



Seminar on PE and Attribution of Profits to PE

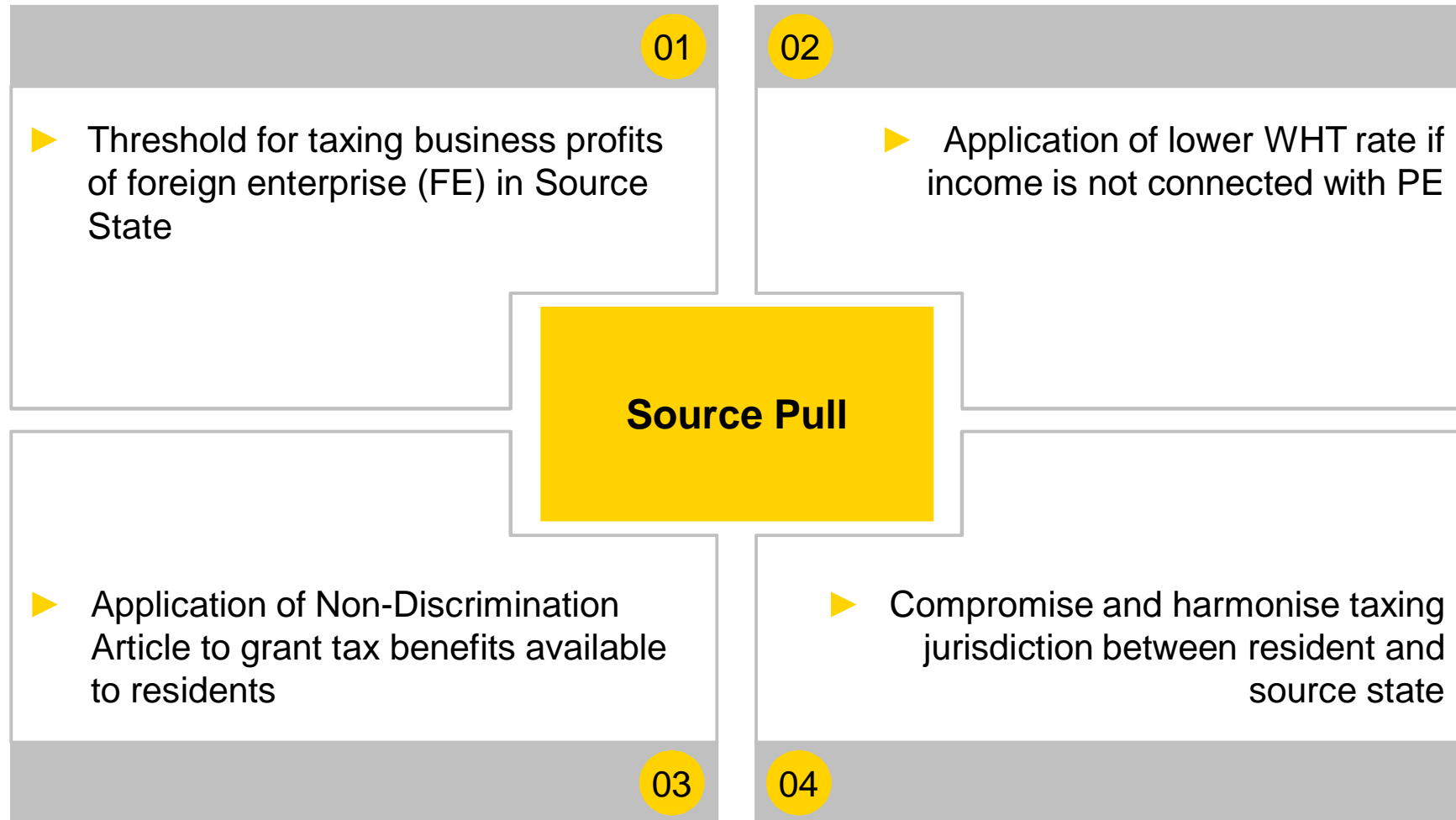
Bhaumik Goda

5 July 2014

Our Agenda



Rationale of PE



Genesis of PE

Article 7(1)

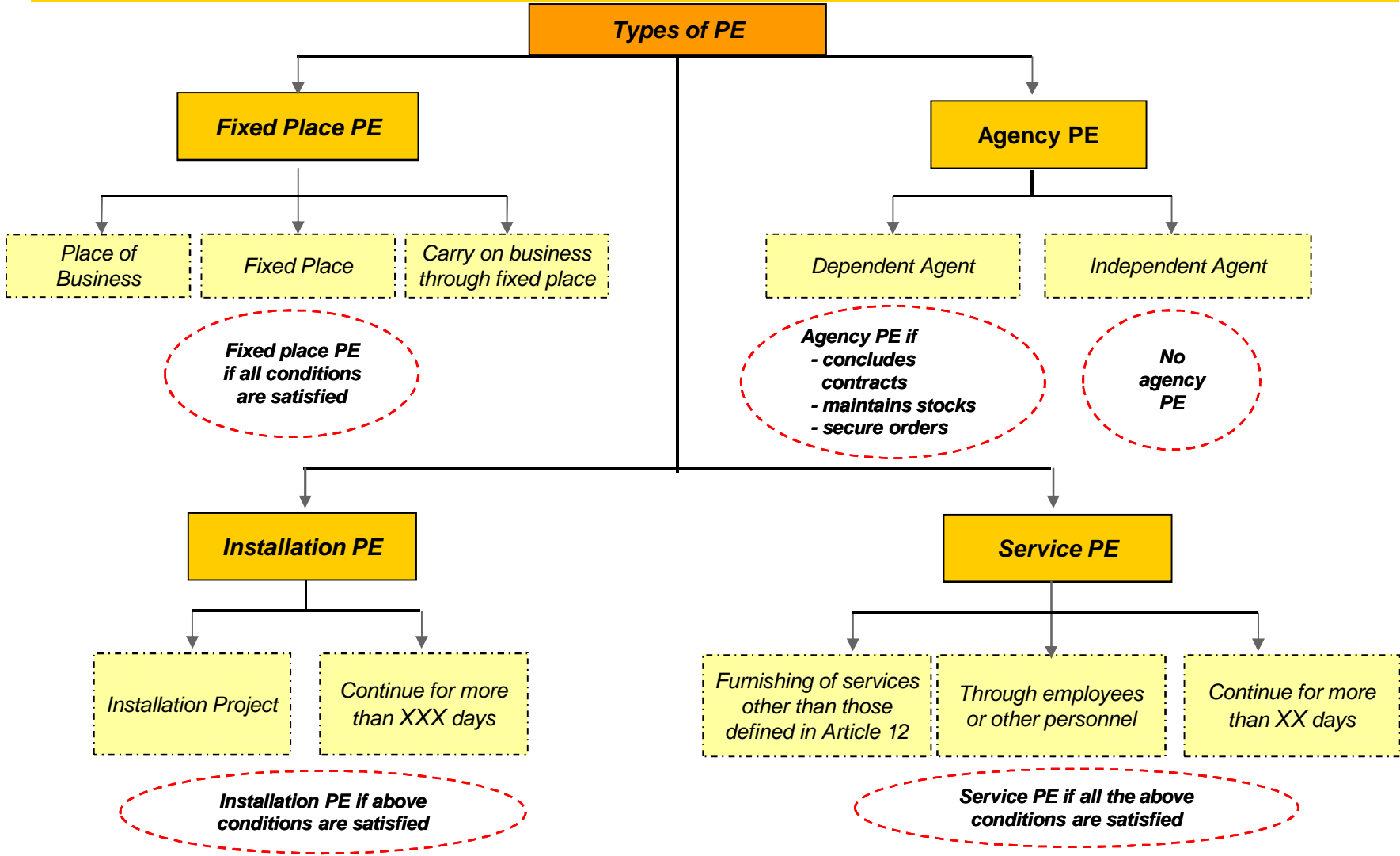
“the profits of an enterprise of a Contracting State (US) shall be taxable only in that State (US) unless the enterprise carries on business in the other Contracting State (India) through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State (India) but only so much of them as is attributable to that permanent establishment.”

Philosophy of PE

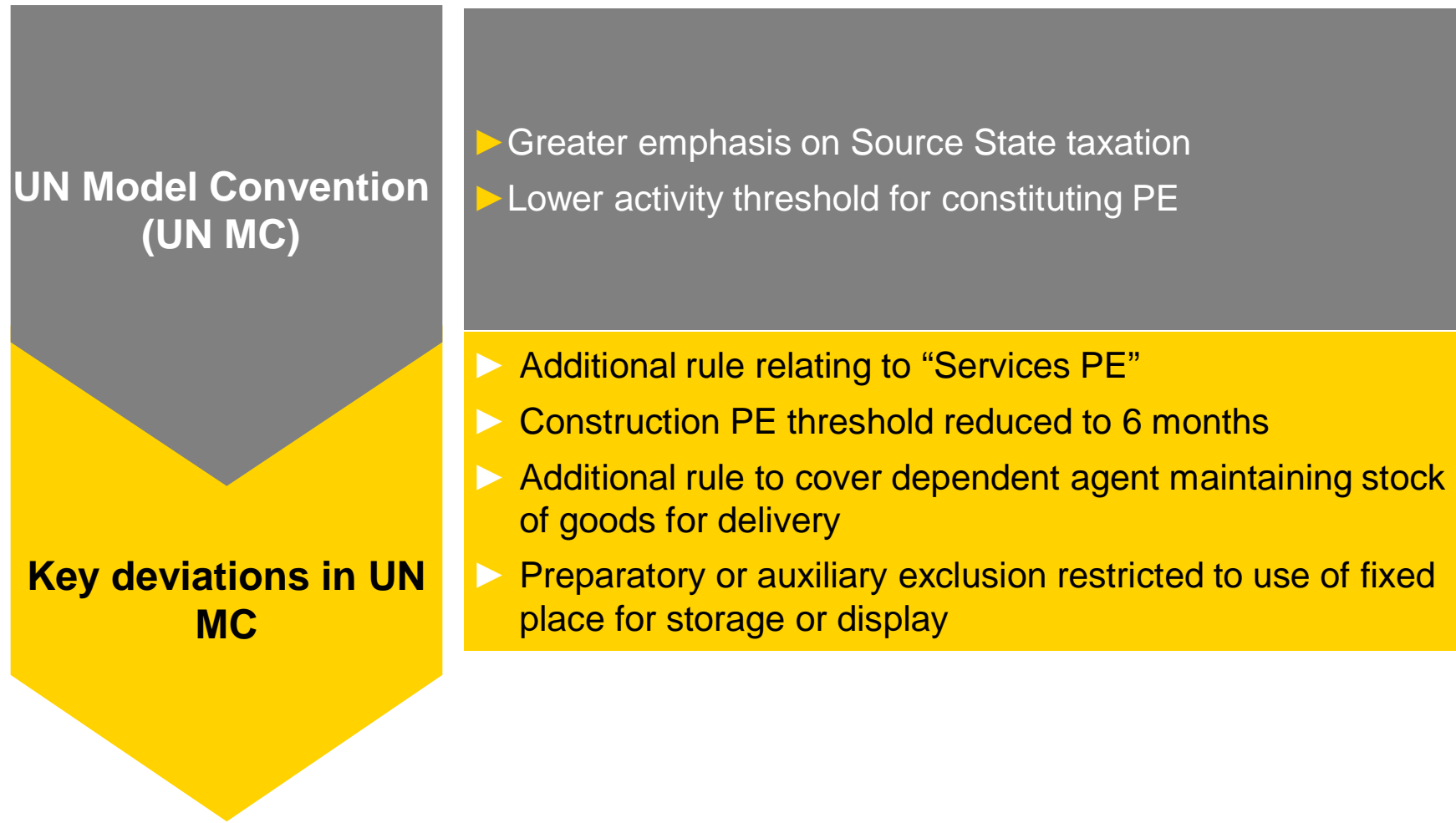
“the words “permanent establishment” postulate the **existence** of a **substantial element** of an **enduring or permanent nature** of a foreign enterprise in another country which can be attributed to a **fixed place** of business in that country. It should be of such a nature that it would amount to a virtual projection of the foreign enterprise of one country **into the soil of another country**” - CIT v Visakhapatnam Port Trust (144 ITR 146) (AP)

- “The concept marks the dividing line for business between merely trading with a country and trading in that country” - Philip Baker
- “A “distinct” place of business could be understood as the location of center of the business activity at a certain spot on the soil (or the seabed) within the jurisdiction of the treaty” - Arvid A. Skaar

Anatomy OF PE



Traditional concept of PE



Fixed Place PE

Basis Rule PE – Article 5(1)

- ▶ “For the purpose 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”

- ▶ Five Essential ingredients of Basic Rule PE
 - ▶ There must be a place of the business. (place of business test)
 - ▶ The place of business must be located at a certain area.(location test)
 - ▶ The taxpayer must have a certain right to use the place of business (right to use test)
 - ▶ The use of the place of business must last for a certain period of time. (permanence test)
 - ▶ The activities performed through the place of business must be a business activity as per treaty or domestic law (business activity test)

Fixed place PE – Place of business test

- ▶ The term ‘place of business’ covers any premises, facilities or installations used for carrying on the business of the enterprise whether or not they are used exclusively for that purpose
- ▶ There must be geographical and commercial coherence

OECD Commentary (2010) Para 4.1:

- ▶ Mere fact that an enterprise has certain amount of space at its disposal which is used for business activities is sufficient to constitute a place of business
- ▶ No formal legal right to use is required
- ▶ For instance- a PE could exist where enterprise illegally occupied a certain location where it carried on its business

Examples:

- ▶ Certain permanently used area in a customs depot (e.g. for the storage of dutiable goods)
- ▶ Certain pitch in market place used for carrying out the business

Fixed place PE – Location test

- ▶ Presence to be 'visible' in the other contracting state
- ▶ Usually linked to a geographical location
- ▶ Covers premises as well as tangible assets used for carrying on business
- ▶ Movable places of business with a temporary fixed location meet the location test
- ▶ Activities carried on within a defined geographical location could constitute a PE

OECD Commentary (2010) Para 5:

- ▶ There has to be a link between the place of business and a specific geographical point;

Which of these constitutes PE?

- ▶ A diving offshore vessel functioning within a defined area
- ▶ A dealer selling merchandise from a mobile van or moving caravan
- ▶ A pedestrian street, outdoor market or fair in different parts of which a trader regularly sets up his stand

Fixed place PE – Duration Test

- ▶ No minimum threshold under Indian law
- ▶ Availability of a fixed place of business for a reasonable period should result in compliance with this condition
- ▶ An isolated activity cannot lead to establishment of a fixed base PE as the ingredients of regularity, continuity and repetitiveness are essentially missing
- ▶ If a non-resident is carrying its activities through a place which is exclusively available to its business in India then that place will be deemed to be its fixed place PE even if the same is used for a day

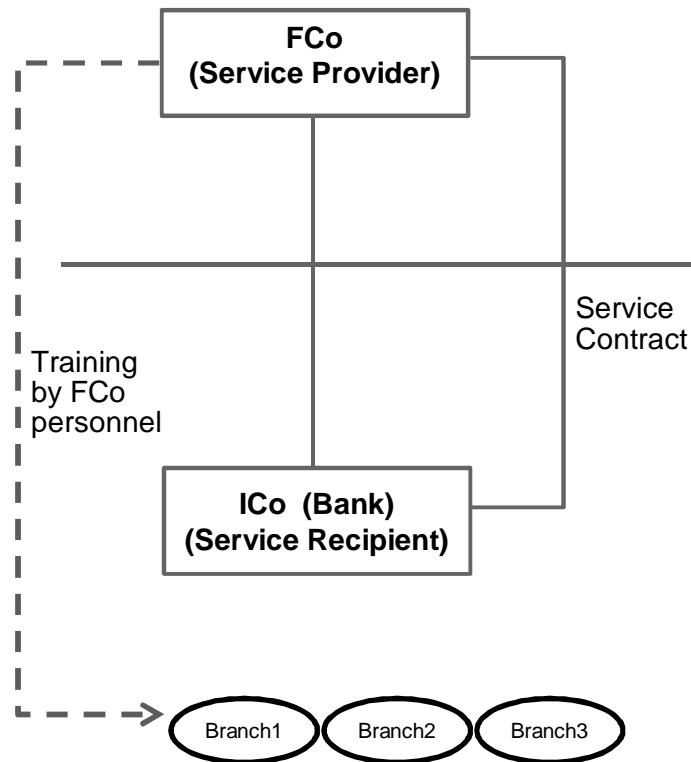
OECD Commentary (2010) Para 6:

There are examples in the OECD Commentary where even presence for a single day, for performance of the most important functions of the business, would constitute a fixed placed PE. However, PE normally have not been considered to exist in situations where a business had been carried on in a country through a place of business that was maintained for less than six months

Case Study : Recurrent / Short duration activities

- ▶ A trade fair is conducted every year in India
- ▶ The fair is for a duration of about 1-2 weeks every year
- ▶ Mr X, a resident of US, participates in the fair every year and is regularly visiting India from past 4 years
- ▶ Mr X displays his products in the fair in a mobile van, which he ships into India every year for the fair
- ▶ The fair is conducted in different parts of India every year
- ▶ Determine whether Mr X constitutes a PE in India by participating in trade fair

Case Study : Place of Business Test



- ▶ FCo renders stress management and spiritual healing training to employees of various companies
- ▶ FCo enters into agreement with ICo Bank which has about 500 branches across India.
- ▶ FCo is to depute about 100 employees who would conduct 3 day course at different branches of ICo.
- ▶ It is expected that FCo employees will be in India for about 3 months.
- ▶ FCo is from a country where treaty does not have service PE
- ▶ Evaluate fixed place PE for FCo in India?

Place at FE's disposal : Disposition test

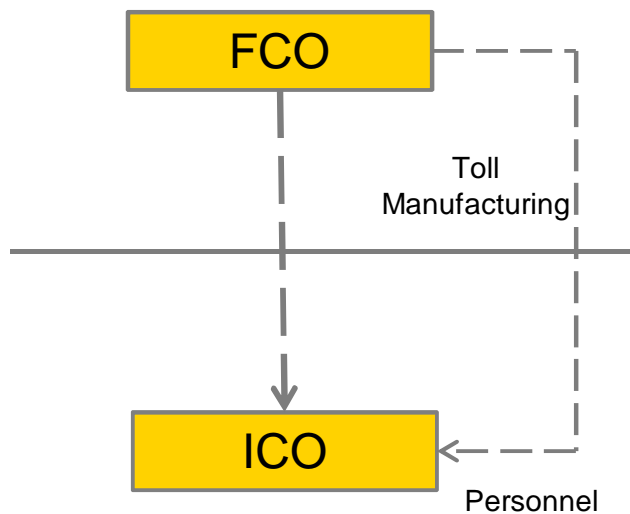
- ▶ Place should be at disposal of foreign enterprise for business activities of Foreign Enterprise (FE)
- ▶ FE should have ability to exercise some right or dominion or control over place
- ▶ Place may be owned, rented or leased
- ▶ Legal right to use not be the sole determinant;
 - ▶ Factual use or exercise of such right is more important
- ▶ Service provider's office is "generally" not at disposal of service recipient

Place at FE's disposal : Disposition test

OECD illustrations :

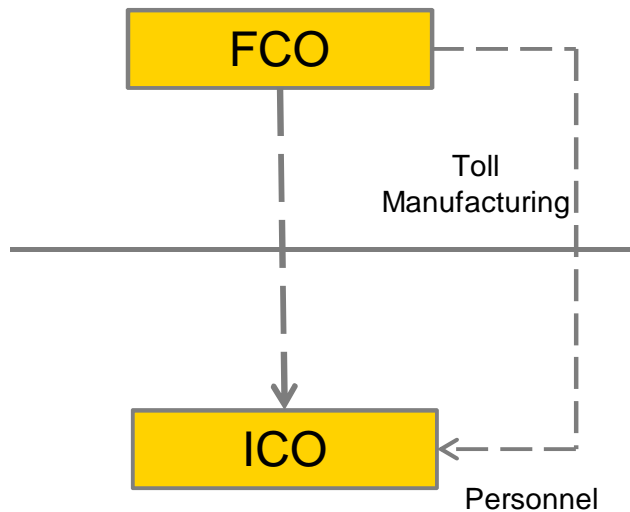
- ▶ Not at disposal
 - ▶ Regular visits by Salesman to meet purchase director to take orders
 - ▶ Road transporter using a delivery dock for a number of years for delivering of goods purchased by client
 - ▶ Foot print area of a satellite
 - ▶ Roaming arrangement where home country operator transfers call to a foreign network
- ▶ At disposal
 - ▶ Employee of parent, is allowed to use office of subsidiary so that SubCo complies with its obligation under contract with parent. Sufficiently long period is essential
 - ▶ Painter, for two years, spending 3 days a week in large office building of client for painting purpose

Case Study : Toll manufacturing arrangement



- ▶ FCo gets its goods manufactured through ICo
- ▶ FCo has provided technical know-how, packaging specifications etc. to ICo
- ▶ FCo also supplies critical raw material / components
- ▶ FCo personnel/ employees visit ICo for quality control, ensure timely execution, etc.
- ▶ ICo is an unrelated party and is remunerated on cost plus basis.
- ▶ Is there PE for FCo in India?

Case Study : Toll manufacturing arrangement



- ▶ Is FCo carrying on business of FCo through ICo at place which is at FCo's disposal?
- ▶ Are activities preparatory and auxiliary in nature for FCo as its goods are maintained solely for processing?
- ▶ Do FCo employees visit/presence trigger services PE?
- ▶ Is ICo a dependent agent?

Place at FE's disposal : Disposition test

- ▶ IFA 2009 General report

“Generally, any service provider must be considered to have a legally based access to the client’s facilities if the service contract presupposes that he or she is going to render his / her services”

- ▶ Booz India Ruling

“Taxpayers rendering service usually do not require a place to be at their constant disposal and therefore application of ‘disposal test’ is generally more complex in such cases.

In some jurisdictions the ‘disposal test’ is satisfied by the mere fact of using a place. In some other jurisdictions it is stressed that something more is required than a mere fact of use of place.”

Fixed place PE – Business Activity Test

- ▶ The definition of PE requires that the business of the foreign enterprise, wholly or partly, ought to be carried out through the fixed place
- ▶ Place of business must 'serve' the business activity and not be 'subject to' it. The use of the premises by an agent for the purpose of the business of the principal may lead to the interpretation that such premises are at the disposal of the principal and therefore constitute a PE [*DIT Vs Galileo International Inc [2009] 336 ITR 264 (Del HC)*]

OECD Commentary (2010) Para 7:

- ▶ Activity need not be permanent in the sense that there is no interruption of operation, but operation must be carried out on a regular basis

Examples:

- ▶ The office of a local courier company shall be considered to constitute a PE for the F Co engaged in providing courier services since the foreign company delivered packages to the local courier company for onward delivery to the addressee- *ACIT Vs DHL Operations BV [2007] 108 TTJ 152 (Mum ITAT)*
- ▶ A painter who, spends his time in a large office building of its main client- the presence of the painter in that office building where he is performing the most important functions of his business (i.e. painting) constitute a permanent establishment of that painter

Illustration of Basic Rule PE – Article 5(2)

The term “permanent establishment” **includes** especially:

- ▶ A place of management
- ▶ A branch
- ▶ An Office
- ▶ A factory
- ▶ A workshop
- ▶ A mine, an oil or gas well, a quarry or any other place of extraction of natural resources

- ▶ Rule of Edjusdem Generis not applicable.

Construction PE

Article 5(3)(a) – What does it say ?

The term 'permanent establishment' also encompasses :

a) a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only if such site, project or activities last more than six months

Construction PE - Article 5(3)

- ▶ Examples : construction of building, sewer systems, bridges or canals, road, highway, excavation or dredging projects, laying pipelines etc
- ▶ Covers installation / assembly project lasting specified duration.(For example, refinery, cement projects)
- ▶ Construction project, installation project, assembly project if exceeds specified duration
- ▶ Could be contractor, sub-contractor
- ▶ Significance of Geographical and commercial coherence

Article 5(3) – Construction PE

- ▶ Building site or construction or installation project constitutes a PE only if it lasts more than
 - ▶ 12 months (OECD MC)
 - ▶ 6 months (UN MC)

Consideration in calculation duration of Construction PE

- ▶ Site exists from the day from which work begins, including any preparatory work;
- ▶ A site exists until the work is completed or permanently abandoned;
- ▶ Temporary interruptions not to be excluded on account of bad weather, lack of raw materials, labour problems, etc;
- ▶ If the part of the contract is subcontracted – Period spent by sub-contractor also to be considered - *CIT Vs Visakhapatnam Port Trust [1983] 144 ITR 146 (Andhra Pradesh HC)*
- ▶ Twelve month test applies to each individual site or project – *Sumitomo Corpn Vs DCIT [2007] 110 TTJ 302 (Del ITAT); OECD (2010), Para 18*
- ▶ A building site should be regarded as a single unit, even if it is based on several contracts

Supervisory PE

- ▶ As per UN model, supervisory activities in connection with building site, construction, installation or assembly project included if duration exceeds 6 months
- ▶ If A Ltd. (of UK) supervises construction project of B Ltd (of USA); each may have its own respective P.E

Service PE

Article 5(3)(i) of India–US: What does it say ?

The term 'permanent establishment' also encompasses :

- ▶ the furnishing of services, other than included services as defined in Article 12 (Royalties and Fees for Included Services), within a Contracting State by an enterprise through employees or other personnel, but only if:
 - (i) activities of that nature continue within that State for a period or periods aggregating more than 90 days within any twelve-month period ; or
 - (ii) the services are performed within that State for a related enterprise [within the meaning of paragraph 1 of Article 9 (Associated Enterprises)]

Extension of Service PE Rule

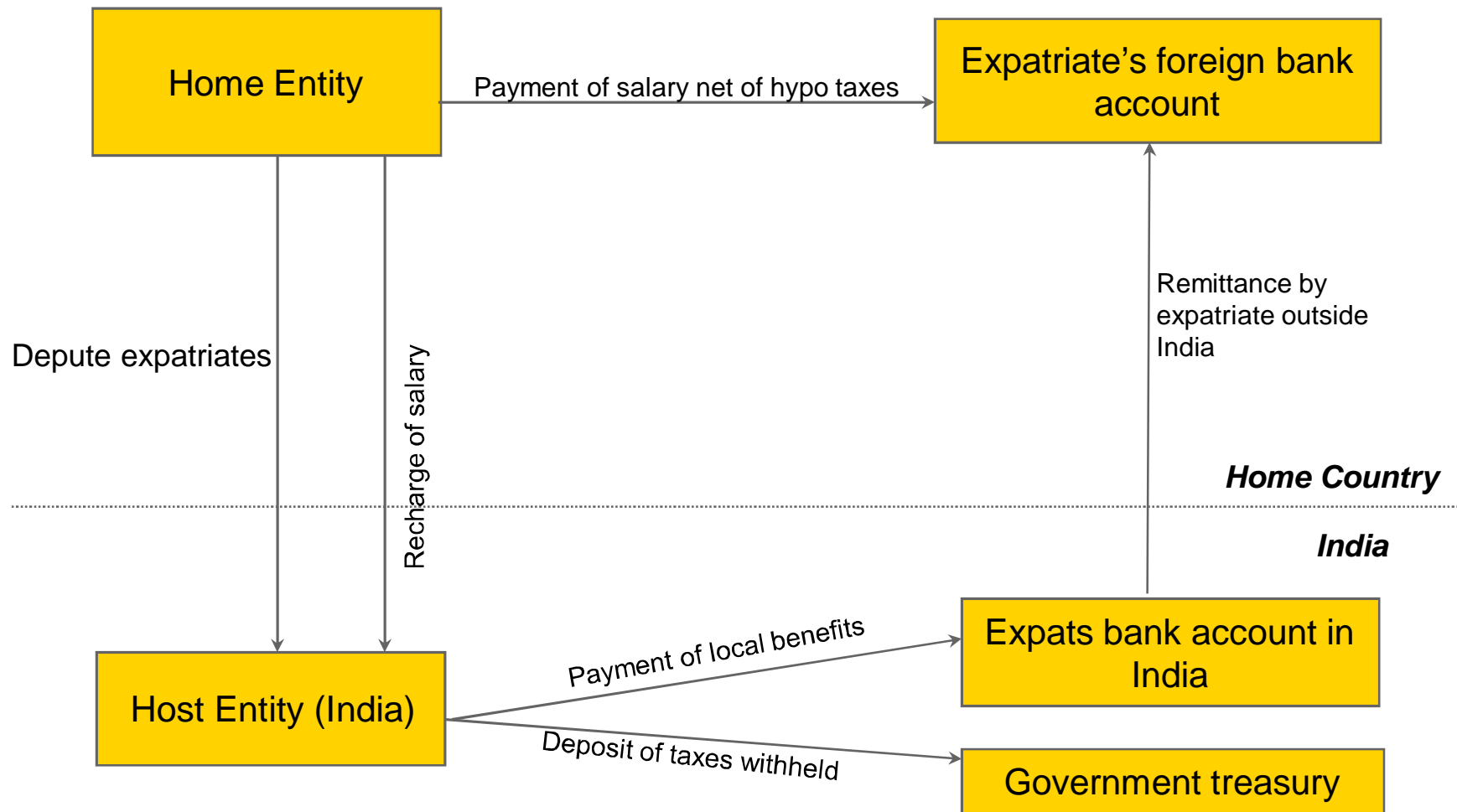
- ▶ Refer, for example, India U.K. treaty

- ▶ Rendering of any services (other than FIS) within the other Contracting state results in P.E. if services rendered for specified days viz
 - * To Associated Enterprises : For 30 days in any 12 month period

 - * To others : For 90 days in any 12 month period

- ▶ Services may be rendered by its employees or other personnel

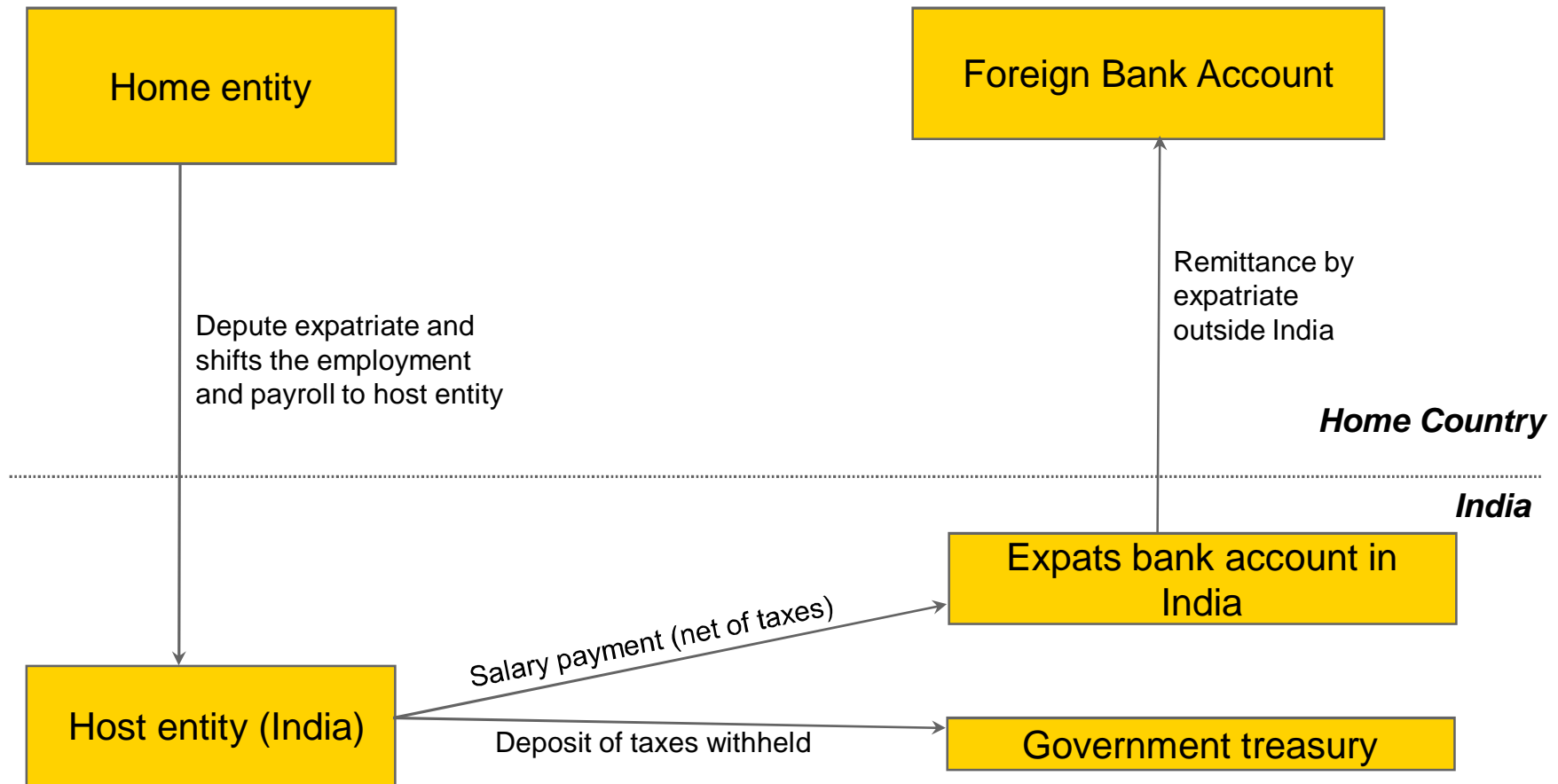
Structure 1 – Payroll with home entity



Mechanics

- ▶ Expatriates deputed to host entity (India) without shifting payroll
- ▶ Control, direction and supervision lies with the Indian entity
- ▶ Hypo tax is deducted from the overseas salary and balance salary will be credited to employee's overseas bank account by the foreign entity
- ▶ Indian entity deposits the taxes on behalf of assignee
- ▶ Foreign entity will recharge expat salary cost to Indian entity under a cost recharge agreement

Structure 2 - Payroll shift model



Mechanics

- ▶ The expatriate employees work under local employment contract issued by the Indian entity
- ▶ The employment contract sets out that the employee is a full time employee of the Indian company working under the direction, control and supervision of a reporting authority in the Indian entity
- ▶ The employment relationship with the foreign entity will be suspended / terminated during the tenure of the employment with the Indian entity
- ▶ All salary including year end bonus and benefits such as accommodation, car, driver etc. will be paid by the Indian entity in India

Morgan Stanley ruling

(292 ITR 416)(SC)(2007)

FACTS

- ▶ Captive BPO in India to provide IT support, account reconciliation, research, etc. (back office functions)
- ▶ USCo to send staff to India for stewardship activities including :
 - ▶ Briefing ICo on standards of service
 - ▶ Conducting training sessions for ICo staff
 - ▶ Monitoring overall outsourcing operations for quality control, etc.
- ▶ Additionally, USCO deputed employees to assist ICo where
 - ▶ USCo responsible for employees work
 - ▶ Legal employment continued with USCo or employees continued to have lien with USCo
 - ▶ 50% salary borne by USCo
 - ▶ Appraisal of employees by FCO – may be, in consultation with ICo

Whether ICo constituted a PE of USCo?

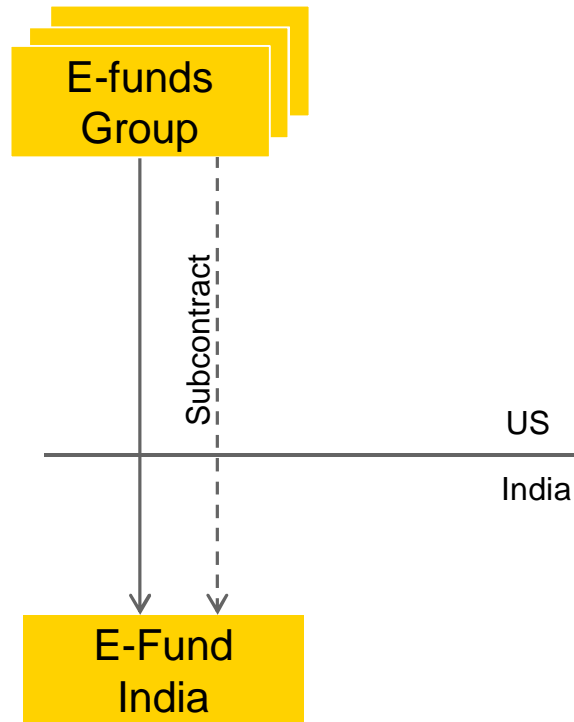
Morgan Stanley ruling

(292 ITR 416)(SC)(2007)

- ▶ No fixed place PE of USCo:
 - ▶ Functional and factual analysis of activities relevant for PE determination
 - ▶ Business of USCo not carried on through ICo
 - ▶ In any case, activities are preparatory and auxiliary
- ▶ No Agency PE:
 - ▶ No authority to conclude contracts on behalf of USCo;
 - ▶ ICo in fact implemented contracts concluded outside India by USCo
- ▶ Service PE :
 - ▶ Service PE can trigger only through presence of employees of FE in India
 - ▶ Employees of subsidiary are not 'personnel' of parent
 - ▶ Stewardship activities for monitoring of outsourcing activity and to protect interest of USCo is outside scope of service PE
 - ▶ Trigger of service PE for activities when employees of USCo deputed at ICo request for expert service

E Funds Corporation

(Del HC)(2014)



- ▶ US companies, (Taxpayers / US Cos) had an Indian affiliate namely E Fund India (I Co)
- ▶ US Cos, engaged in the business of electronic payment, ATM Management, decision support and risk management services
- ▶ Taxpayers subcontracted the back office and data entry support in respect of the three of the four main business lines of US Cos
- ▶ Tax Authorities contended that Taxpayers had a PE in India
- ▶ For past years, pursuant to MAP, certain income allocation was agreed to on “without prejudice” basis
- ▶ Tax Authority relied also on MAP resolution and held that a PE exists and thus profits to be attributed for subsequent financial years also

E Funds Corporation

(Del HC)(2014)

HC Ruling:

- ▶ Existence of a subsidiary in itself does not constitute a PE
 - ▶ A subsidiary constitutes an independent legal entity for taxation purpose
 - ▶ The holding-subsubsidiary relationship or control exercised by a parent on its subsidiary, by itself, does not result in a PE in India unless the contrary is proved.
 - ▶ Right to use as also disposition test not met.
- ▶ Factors not relevant in determining a PE
 - ▶ Close connection between USCos and I Co
 - ▶ Services provided by ICo to USCos
 - ▶ Dependency of ICo on USCos for its earnings
 - ▶ ICo was a risk mitigated entity and remunerated on cost + model
 - ▶ Intangibles provided free of cost by Taxpayer
 - ▶ Taxpayer outsourcing activities with an intent to save cost
 - ▶ Agreeing to taxation under MAP Agreement in the past

E Funds Corporation

(Del HC)(2014)

- ▶ No DAPE in absence of authority to conclude contract, stock maintenance etc. Also, ICo was remunerated under ALP
- ▶ Deputation of employees to carry out stewardship activities to protect the interests of US Cos does not result in a service PE.
- ▶ Employees of the subsidiary who work under the supervision and direction of the Indian affiliate do not result in a service PE of the USCos in India.

PE Exclusions

Preparatory or Auxiliary Activities (P&A)- Article 5(4)

- ▶ Core activities v/s P&A activities
- ▶ Negative list includes
 - ▶ Use of facility for purpose of storage, display or delivery of goods or merchandise belonging to the enterprise
 - ▶ Maintenance of stock of goods or merchandise belonging to the enterprise for the purpose of storage, display or delivery
 - ▶ Maintenance of stock of goods or merchandise for the purpose of processing by another enterprise
 - ▶ Maintenance of fixed place of business for the purpose of purchasing goods or merchandise or collecting information for enterprise
 - ▶ Maintenance of fixed place of business for the purpose of any other activity of a P&A character
 - ▶ Maintenance of fixed place of business for any activity specified in (a) to (e) above provided overall activity is of P&A character

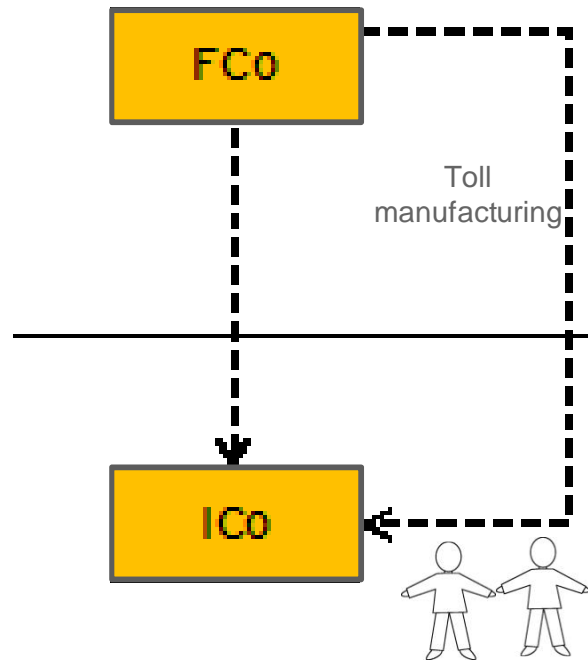
Preparatory and auxiliary activities

- ▶ Service which prepares for core function or is supportive in nature
- ▶ Not preparatory, if answer is 'yes' to following:
 - ▶ Does it match with general purpose of enterprise?
 - ▶ Are services rendered also to third parties?
 - ▶ Is activity an essential & significant part of the activity as a whole?
- ▶ Place available for core function coupled with preparatory activity results in PE (eg. delivery point acting also as a sales outlet)

Preparatory and auxiliary activities

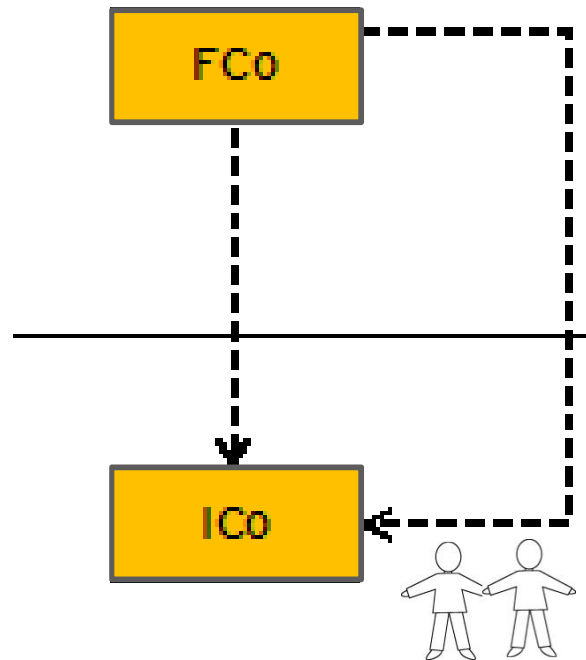
- ▶ Illustrations of non-preparatory activities:
 - ▶ Managing other enterprises by establishment of management office in case of 'polycentric' enterprises
 - ▶ Delivery of spares and undertaking repairs
 - ▶ Performance of after sales function
 - ▶ Providing customised business plan instead of raw data information
 - ▶ R&D coupled with manufacture
 - ▶ Transportation & delivery of goods belonging to third party in case of delivery pipelines

Case Study : Toll manufacturing arrangement



- ▶ FCo gets its goods manufactured through ICo
- ▶ FCo has provided technical know-how, packaging specifications etc. to ICo
- ▶ FCo also supplies critical raw material / components
- ▶ FCo personnel/ employees visit ICo for quality control, ensure timely execution, etc.
- ▶ ICo is an unrelated party and is remunerated on cost plus basis.
- ▶ Is there PE for FCo in India?

Case Study : Toll manufacturing arrangement



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Agency PE

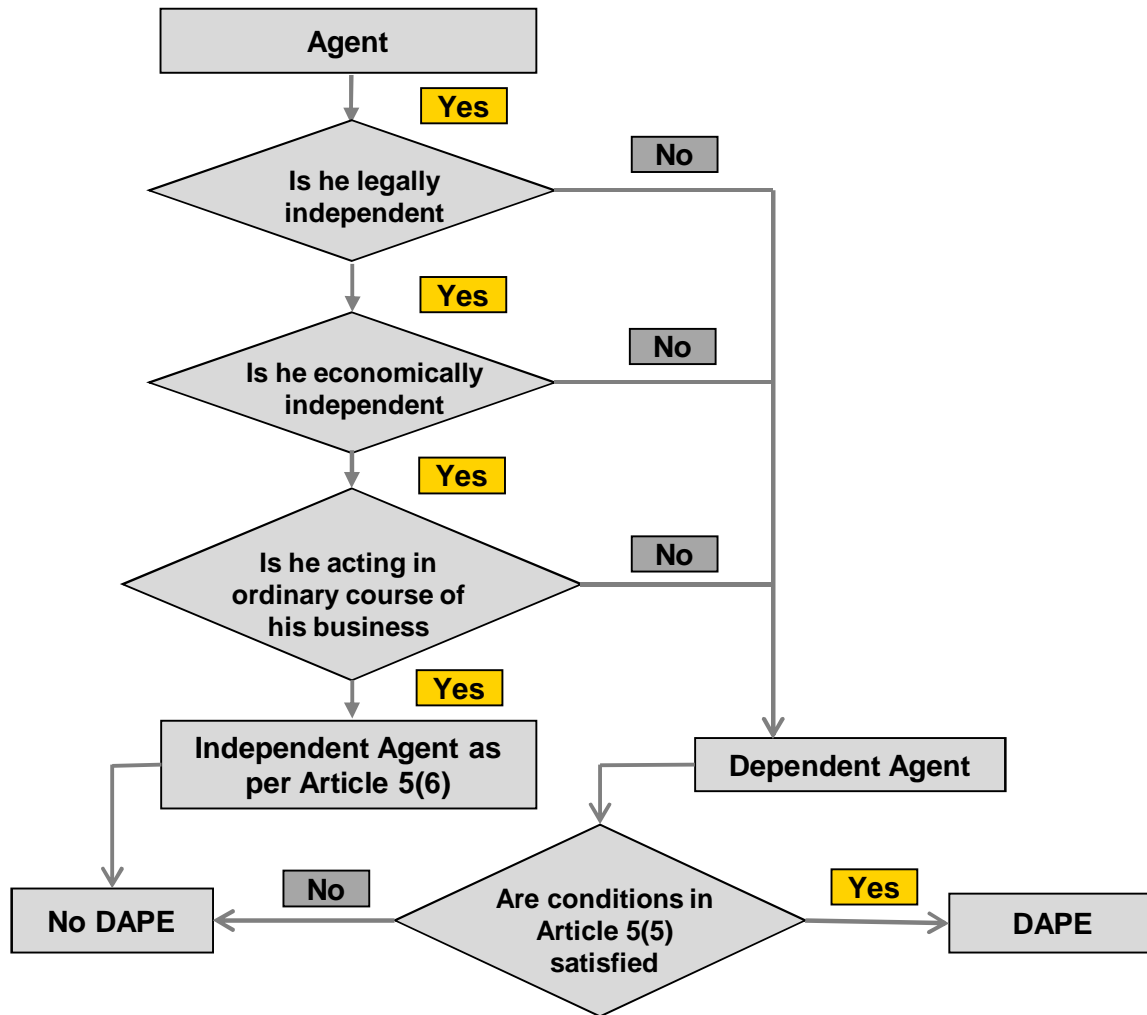
Article 5(5): What does it say ?

“Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 7 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, if such a person:

(a) Has and habitually exercises in that State an authority to conclude contracts in the name of 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, would not make this fixed place of business a permanent establishment under the provisions of that paragraph; or

(b) Has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise.”

Independent Agent – Exception

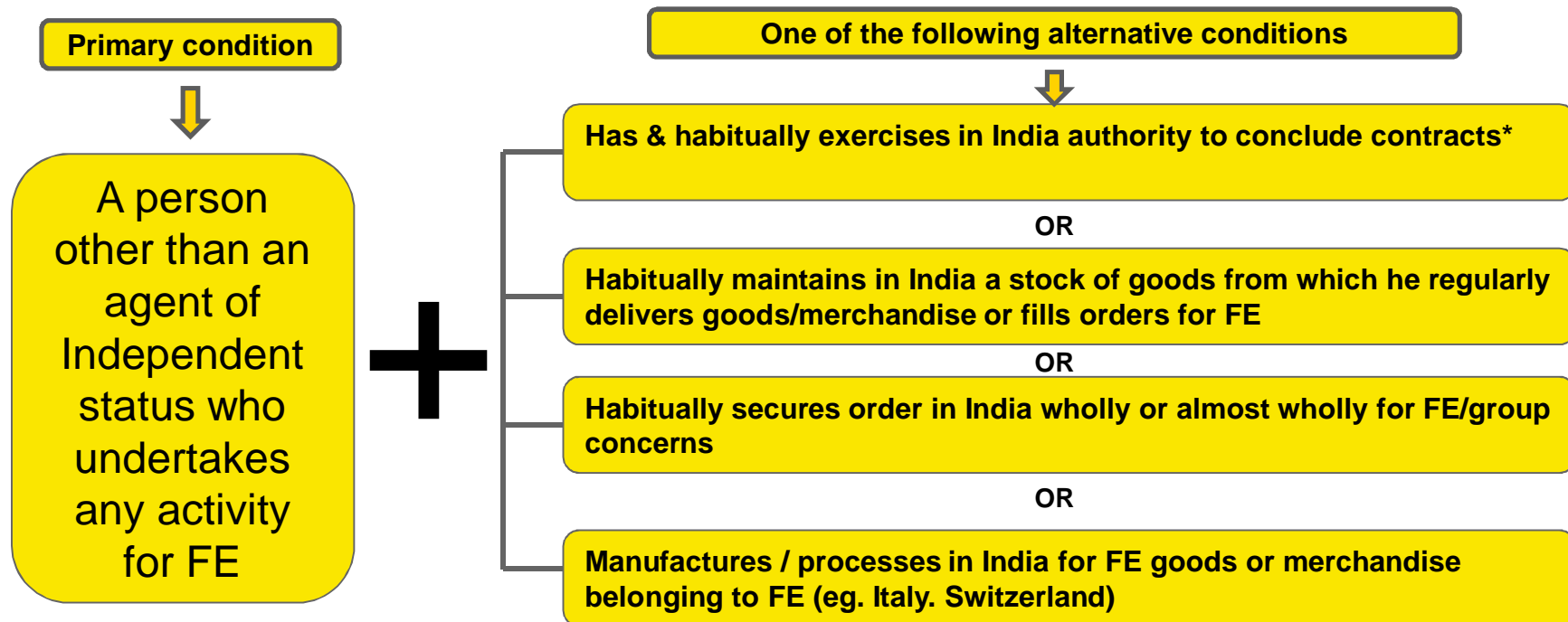


Factors relevant for legal and economic independence

- ▶ **Not subject to high degree of control** (like employer-employee relationship)
- ▶ **Not subject to detailed instructions and control in respect of conduct of business**
- ▶ **Conduct business according to own view, expertise and method**
- ▶ **Will the agent continue its business if principal terminates the service agreement**
- ▶ **Agent bears the risk of loss from its own activities**

Deemed PE : Person other than an IA (DAPE)

- ▶ 'Agent' is a person employed to do any act for another or to represent another in dealing with third parties (S. 182 of Contract Act)



Authority to conclude

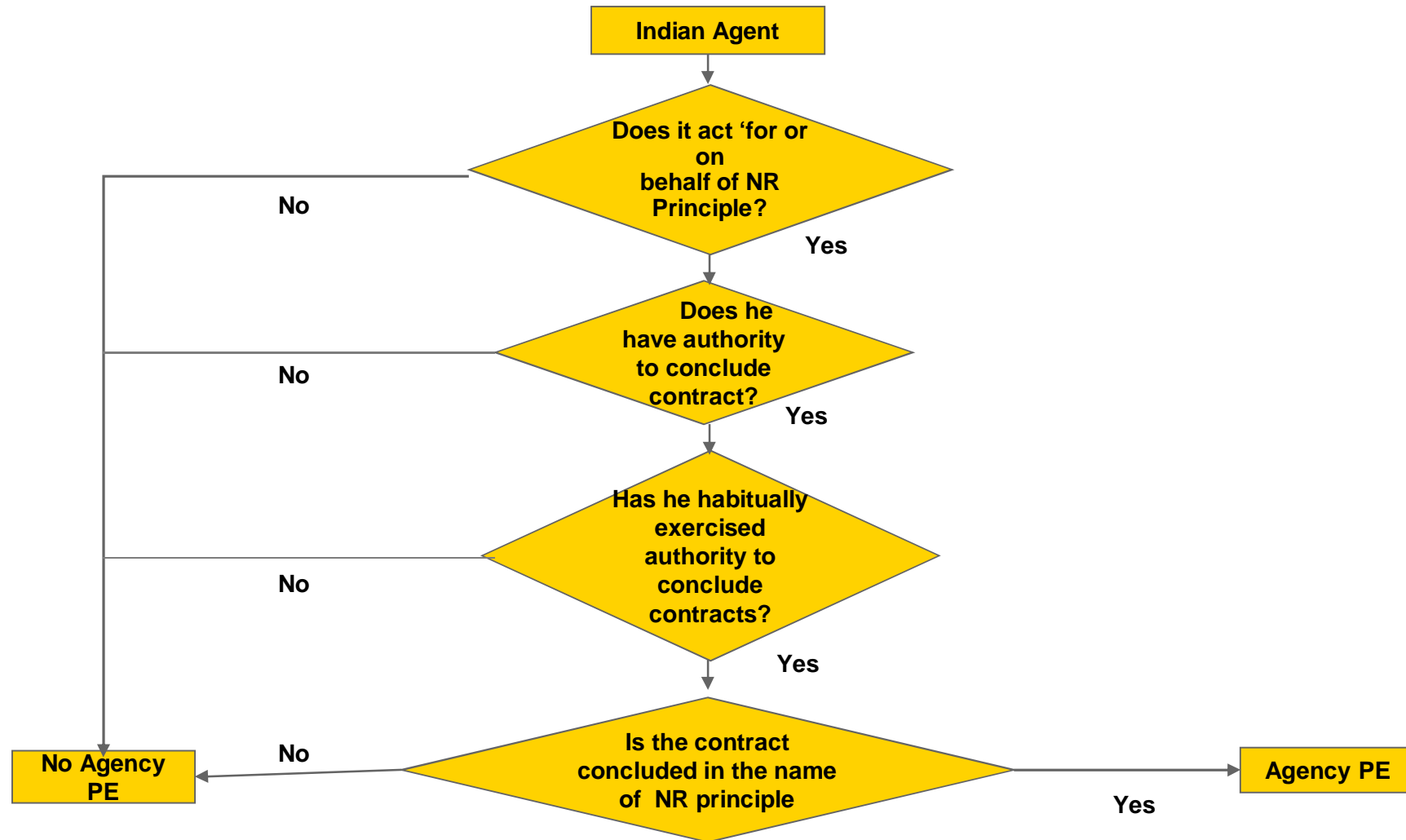
- ▶ Person said to have authority to conclude contracts if, he/she:
 - ▶ Has sufficient authority to bind foreign enterprise and decide final terms
 - ▶ Can act independently, without control from the principal
 - ▶ Is authorized to negotiate all elements and details of a contract
 - ▶ Where approval of contract by foreign enterprise is a mere formality
- ▶ Significance of provisions of range / standard terms by NR principal
 - ▶ “A general authority cannot be taken to exist if the authority to negotiate and conclude contract is so restricted that it allows the agent to settle for only such prices and terms and conditions as were fixed in advance by his principal, the agent having no scope for decisions of his own in this respect...” **(Vogel)**
 - ▶ “No agency PEwhen the authority is limited to fixed prices and other fixed conditions determined by the principal, even if the contract is concluded by the agent” **(Skaar)**

Securing of order

- ▶ US Protocol
 - ▶ The agent frequently accepts orders for goods or merchandise on behalf of the enterprise
 - ▶ Substantially all the agent's sales-related activities in the other Contracting State consist of activities for the enterprise
 - ▶ The agent habitually represents to the person offering to buy goods or merchandise that acceptance of an order by the agent constitutes the agreement of the enterprise to supply goods or merchandise under the terms or conditions specified in the order
 - ▶ The enterprise takes actions that give purchasers t basis for a reasonable belief that such person has authority to bind the enterprise

Does this help on parallel treaty interpretation or does this reflect a negotiated concession restricted to above treaties?

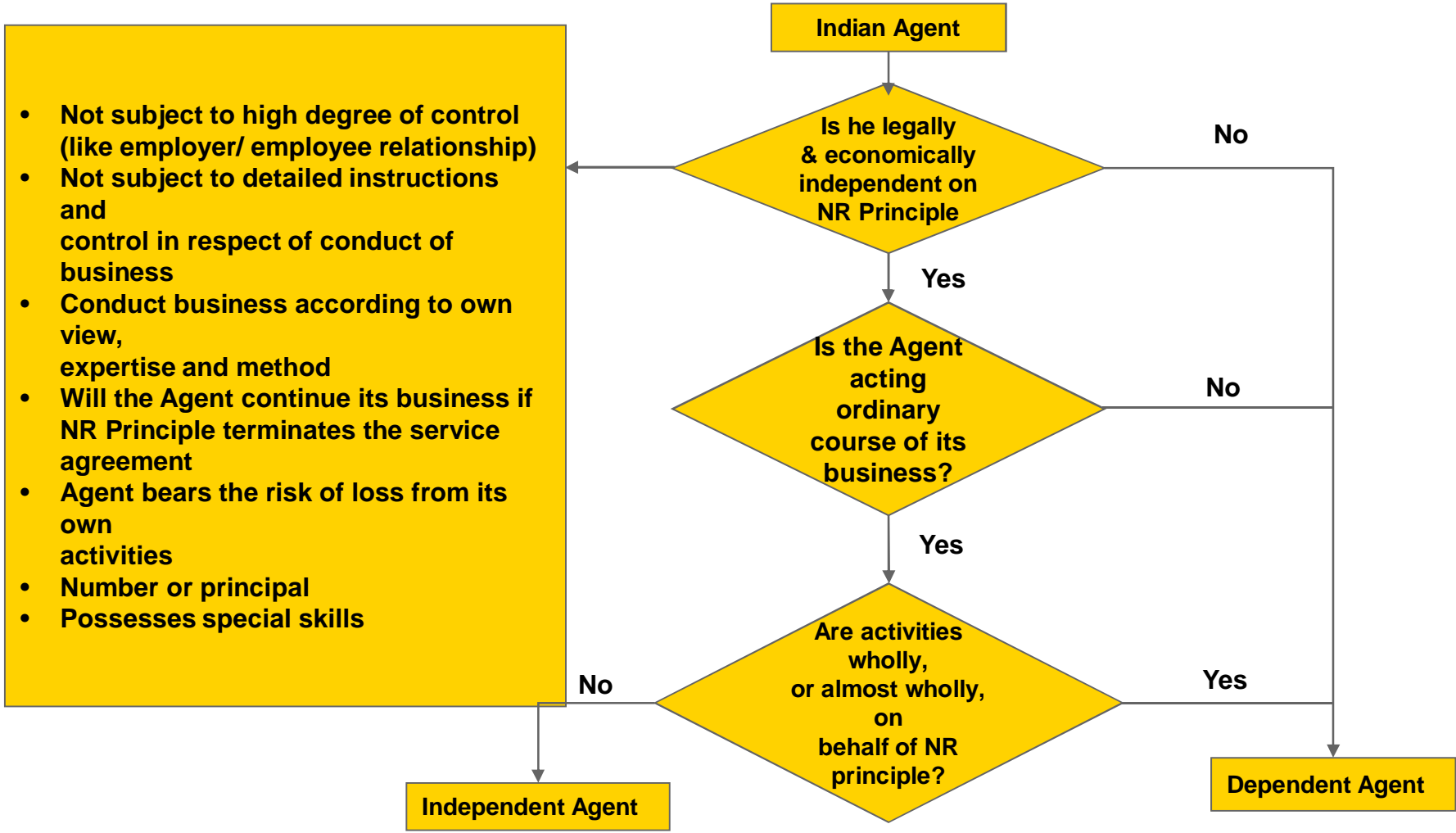
Agency PE – Dependent Agent Test



Article 5(7): What does it say ?

"An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, and conditions are made or imposed between that enterprise and the agent in their commercial and financial relations which differ from those which would have been made between independent enterprises, he will not be considered an agent of an independent status within the meaning of this paragraph."

Agency PE - Independent Agent tests



Subsidiary PE

Subsidiary PE – Article 5(8)

“The fact that a company which is a resident of a Contracting State (US) controls or is controlled by a company which is a resident of the other Contracting State (India), or which carries on business in that other state (India) (whether through a PE or otherwise), shall not of itself constitute either company a PE of the other”

- ▶ Clarificatory in nature.
- ▶ Recourse to Basic Rule PE, Service PE or Agency PE.
- ▶ No Protection to Empty Companies.

PE in e-commerce

Innovative ways of conducting business – Amazon Prime Air

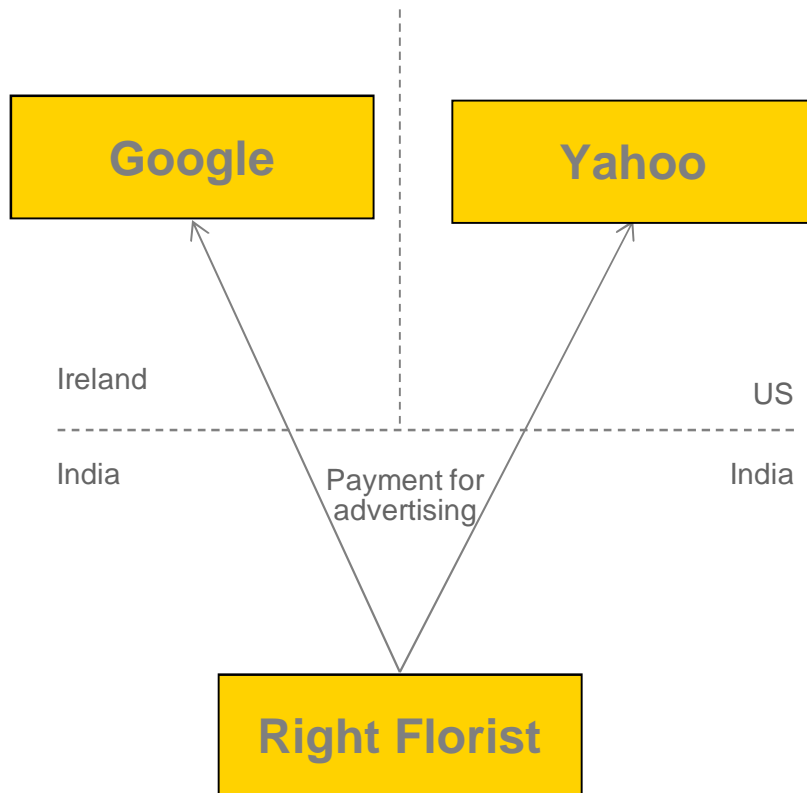
- ▶ Amazon Prime Air - The goal of this new delivery system is to get packages into customers' hands in 30 minutes or less using unmanned aerial vehicles.
- ▶ It has the implications as depicted in these pictures!!



OECD commentary updates on Article 5

2000 Update	2003 Update	
<p>Whether Server can constitute PE?</p> <ul style="list-style-type: none">▶ A server can constitute a PE of an entity which owns or leases the server, even if there is no human presence▶ The server should be “fixed” - “located at a certain place for a sufficient period of time”▶ The functions performed by the server should not be merely “preparatory & auxiliary”, e.g., acting as communication link, advertising etc	<p>Whether website can constitute PE?</p> <ul style="list-style-type: none">▶ A Website cannot constitute a fixed place of business, because it is not a tangible property	<p>Whether ISP can constitute PE?</p> <ul style="list-style-type: none">▶ Agreement to host web site does not result in a fixed place of business, though disk space may be guaranteed▶ ISP is generally not an agent of the entity for which it hosts the web site
<p><u>India observation</u></p> <ul style="list-style-type: none">▶ In certain circumstances, website can create a PE▶ Depending on facts, an enterprise can be considered to have a ‘place of business’ by virtue of hosting a website on a particular server at a particular location		

Right Florists Pvt Ltd



Facts:

- ▶ Right Florist, an Indian company (Taxpayer), used search engines of Google/ Yahoo for advertising its business.
- ▶ Payments were made to Google Ireland (Google) and Yahoo US (Yahoo), for displaying the Taxpayer's advertisement when certain key terms were used on such search engines.

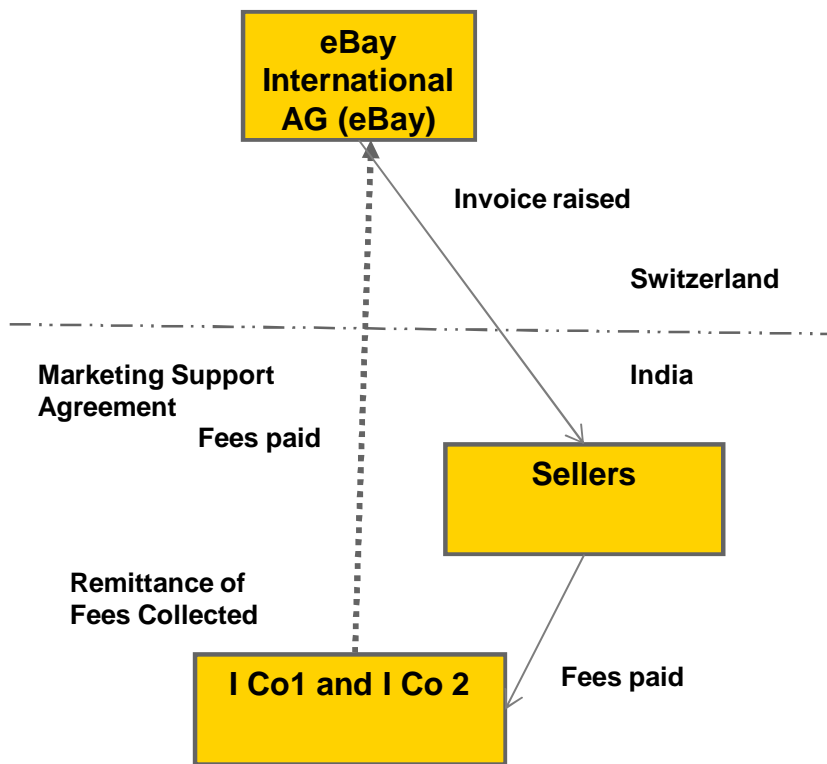
Relevant issue

- ▶ Whether Google/Yahoo have a taxable presence in India

Tribunal Ruling on PE

- ▶ Conventional PE tests fails in this virtual world even when a reasonable level of commercial activity is crossed by foreign enterprise
- ▶ Website does not constitute PE unless the server on which websites are hosted are also located in same jurisdiction
- ▶ Website does not constitute a tangible property. It cannot have a location which constitutes place of business
- ▶ A web server, on which web site is stored and through which it is accessible is a piece of equipment having physical location and such location cannot constitute a fixed place of business of that enterprise that operates that server
- ▶ A search engine which has only its presence through its website cannot be a PE unless its web servers are located in same jurisdiction

eBay International AG



Facts :

- ▶ eBay AG operated India specific websites for facilitating purchase and sale of goods and services to India based users
- ▶ eBay engaged its Indian affiliates (I Cos) for availing certain support services for which it had entered into a Marketing Support Agreement (MSA).
- ▶ eBay earned revenues from the sellers on every successful sale of their products on the website as also from advertisement

Issues :

- ▶ Whether user fee from the sellers would be in the nature of FTS
- ▶ Would I Cos constitute a PE

Tribunal Ruling on PE

- ▶ I Cos has no role in directly introducing any specific customer to eBay AG
- ▶ Agreement between seller's of product and eBay AG which results in user fee (advertisement fee) is entered online through eBay AG website operated outside India
- ▶ Finalization transaction between seller and buyer which eventually results into revenue is done through eBay AG website situated and controlled from abroad

Tribunal Ruling on PE

- ▶ I Cos are providing exclusive service to eBay AG and thus is dependent agent of eBay AG
- ▶ Providing marketing services to eBay AG or making collection from the customers and forwarding the same to AG it cannot be said that I Cos are entering into contracts on behalf of eBay AG
- ▶ Thus, even though I Cos are dependent agent, since they do not fulfill conditions of DAPE they do not constitute DAPE of eBay AG

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Thank You