

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Installation related to a construction project;

Installation of new equipment, like complex machine, in an existing building or outdoors

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Applies to each individual site or project ?

Time previously spent on unconnected sites or projects ?

Building site based on several contracts/ Several orders ?

Contract splitting within group companies for less than 12 months ?

Date of commencement of site ?

Time spent by a subcontractor working on the building site ?
Subcontractor PE ?

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Seasonal or other temporary interruptions ?

Bad weather

Shortage of material / Labour

Abandonment ?

Testing Period

Work performed under guarantee ?

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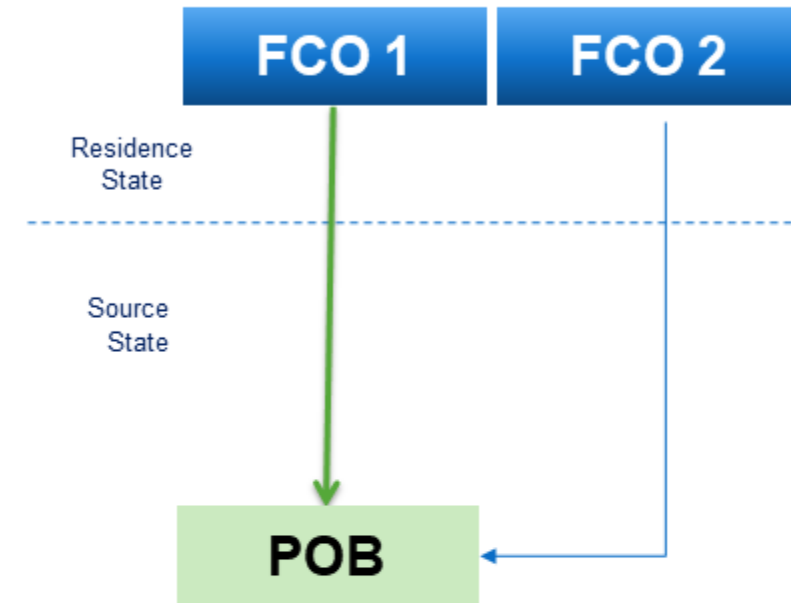


For the sole purpose of determining whether the twelve-month period referred to in paragraph 3 has been exceeded,

(a) where an enterprise of a Contracting State carries on activities in the other Contracting State at a place that constitutes a building site or construction or installation project and these activities are carried on during one or more periods of time that, in the aggregate, exceed 30 days without exceeding twelve months, and

(b) connected activities are carried on at the same building site or construction or installation project during different periods of time, each exceeding 30 days, by one or more enterprises closely related to the first-mentioned enterprise,

these different periods of time shall be added to the period of time during which the first-mentioned enterprise has carried on activities at that building site or construction or installation project.



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Whether the activities would have been covered by a single contract absent tax planning considerations ?

Whether the conclusion of additional contracts with a person is a logical consequence of a previous contract concluded with that person or related persons;

Whether the contracts covering the different activities were concluded with the same person or related persons

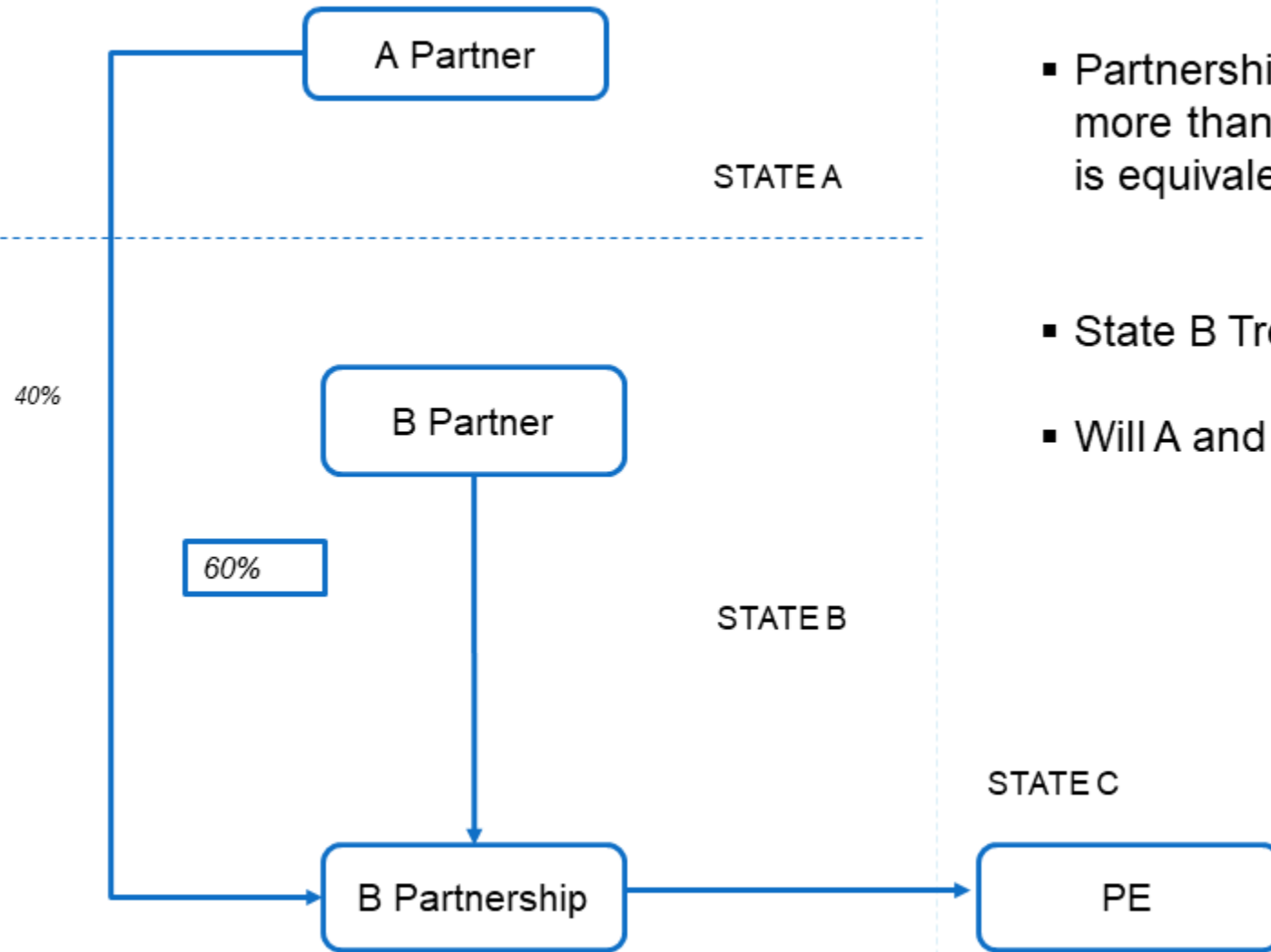
Whether the nature of the work involved under the different contracts is the same or similar

Whether the same employees are performing the activities under the different contracts.

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- Partnership carries on construction activity for more than 12 months . Net Profit of partnership is equivalent to USD 2,000,000
- State B Treats partnership as fiscally transparent
- Will A and B have a PE in State C ?

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ARTICLE 5(4) - SPECIFIC ACTIVITIES EXEMPTED FROM CONSTITUTING A PE

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Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

- a) facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise.
- b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery.
- c) The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise.

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Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

- a) ..
- b) ...
- c)

- d) Maintenance of a [fixed place of business](#) solely for the purpose of purchasing goods or merchandise or of [collecting information](#), for the enterprise.

- e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character ;

- f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e),

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Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

- a) ..
- b) ...
- c)
- d) Maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise.
- e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity; **of a preparatory or auxiliary character**
- f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e),

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Whether the activity of the fixed place of business forms an essential and significant part of the activity of the enterprise as a whole ?

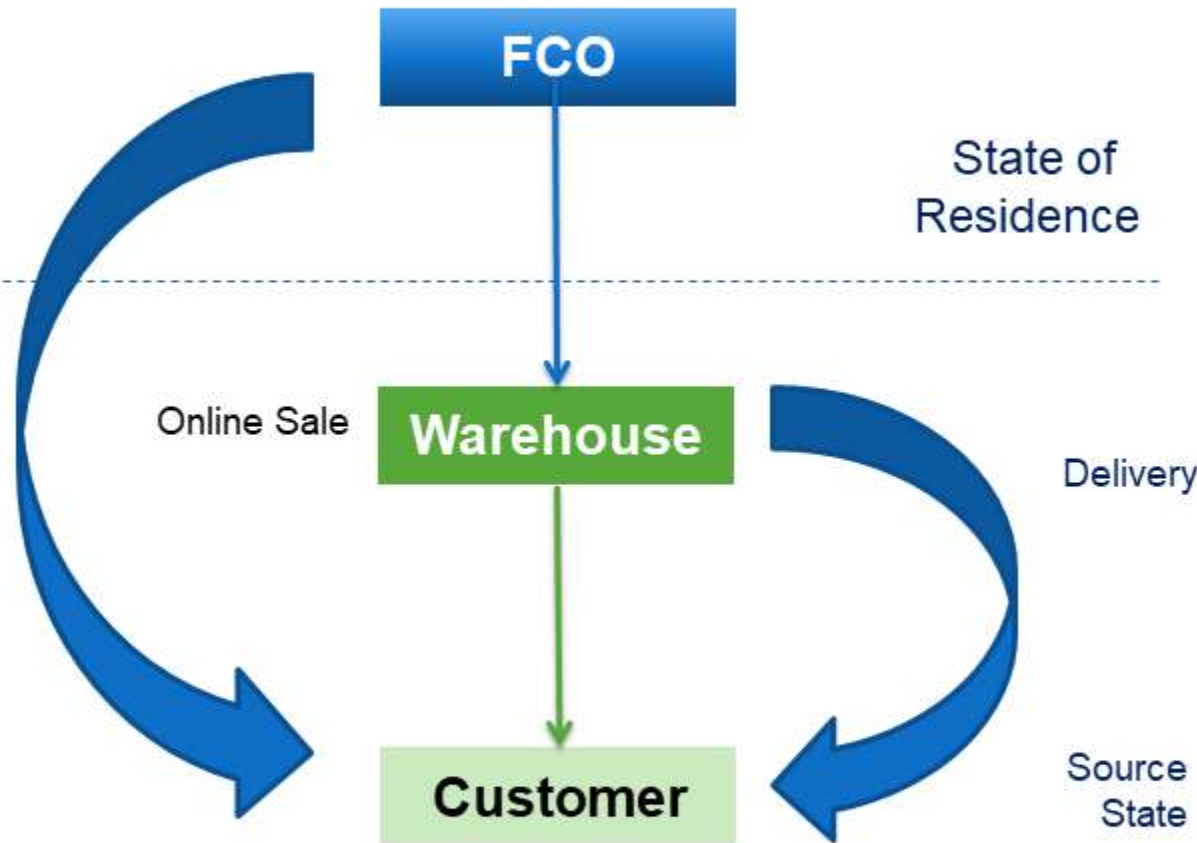
Whether the activity is carried on in contemplation of essential activity of the enterprise as a whole ?

Whether it is carried out for a short period relevant to the overall business activity ?

Training for construction ?

Proportion of the assets or employees of the enterprise used to provide activity ?

Activities performed for self vs others ?



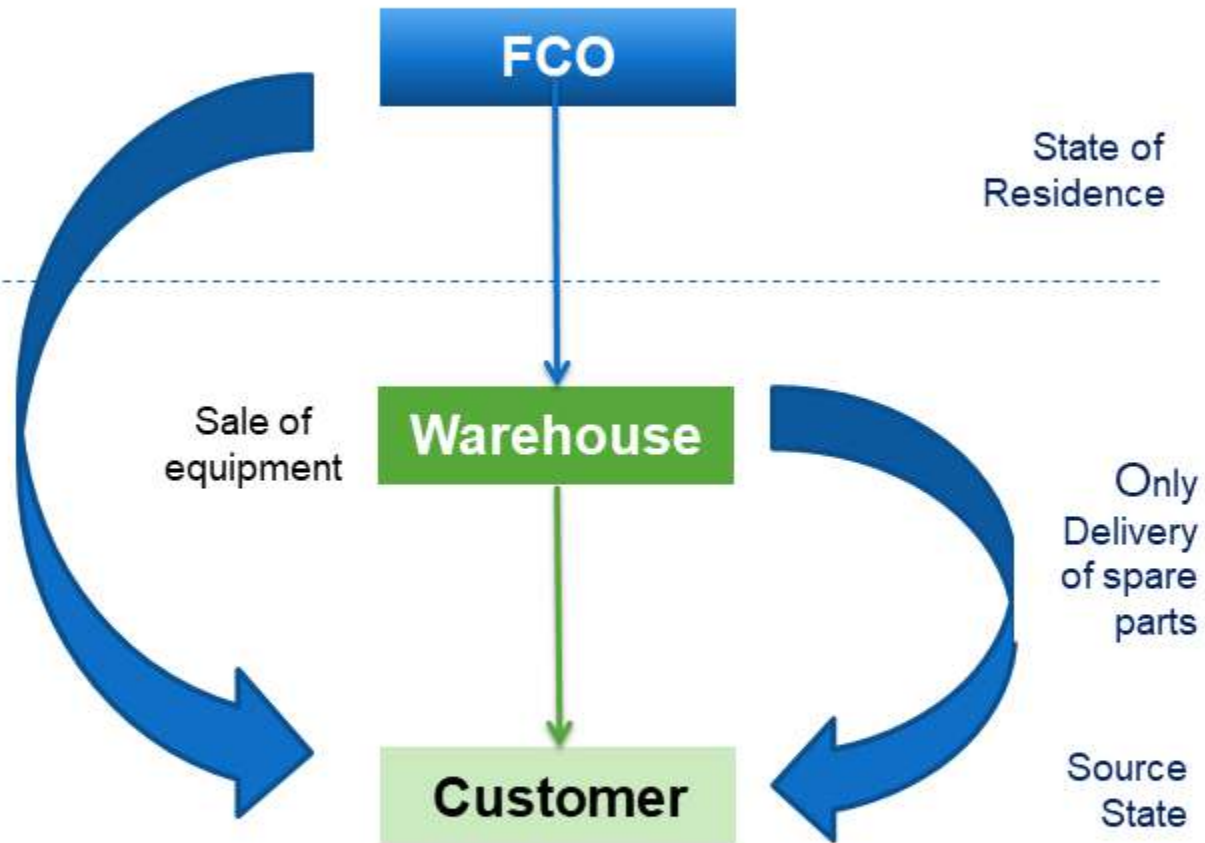
a) facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise.

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ARTICLE 5(4)(a)



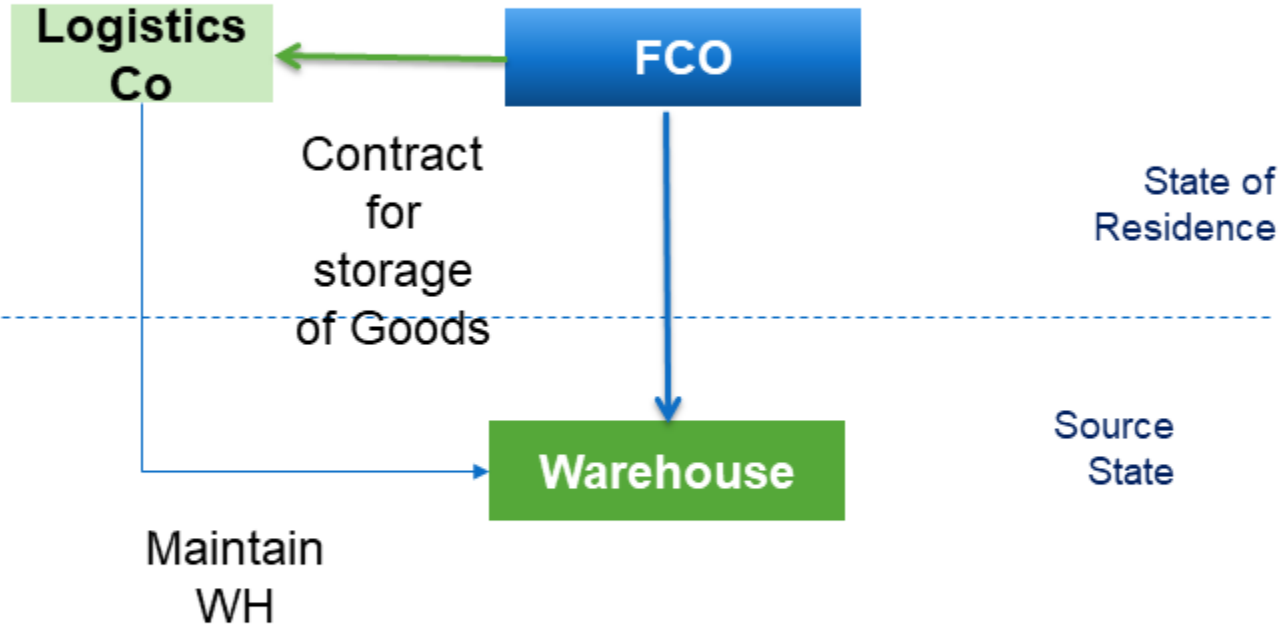
- a) facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise.

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ARTICLE 5(4)(b) - MAINTENANCE OF STOCK OF GOODS OR MERCHANDISE



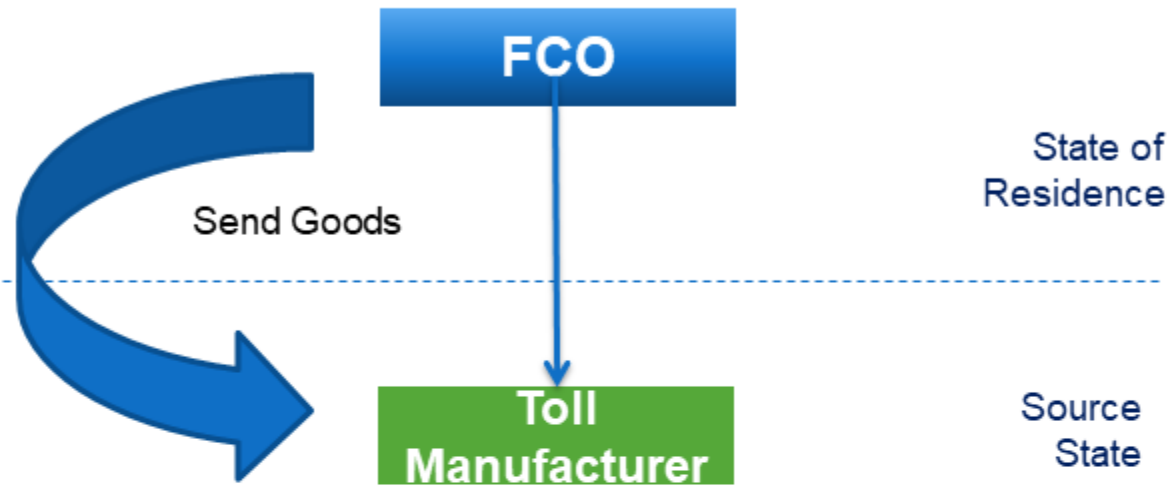
the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery.

PE of FCO ? Separate part with full access ?

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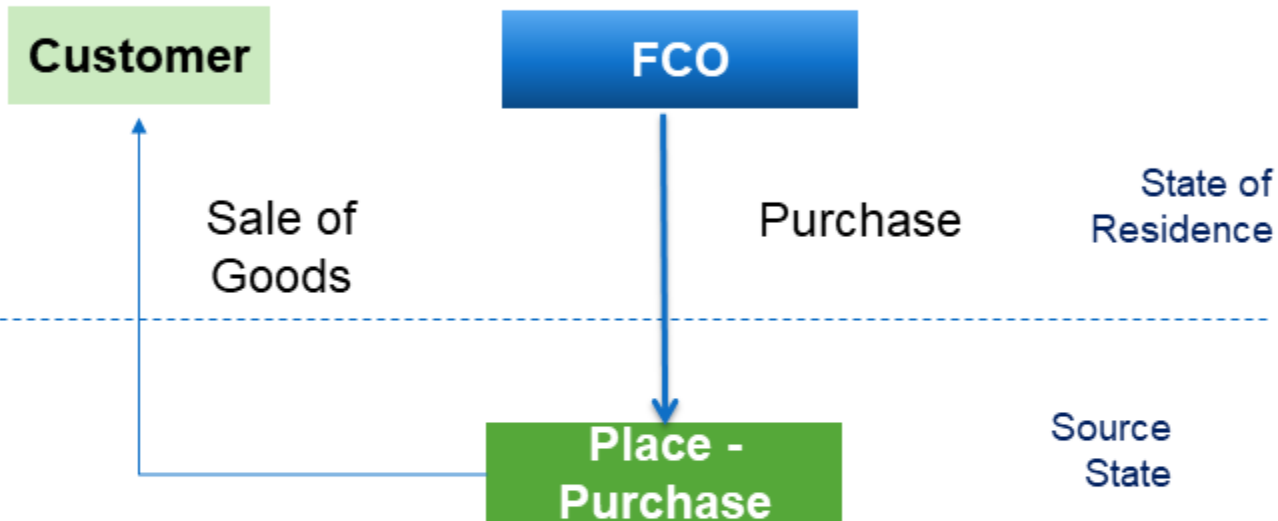
(c) maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise.

What if unlimited access to TM place ?

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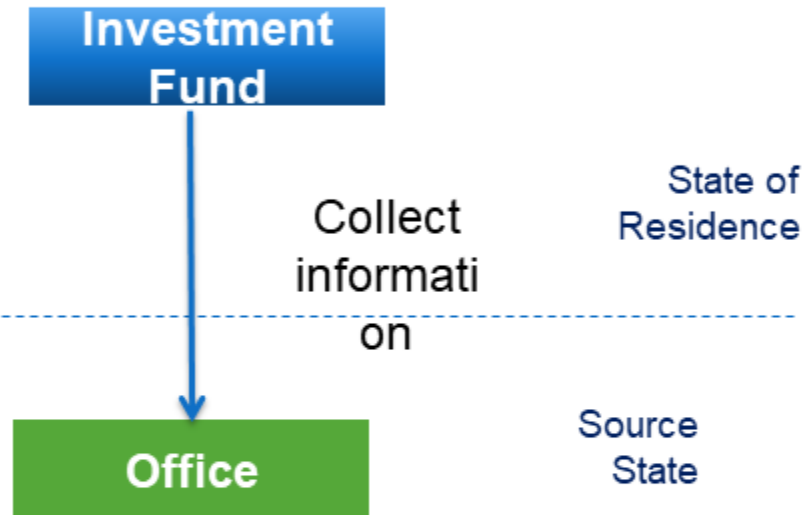


Maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise.

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Maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise.

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ADVERTISING

SUPPLY OF INFORMATION

SCIENTIFIC RESEARCH

SERVICING OF A PATENT OR A KNOW-HOW CONTRACT

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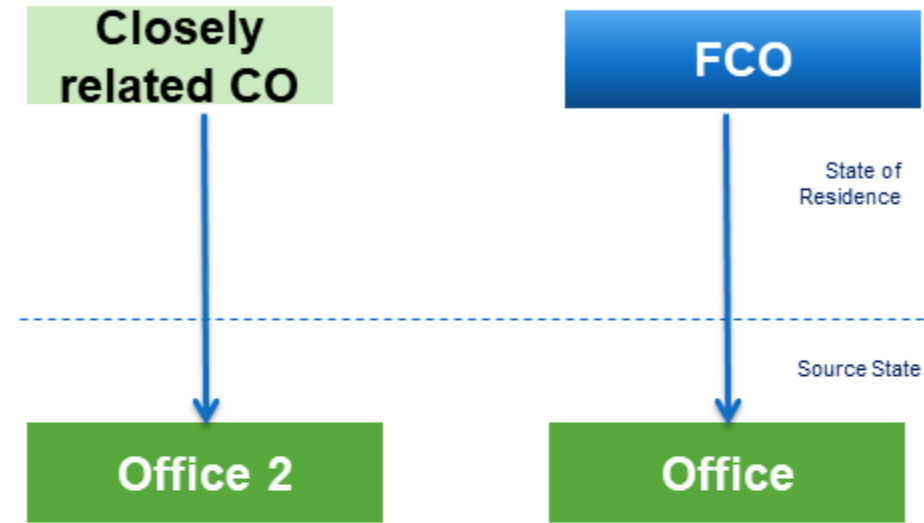
ARTICLE 5 (4.1) – OFFICE CONSTITUTING CLOSELY RELATED CO PE

Paragraph 4 shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carries on business activities at the same place or at another place in the same Contracting State and

(a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of this Article, or

(b) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character,

provided that the business activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, constitute complementary functions that are part of a cohesive business operation.

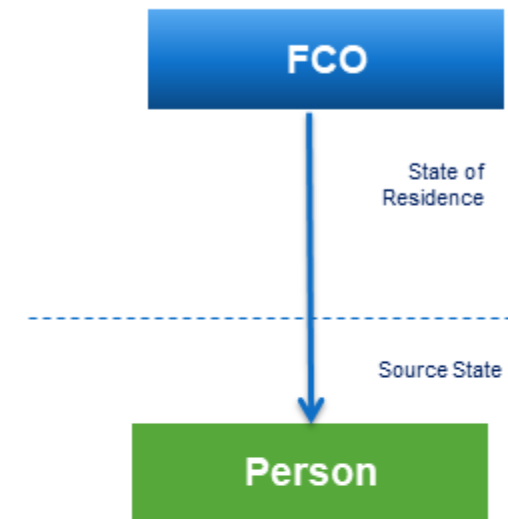


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ARTICLE 5(5)- DEPENDENT AGENT



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Notwithstanding the provisions of paragraphs 1 and 2 and subject to the provisions of paragraph 6,

where a person is acting in a Contracting State on behalf of an enterprise

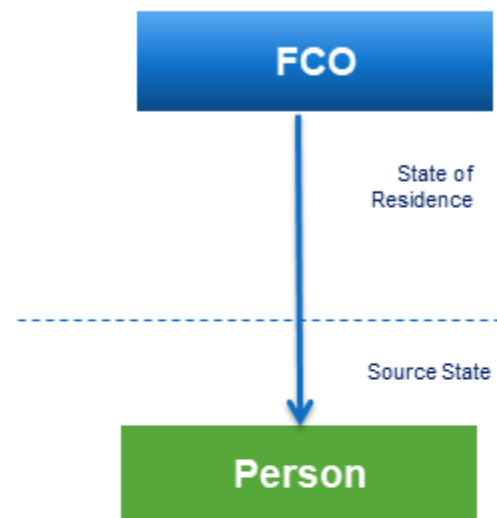
and, in doing so, habitually concludes contracts,

or habitually plays the principal role in leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are

(A) in the name of the enterprise, or

(B) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or

(c) the provision of services by that enterprise,



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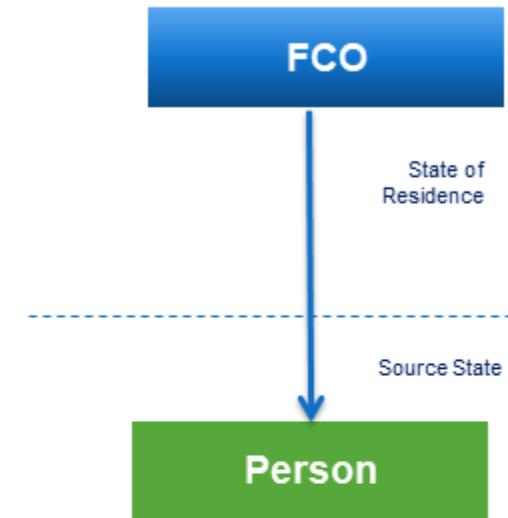
that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities

which that person undertakes for the enterprise unless the activities of such person are limited

to those mentioned in paragraph 4 which,

if exercised through a fixed place of business (other than a fixed place of business to which paragraph 4.1 would apply),

would not make this fixed place of business a permanent establishment under the provisions of that paragraph.



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Overrides Fixed Place PE (Para 1) / specific inclusions in PE (Para 2)

Agent should not be an independent agent as per Para 5

Activities should be on behalf of FE and not in own capacity

Activities should be in Source State

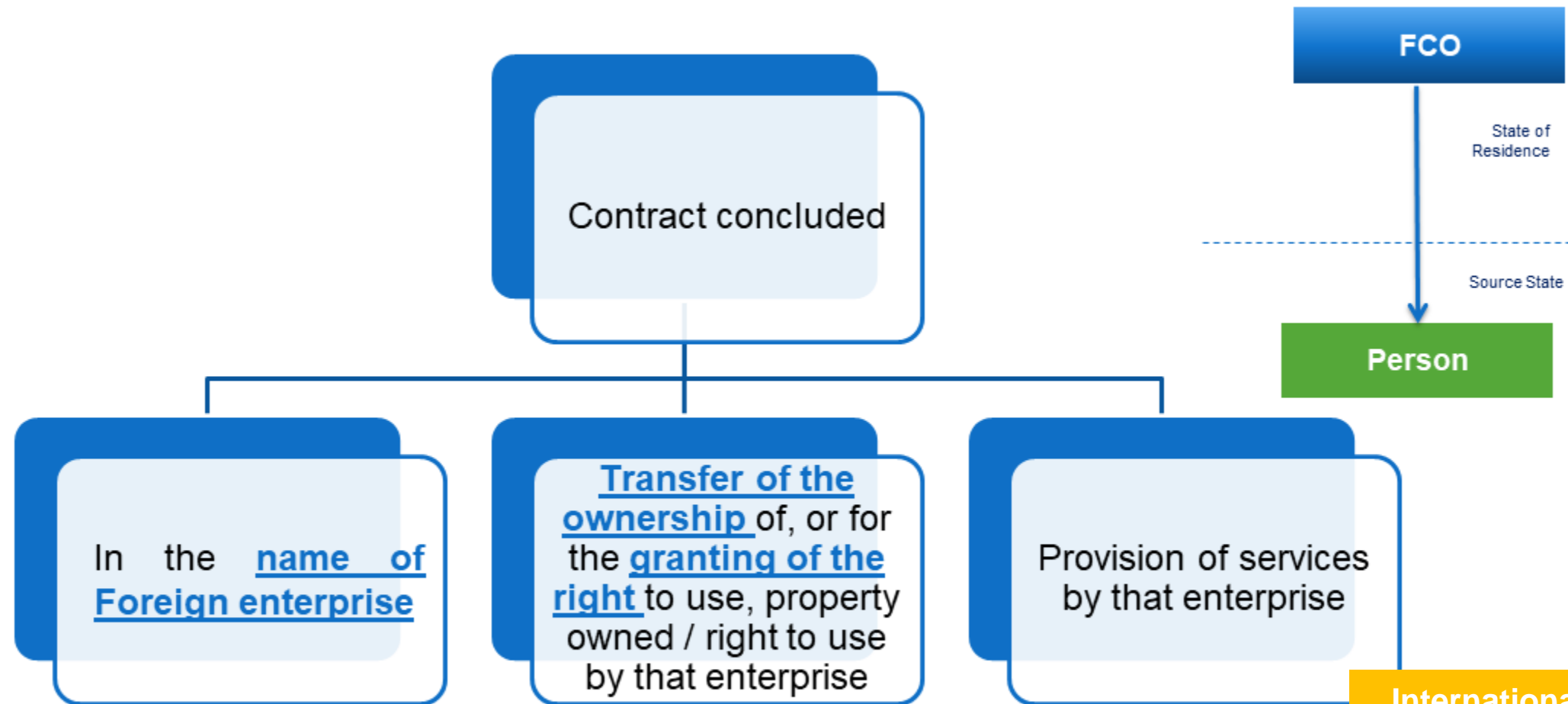
Habitually concluding contract/ playing principal role in concluding contracts routinely concluded without material modification by the Foreign enterprise

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ROLE OF AGENT IN THE CONTRACT



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Contracts

Contracts should relate to business proper of the enterprise

Acting on behalf of

Foreign enterprise vs acting on own behalf

Frequency

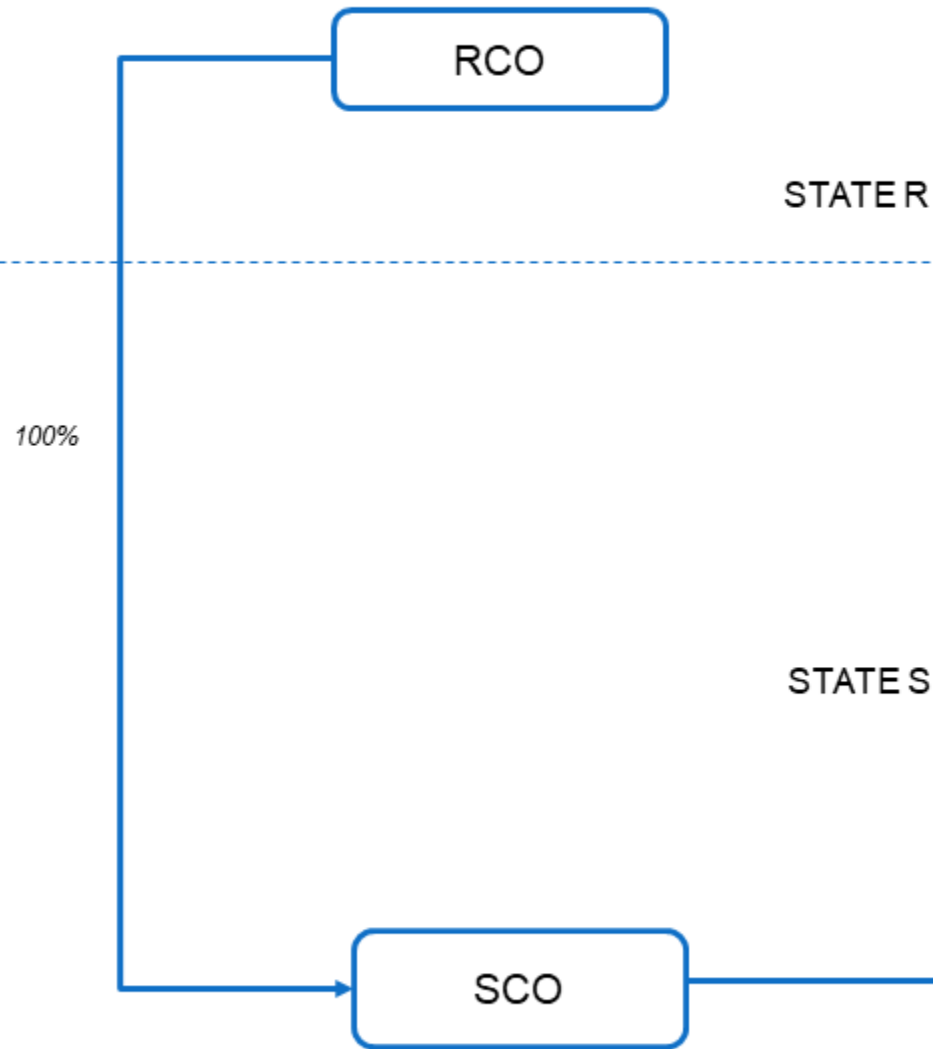
It is not possible to lay down a precise frequency test.

Attribution

PE exists to the extent that the person acts for the latter – Article 7

Fixed Place PE exists

Whether requirement of Dependent Agent PE is relevant ?



- RCO, a company resident of State R, distributes various products and services worldwide through its websites
- SCO is a subsidiary of RCO
- Employees of SCO perform following functions : -
 - Meet customers
 - Convince them to buy RCO's products and services
- Employees remuneration is partially based on the revenues derived by RCO
- Employee indicates contract must be concluded online with RCO before the goods or services can be provided by RCO and explains the standard terms of RCO's contracts

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ARTICLE 5 (6)- INDEPENDENT AGENT

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Paragraph 5 of Article 5 shall not apply

where the person **acting** in a Contracting State **on behalf of** an enterprise of the other Contracting State

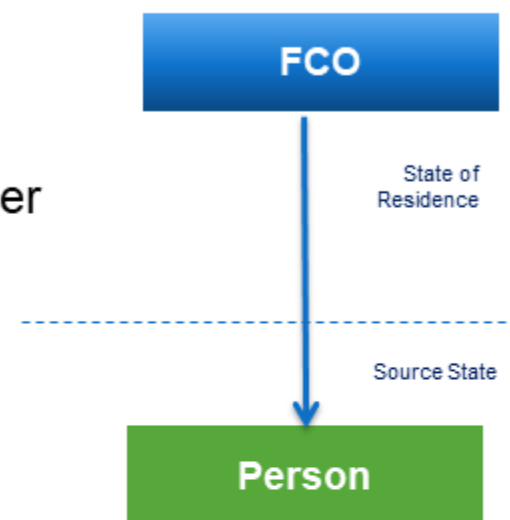
carries on **business** in the first-mentioned State as an **independent agent** and

acts for the enterprise in the **ordinary course of that business**.

Where, however, a person acts **exclusively or almost exclusively**

on behalf of one or more enterprises to which it is closely related,

that person shall **not be considered to be an independent agent** within the meaning of this paragraph with respect to any such enterprise.



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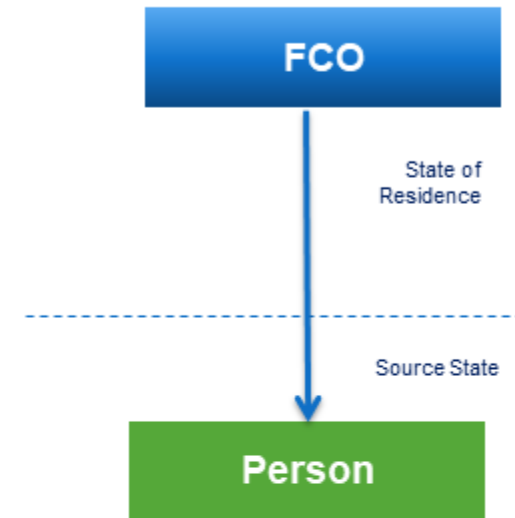
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An independent **Agent** acts for the Foreign **Enterprise**

Agent acts for the Foreign **Enterprise** in the ordinary course of its business.

NA if person acts exclusively or almost exclusively on behalf of one or more closely related enterprises

Responsible for results of work, not subject to significant control



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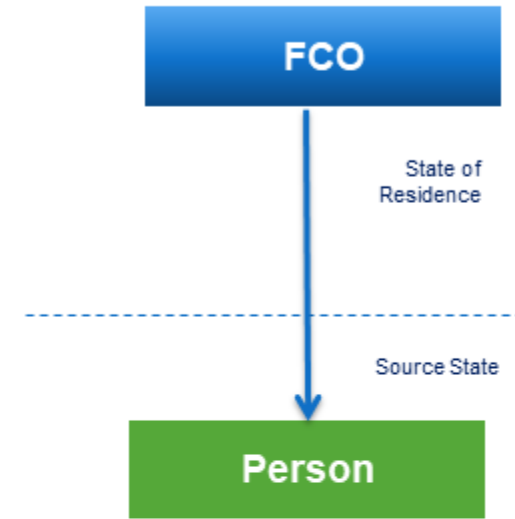
Degree of control on activities

Number of principal an agent works for

Whether the principal is closely related or independent person

Seeking approval for activities vs providing information

Activities relating to agent's business



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ARTICLE 5(7) - SUBSIDIARY PERMANENT ESTABLISHMENT

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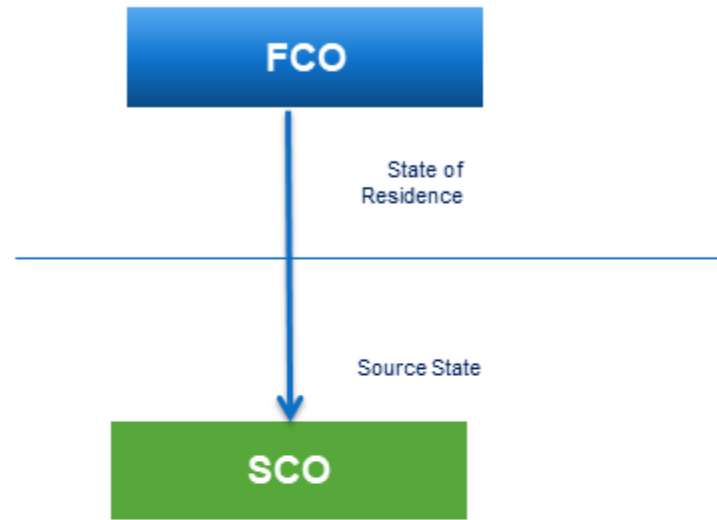
ARTICLE 5(7) - HOLDING SUBSIDIARY RELATIONSHIP

The fact that a company which is a resident of a Contracting State

controls or is controlled by a company which is a resident of the other Contracting State,

or which carries on business in that other State (whether through a permanent establishment or otherwise),

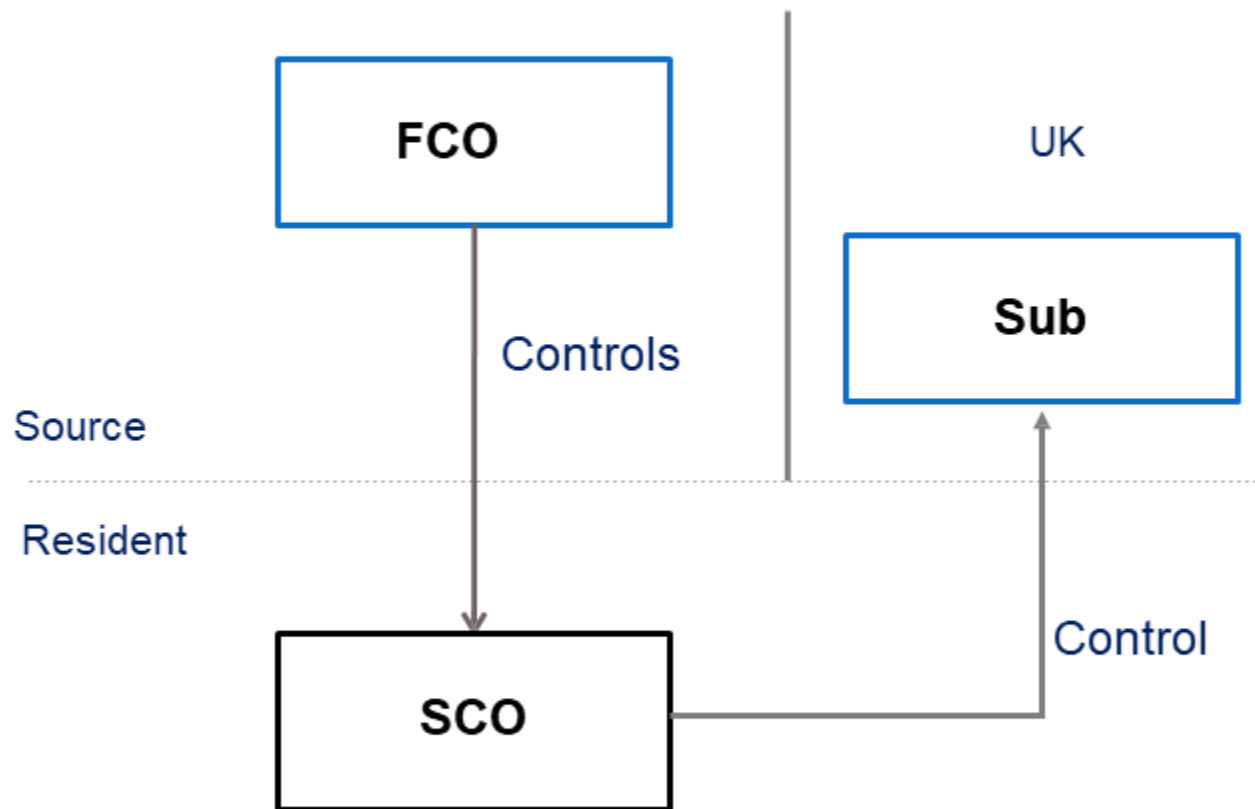
shall not of itself constitute either company a permanent establishment of the other.



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The fact that a company which is a **resident of a Contracting State**

- controls a **company which is a resident of the other Contracting State** , or
- **Is Controlled** by a **company which is a resident of the other Contracting State**
- or which carries on business in that other State (whether through a permanent establishment or otherwise),

shall **not of itself** constitute either company a permanent establishment of the other

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ARTICLE 5 (8) - RELATED ENTERPRISE

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ARTICLE 5 (8) - RELATED ENTERPRISE

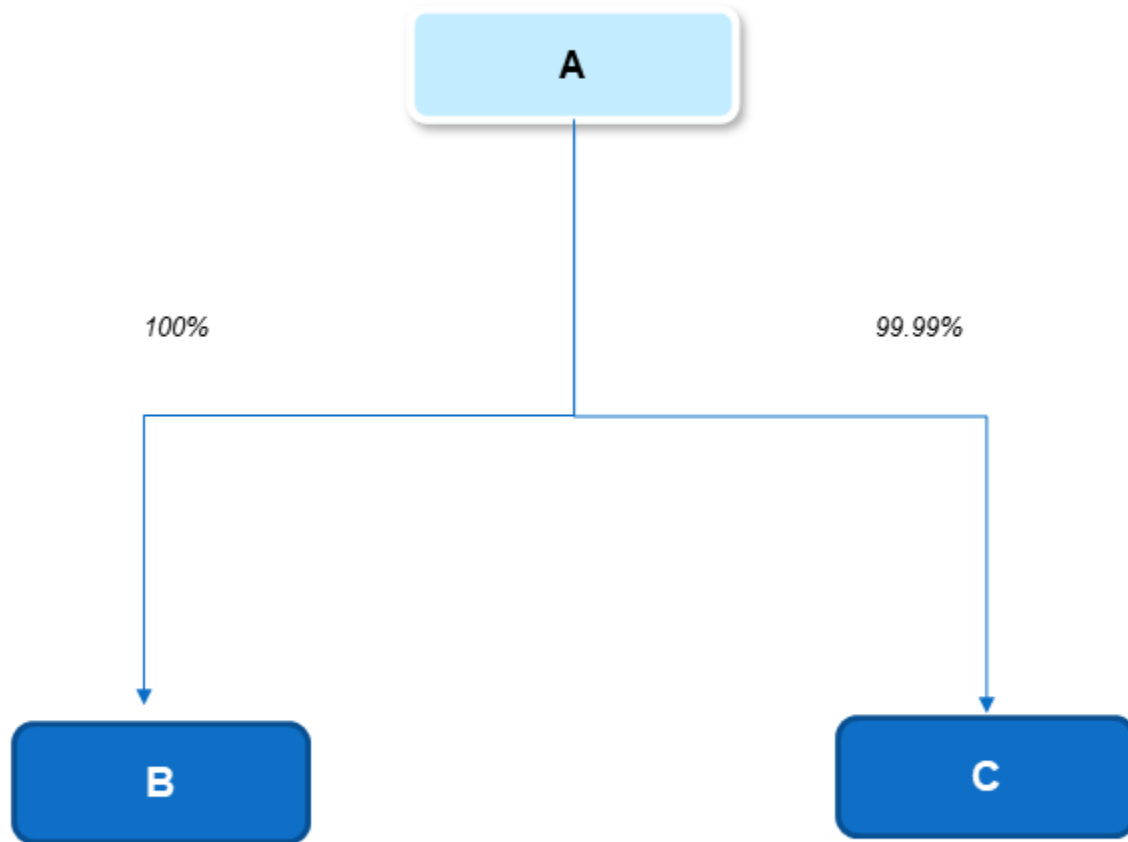
For the purposes of this Article, a person or enterprise is closely related to an enterprise if, based on all the relevant facts and circumstances,

one has control of the other or

both are under the control of the same persons or enterprises.

In any case, a person or enterprise shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person or enterprise possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise or in the two enterprises.



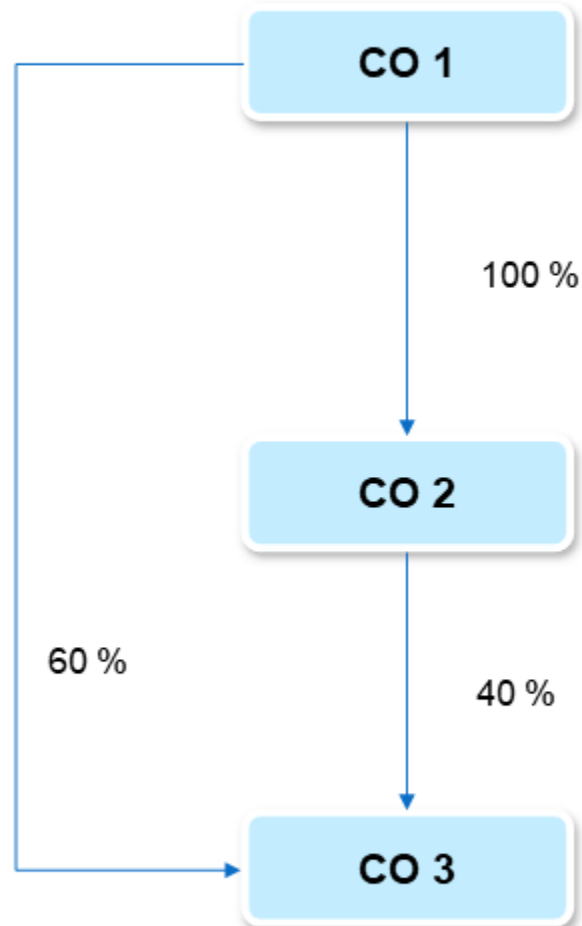


One has control of the other or both are under the control of the same persons

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- CO 1 is closely related as it has direct ownership of > 50 % in CO 2
- CO 1 is closely related to CO3 as it has indirect ownership of 100% in CO 3.
- CO2 and CO 3 are closely related as CO1 has > 50% ownership in both of them

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- With over 20 years of experience, Arinjay has helped Clients on International Tax , M&A Tax and Direct tax matters impacting their business in India and UAE . He has worked on International tax with over 750 transaction of Inbound Investment, Outbound Investments, Due diligence, Family Structuring and Succession planning across sectors ;
- Arinjay has worked with over 500 UAE companies on UAE Economic Substance Regulations advisory services, and UAE Corporate Tax (proposed to be introduced from June 1, 2023) ;
- Delivered Live Seminar and Webinar on Economic Substance Regulations and UAE Corporate Tax
- Author of various books in International Tax and Direct Tax ;
- Trained more than 2000 CA's in Live international tax course (With two of the largest global tax firms) and over 5000 students in International Tax
- Created India's first e learning course on International tax for professionals in 2016 with students from over 30 countries.
- Editor International Tax at Taxmann Publications, New Delhi - Handled the Journal on International Tax with Taxmann Publications, India's oldest Publishing house on tax and corporate law publications.
- Faculty at the International tax Course of ICAI during the year 2009 & 10



CA Arinjay Jain

Faculty

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DTAA Double taxation avoidance agreement

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