



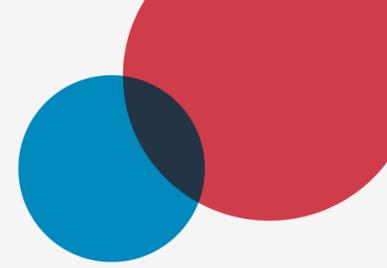
The Permanent Establishment Concept

Taxand Asia Junior
School 2019

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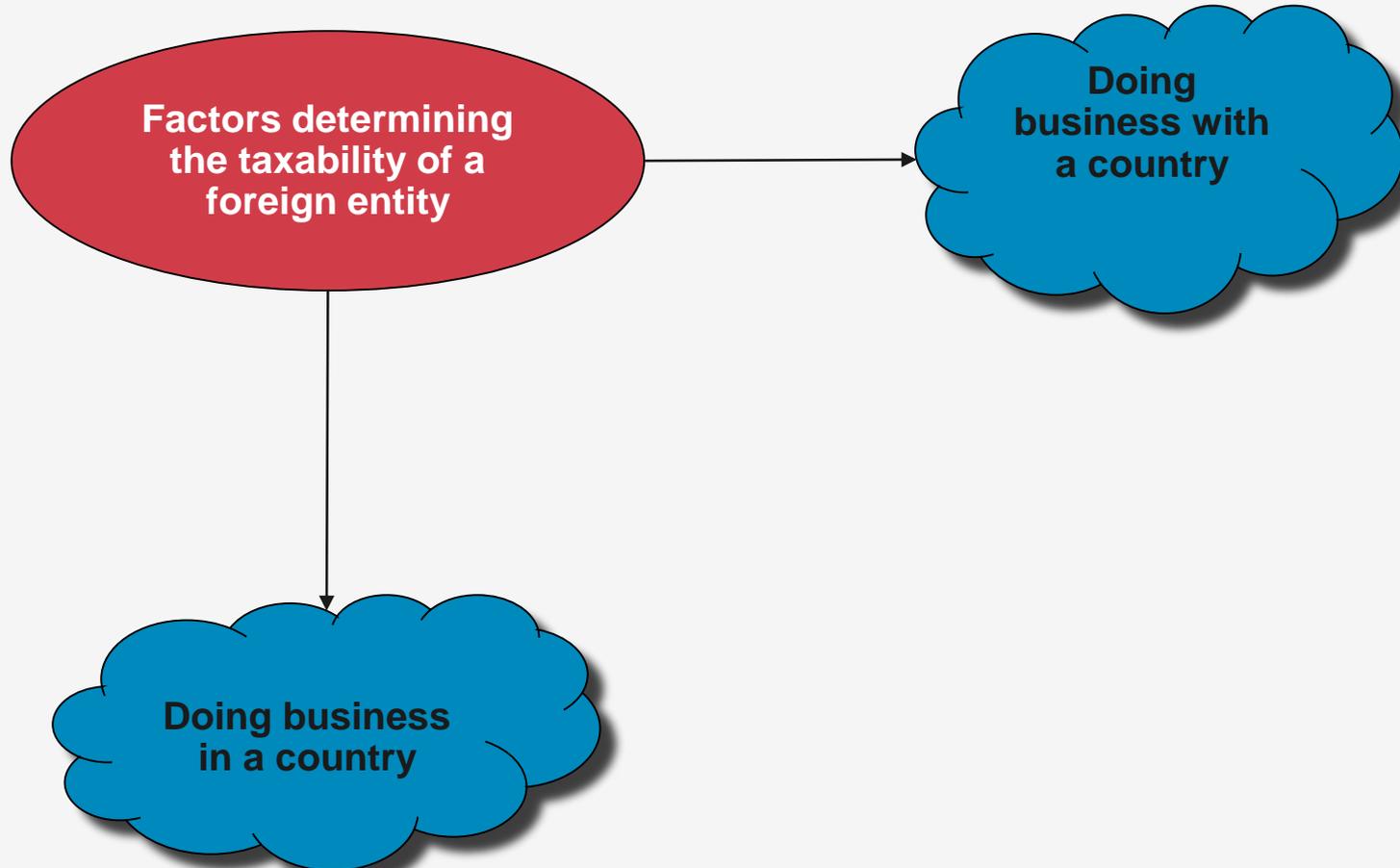
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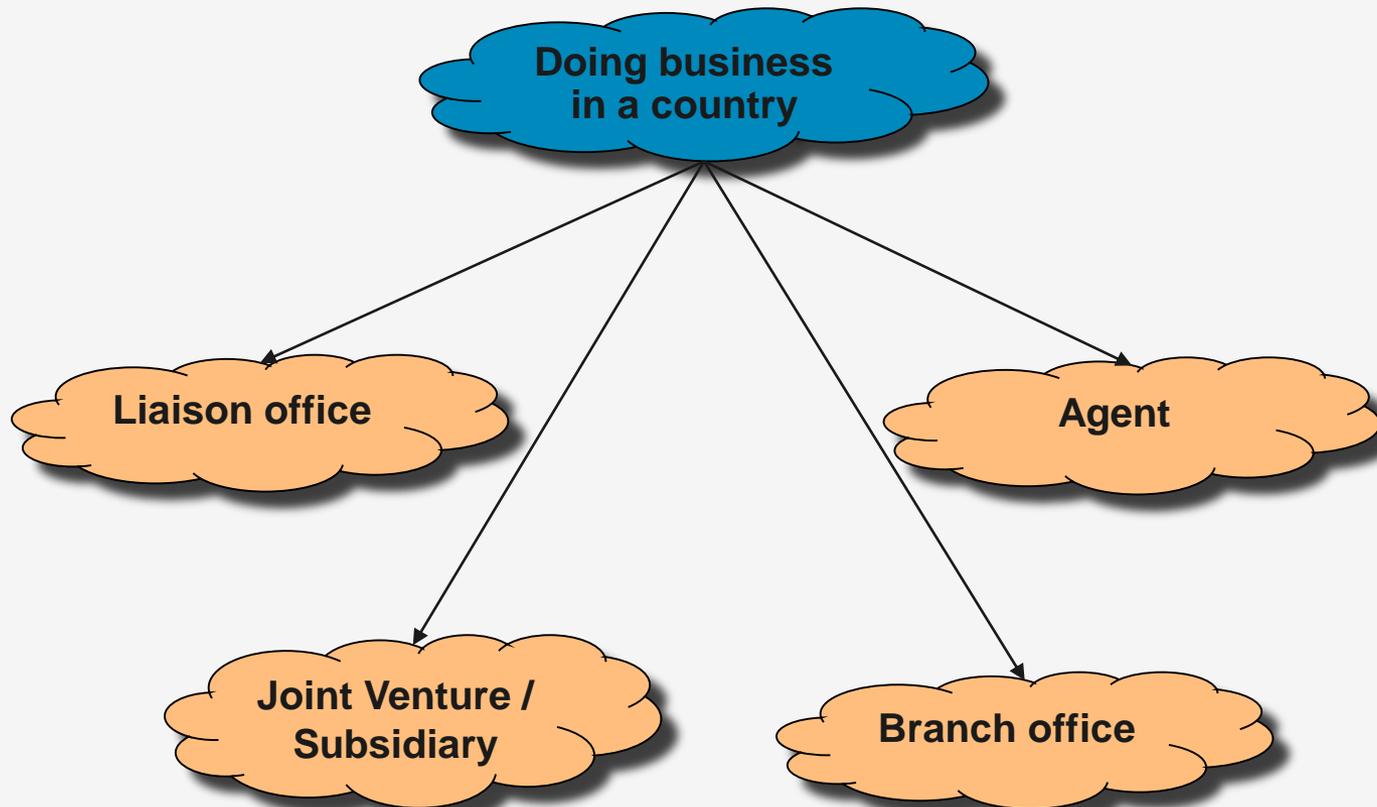


1. Permanent Establishment
2. Basic rule PE
3. Specific PE
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6. Service PE
7. Agency PE
8. Challenges to PE concept

Taxability of foreign entity

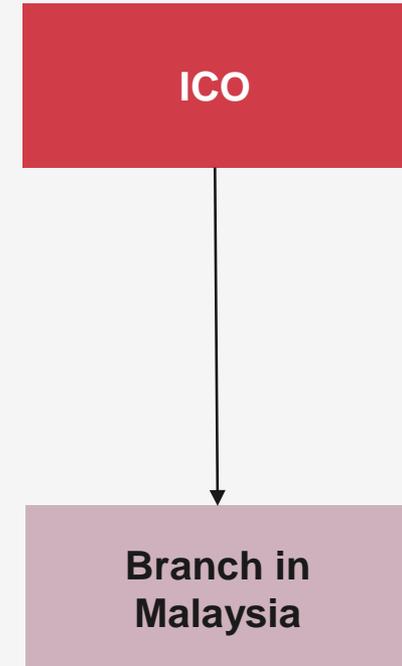


Taxability of foreign entity

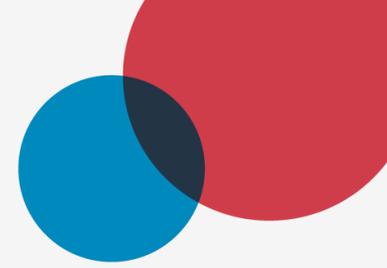


Taxability of foreign entity

- ❖ India would be the State of residence for Indian company ('ICO')
- ❖ Malaysia would be the State of source
- ❖ Malaysia would tax the profits earned by the branch of ICO located in Malaysia
- ❖ ICO would be taxed on worldwide basis in India, including profits of its Malaysia branch

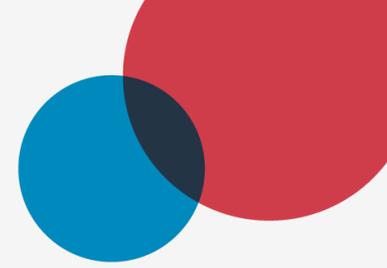


Concept of PE



- ❖ PE is a taxable presence that an enterprise of one contracting State has in another contracting State
- ❖ PE is a compromise between a State of source and State of residence for purposes of taxation of business profits
- ❖ PE does not necessarily give rise to a legal presence

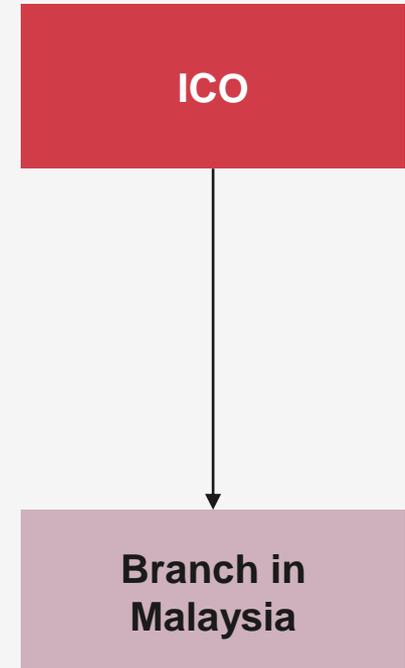
Role of PE concept in treaties



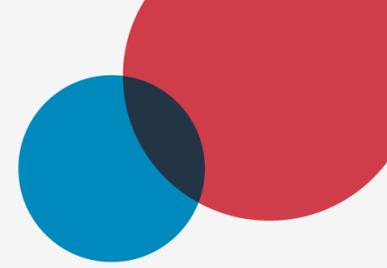
- ❖ Main use: Determine taxing right in State of residence of enterprise
- ❖ Assess business activity in State of source
- ❖ Determine taxing right in State of source (potential source)
- ❖ Is there a PE?
- ❖ Profit Allocation/Attribution
- ❖ Allocation/Attribution factors

Objective of PE

- ❖ To tax profits arising to an enterprise resident of a foreign state from activities carried on in the state of source through a fixed place of business as it amounts to 'doing business in a country' as opposed to 'doing business with a country'
- ❖ For the state of source - To levy tax on foreign enterprise carrying on business on its soil
- ❖ For a taxpayer - The concept is significant as if there is **no PE** then **no tax** is payable in the state of source

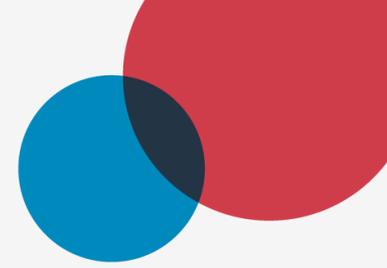


OECD Model – Article 5 (2010 Version)



- ❖ Article 5(1) Basic rule PE
- ❖ Article 5(2) Specific PE
- ❖ Article 5(3) Construction, Building and Installation Projects and Service PE (UN Model)
- ❖ Article 5(4) Exclusions; Anti-fragmentation rule
- ❖ Article 5(5) Dependent agent
- ❖ Article 5(6) Independent agent
- ❖ Article 5(7) Subsidiary (Controlled company)
- ❖ Article 5(8) Definition of “closely related”

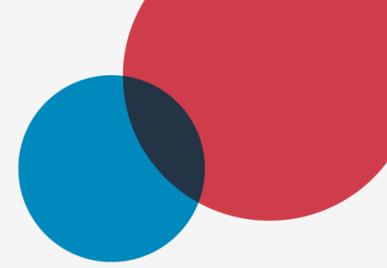
Article 5(1) – Basic rule PE



❖ The term PE has been defined as under:

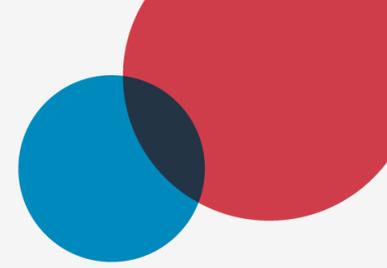
“ a fixed place of business, through which the business of an enterprise is wholly or partly carried on ”

Points of discussion



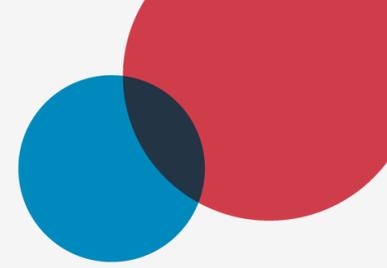
- ❖ The definition presupposes
 - Existence of a **place of business** (*i.e.*, facility, machinery)
 - The place of business must be **fixed** (distinct place/ degree of permanence); and
 - **Through which** the business is carried on (dependence on the enterprise [personnel] conduct).

Points of discussion – place of business



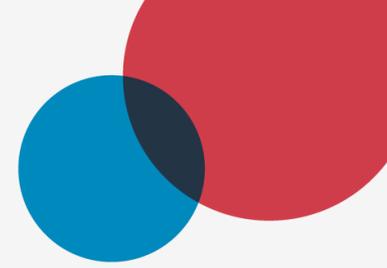
- ❖ Any premises, facilities or installations, used for carrying on the business of the enterprise, whether or not they are exclusively used for that purpose
- ❖ May also exist without a premises like a pitch in a market place, customs depot (storage for dutiable goods) machinery, a pipeline, and even a racehorse

Points of discussion – fixed place



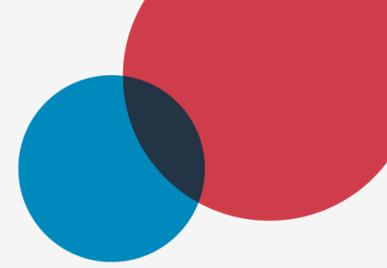
- ❖ Fixed place of business refers to a **link** between the place of business and a specific geographical point
 - Length of time immaterial
 - Equipment need not be fixed on soil
- ❖ Fixed place must be **at the disposal of the enterprise**
 - Immaterial if rented
 - No formal legal right required
- ❖ A fixed place of a business owned by an enterprise but placed at the disposal of a third party – Would such a fixed place result in a PE?

Points of discussion – business carried on



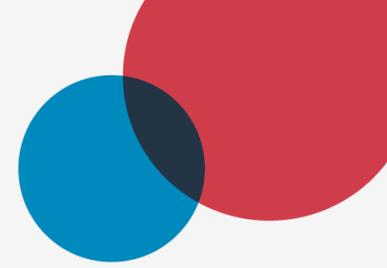
- ❖ Business should be carried **through** such a place of business wholly or partly
- ❖ Where a place of business which was at the outset designed for a short / temporary period only, but turns out to be **for a longer duration**, then it becomes a fixed place of business – Would this result in a PE and since when?

Points of discussion – others



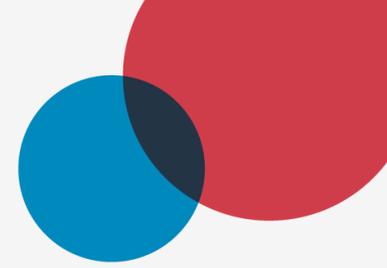
- Whether length of time is relevant in determining permanence?
 - No consistent interpretation
 - GR: At least six months
 - EX: Recurrent; business conducted wholly/exclusively

Points of discussion – others



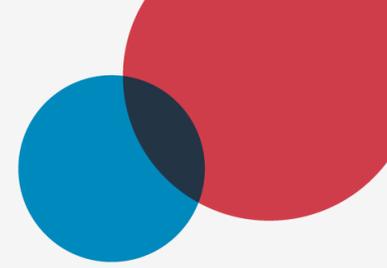
- Letting and leasing
 - Leasing of facilities, equipment and buildings
 - *If no fixed place of business is maintained, no PE*
 - Leasing of containers
 - A painter spending three days a week in a large office building of its main client for a period of two years
 - Mobile offices

Points of discussion – others



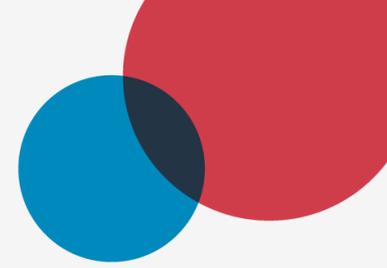
- ❖ A PE comes into existence, when the enterprise **commences** its business activities through a fixed place of business
- ❖ A PE ceases to exist with the **disposal** of fixed place of business or with the **cessation of any activity** through it
 - *Activity includes winding up activities, repairs, maintenance*

Points of discussion – others



- ❖ Whether time spent to establish fixed place of business should be excluded?
 - *No, provided the activity is substantially different from the activity intended for the PE*
- ❖ What about temporary interruption of operations of an enterprise?
 - *No effect, provided operations are regularly conducted*
- ❖ If a fixed place of business is leased to another enterprise, whether PE will cease to exist?
 - *Yes, unless lessor continues activity in another PE*

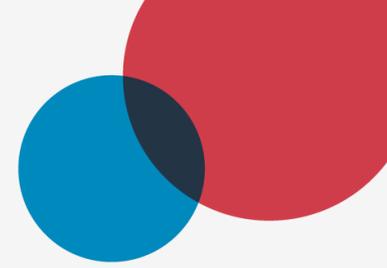
Article 5(2) – Specific PE



- ❖ A Place of management
- ❖ A Branch
- ❖ An Office
- ❖ A Factory
- ❖ A Workshop
- ❖ A Warehouse and
- ❖ A mine, an oil or gas well, a quarry or any other place of extraction of natural resources

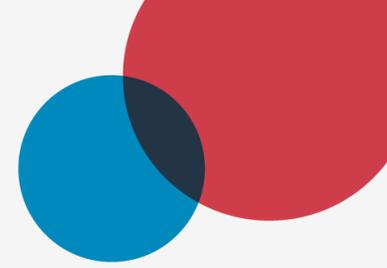
Whether such inclusions *per se* would result in a PE?

Points of discussion – place of management



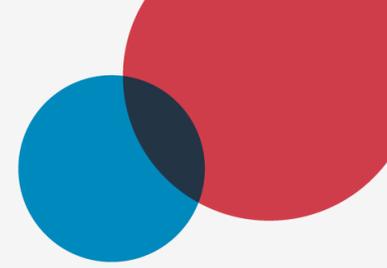
- ❖ Place of management exists in the State where control and management of an enterprise reside
- ❖ Control and management have generally been construed as the ‘head and brain’ of the enterprise

Points of discussion – branch



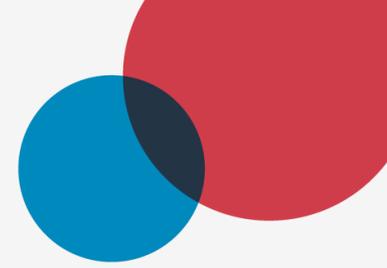
- ❖ Branch is generally construed to be an office or other establishment of a company / corporation incorporated under the laws of a country other than the one in which the branch is located
- ❖ A branch or other fixed place of business connotes a place of business of the non-resident enterprise – something physically and separately identifiable

Points of discussion – office



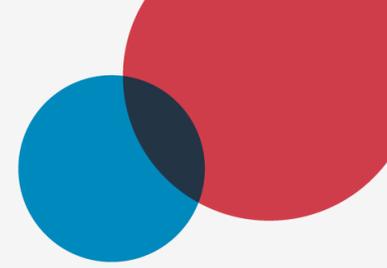
- ❖ Office has various meaning depending upon its context
- ❖ Office does not include a liaison office or a representative office
- ❖ Whether country manager's place of residence which was used as office address could be construed as office?

Points of discussion – factory/workshop



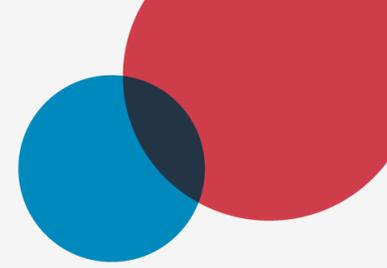
- ❖ Factories and workshops are places where goods are manufactured or processed
- ❖ Farms and shipyards are not regarded as factories

Points of discussion – warehouse



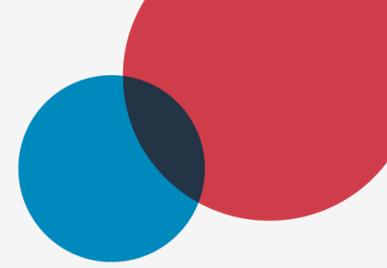
- ❖ A warehouse in common parlance means a place where goods or materials, not for immediate sale, are stored
- ❖ Whether a warehouse in which a business of letting facilities for storage etc. to third parties is carried on will constitute a PE?

Points of discussion – mine, oil well, etc.



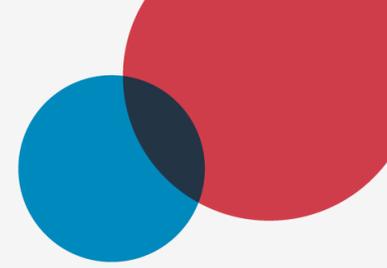
- ❖ Mine is not defined and therefore meaning is taken as defined under the laws governing the mining activities of the State applying the Treaty
- ❖ Any other place of extraction of natural resources are interpreted broadly – *includes on or offshore drilling of hydrocarbon*
- ❖ Exploration activities not mentioned; parties free to agree
 - *Will be deemed PE only if conducted after a certain period of time*

Article 5(3) – Construction projects



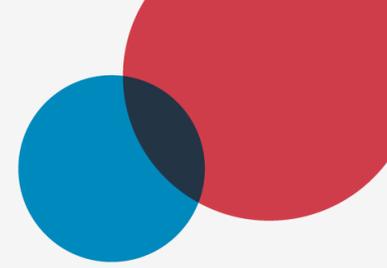
- ❖ As per OECD Model Convention,
 - a building site or
 - construction or installation project
 - if it lasts more than twelve (12) months
- ❖ As a tax treaty is a matter of negotiation between two countries, this period may vary

Article 5(3) – Construction projects (UN Model)



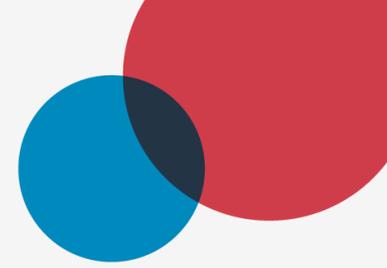
- ❖ As per **UN Model Convention**, a building site, construction, **assembly** or installation project constitutes a PE only if it lasts more than **six (6) months**
- ❖ Extends to the following:
 - **Assembly** projects
 - **Supervisory activities** in relation, to building sites, construction, assembly project

Building projects



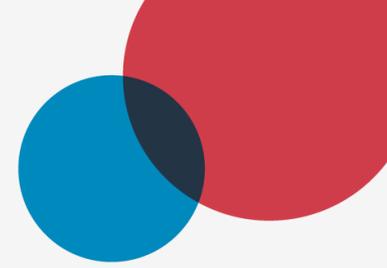
- ❖ Includes not only the construction of buildings but also the construction of roads, bridges or canals, the renovation (including more than mere maintenance or redecoration) of buildings, roads, bridges, or canals, the laying of pipelines, and excavating and dredging
- ❖ Where there exists an office or a workshop to cater to various projects in the State of Source and such an office or workshop operate for a period exceeding twelve months then, notwithstanding the fact that these individual projects do not constitute PE, being in operation for less than prescribed time limit, such an office or workshop would constitute a PE

Points of discussion



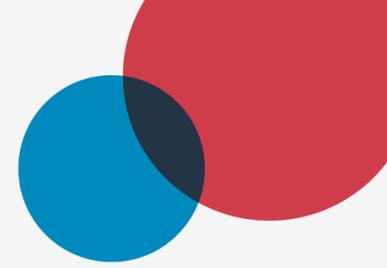
- ❖ Can planning and supervision of building works constitute a building site?
 - *Yes, if on-site*
- ❖ How to calculate the period prescribed in treaties for constituting the same as a PE?
- ❖ Whether time spent by sub-contractor is to be considered for determining the time spent by the main contractor?

Installation projects



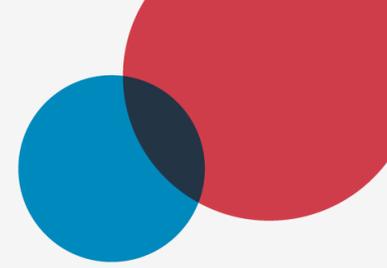
- ❖ Installation project includes installation related to construction projects, installation of new equipment, such as complex machine in an existing building or outdoors
- ❖ Whether installation of computer network or ERP package would constitute a PE?

Service PE (UN Model, 5[3][b])



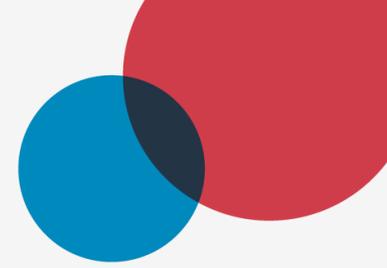
- ❖ UN Model: The term permanent establishment also encompasses:
 - The furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose
 - If activities of that nature continue within a Contracting State for a period or periods aggregating more than 183 days in any 12-month period commencing or ending in the fiscal year concerned

Service PE



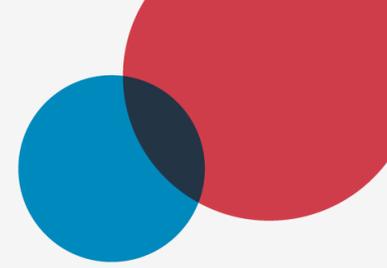
- ❖ The permanence element of a PE is replaced by a test of minimum length of time in the case of Service PE as in case of Construction PE - *[UN Model: 6 months; OECD Model: 12 months]*
- ❖ It is important to evaluate the requirements of Article 12 before examining the service PE clause
- ❖ The number of days calculation is based on man days

Place of provision of services



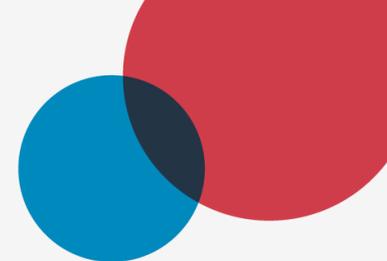
- ❖ The persons rendering the services and the persons availing the services may be in different locations
- ❖ For example:
 - The employee is present in the state where the services are being rendered (i.e., Enterprise X in State X provides services to Enterprise Y in State Y)
 - The employee is not present in the state where the services are being rendered (i.e., An employee of Enterprise X in State X is present in State Z for rendering services to Enterprise Y in State Y)
 - The employee is present neither in the state where the services are being rendered nor in the state where the services are utilised (i.e., an Employee of Enterprise X in State X who is present in State Z for rendering services to Enterprise Y of State Y and the services are to be utilised in State Y)

OECD view



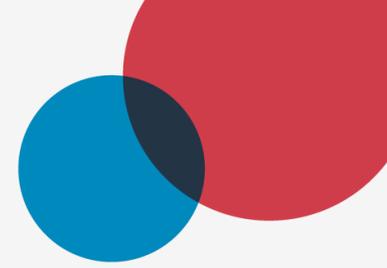
- ❖ According to OECD, a State should not have source taxation rights on income derived from the provision of services performed by a non-resident outside that State

Other Personnel



- ❖ According to OECD, the business of an enterprise is carried on mainly by the entrepreneur or persons who are in paid employment relationship with the enterprise. These personnel include employees and other persons receiving instructions from the enterprise
- ❖ The interpretation of ‘other persons’ referred to above is based on the principle of *noscitur a sociis*
- ❖ Some issues arising in interpreting ‘other persons’ are:
 - Whether non-individuals are included
 - Whether employees of another enterprise included
 - Should the personnel be dependent on the enterprise
 - Is there an overlap between service PE and agency PE or are they mutually exclusive

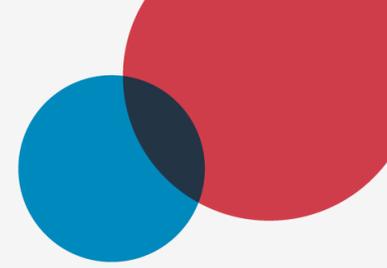
Article 5(4) – Exclusions



- ❖ Following activities are not regarded as PEs:
 - a) Use of facilities solely for storage, display or **delivery** of goods or merchandise (*Note: UN Model does NOT include delivery*)
 - b) Maintenance of stock of goods solely for storage, display or delivery
 - c) Maintenance of stock of goods solely for purpose of processing by another enterprise
 - d) Maintenance of fixed place of business solely for purpose of purchasing goods, or collecting information
 - e) Maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity
 - f) Maintenance of a fixed place of business solely for any combination of activities in subparas. (a) to (e)

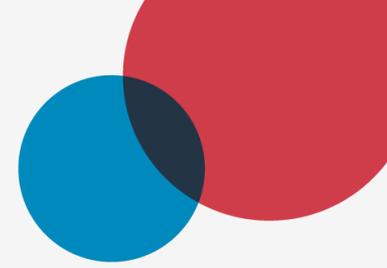
Such activity or, in the case of (f), the overall activity of the fixed place of business, is **of a preparatory or auxiliary character** (*generalised exception*)

Points of discussion



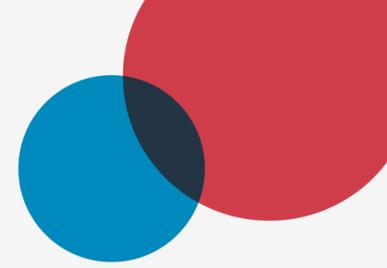
- ❖ When is an activity mere “**preparatory or auxiliary**” in nature?
 - An activity that has a **preparatory** character is one that is carried on in contemplation of the carrying on of what constitutes an essential and significant part of the activity of an enterprise as a whole.
 - An activity that has an **auxiliary** character generally corresponds to an activity that is carried on to support, without being part of, the essential and significant part of the activity of the enterprise as a whole
 - Remote to the realisation of profits such that it is difficult to allocate profits

Points of discussion



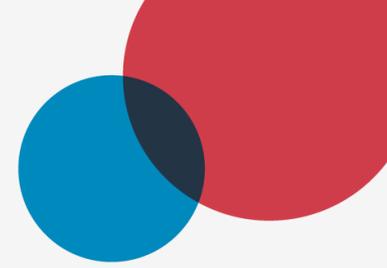
- ❖ If the activities of fixed base are identical with the general purpose and object of its parent, then such cannot be regarded as preparatory and auxiliary in nature
 - *Cannot be a management office – management is essential part*
 - *After sales organisations? Pipes and cables?*
- ❖ Whether after sales service would result in a PE?
- ❖ Whether display of goods or merchandise at an exhibition would constitute to be a PE?
- ❖ If goods are sold at the termination of exhibition, then would it be constituted as PE?

Points of discussion



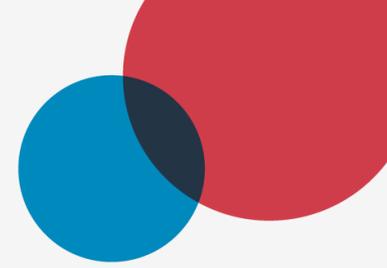
- ❖ Whether a call centre activity would constitute to be preparatory and auxiliary activity?
- ❖ Where an enterprise has two or more activities but all are in the nature of preparatory and auxiliary in character, whether they would constitute to be a PE?

Anti-Fragmentation Rule



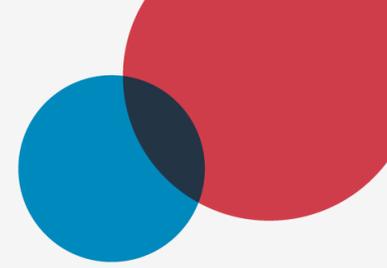
- ❖ Para. 4 will not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carried on business activities at the same place or at another place in the same Contracting State and:
 - That place or other place constitutes a PE for the enterprise or the closely related enterprise; or
 - The overall activity 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
 - The business activities constitute complementary functions that are part of a cohesive business operation
- ❖ Purpose: To prevent the fragmentation of a cohesive business into several small operations to argue that each is merely is a preparatory or auxiliary activity

Art. 5(8) – “Closely Related”



- ❖ 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 enterprise
- ❖ A person or enterprise shall be closely related to an enterprise if:
 - One possesses directly or indirectly more than 50% of the beneficial interest in the other (or if a company, more than 50% of the aggregate vote and value of the company’s shares or of the beneficial equity interest in the company); or
 - Another person or enterprise possesses directly or indirectly more than 50% of the beneficial interest (or if a company, more than 50% 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

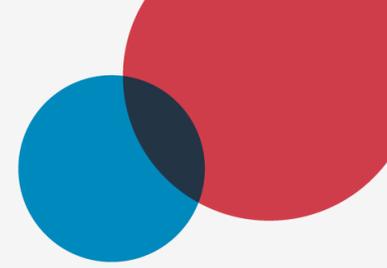
Article 5(5) – Dependent agent



❖ Dependent Agent

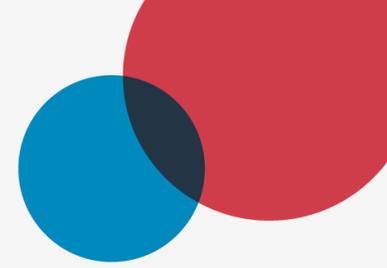
- The activities of an agent (other than an independent agent) would constitute a PE of an enterprise if, *inter alia*:
 - The agent (1) habitually concludes contracts, or (2) habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modifications by the enterprise, and these contracts are:
 - In the name of the enterprise; or
 - For the transfer of the ownership of, or for the granting of the right to use, property owned by the enterprise
 - For the provision of services by that enterprise

Article 5(5) – Dependent agent



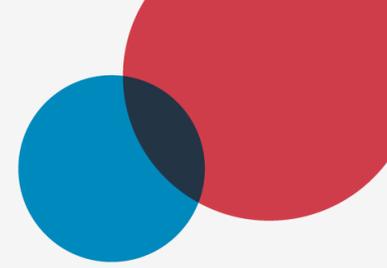
- ❖ The following conditions must be met for Art. 5(5) to apply:
 - A person acts in a Contracting State on behalf of the enterprise;
 - In doing so, that person habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise; and
 - These contracts are either in the name of the enterprise or 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 for the provision of services by that enterprise

Article 5(5) – Dependent agent



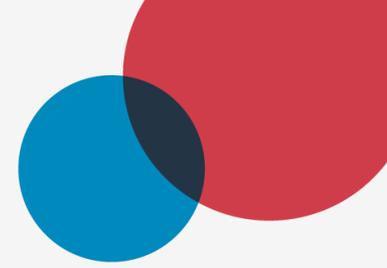
- ❖ Art. 5(5) will not apply:
 - If activities by the person on behalf of the enterprise are covered by the independent agent exception under Art. 5(6); or
 - The activities are preparatory or auxiliary

Points of discussion



- ❖ Replaces requirement of fixed place of business (*alternative tests*)
- ❖ **UN Model:**
 - Even without such authority but habitually maintains stock of goods and regularly delivers goods for the enterprise
 - An insurance enterprise of a Contracting State shall, except in regard to re-insurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person.

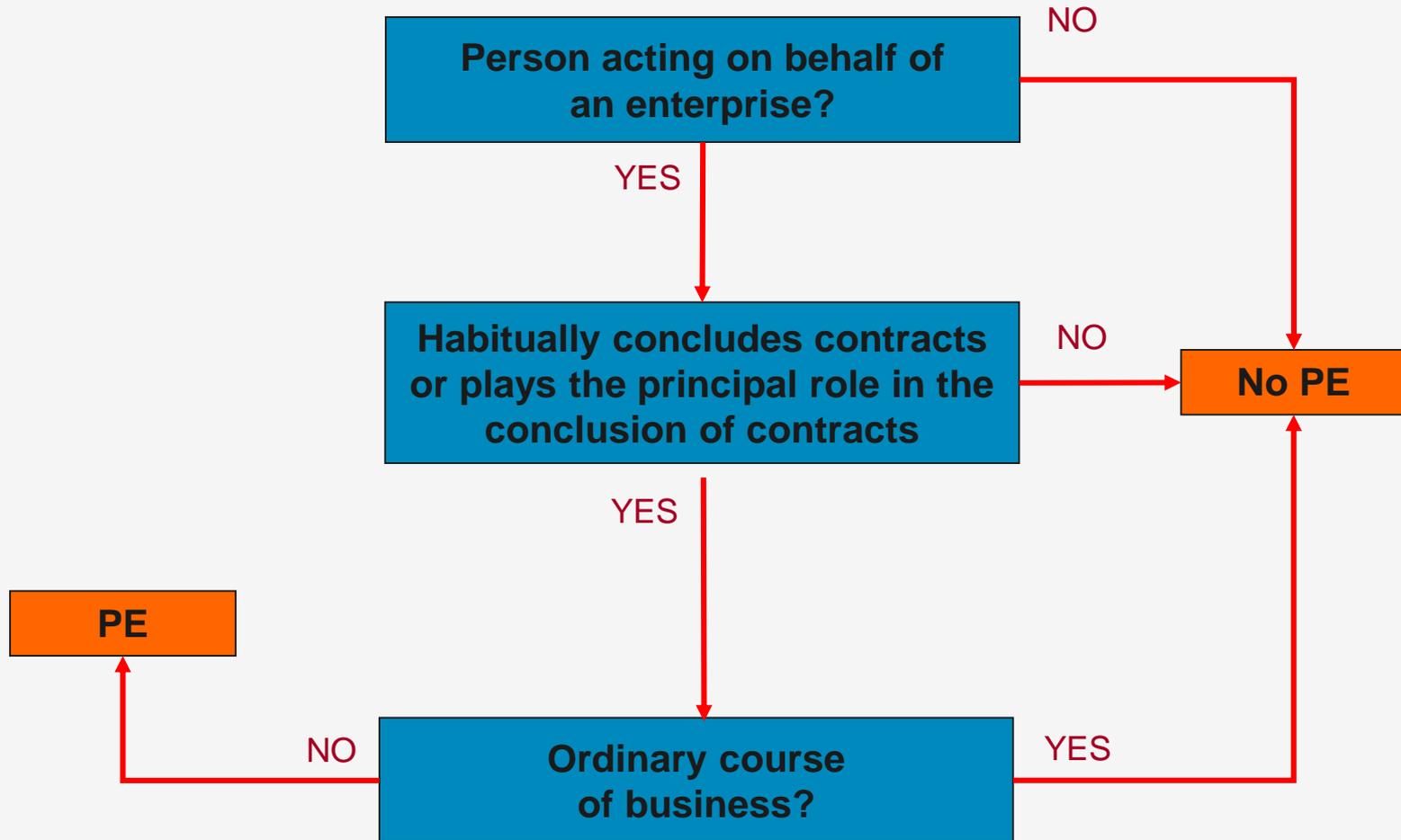
Article 5(6) – Independent agent



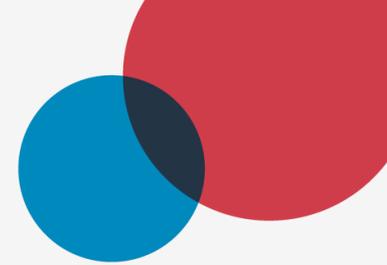
❖ Independent Agent

- An agent is considered to be of independent status if he acts in the ordinary course of his business
- A person who acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related shall not be considered an independent agent
- Legal and Economic independence
 - No detailed instruction/comprehensive control
 - Responsible for results, but not controlled as to the means
 - Number of principals indicative
- Subject to the above conditions, an independent agent does not constitute a PE

Agency PE - summarized

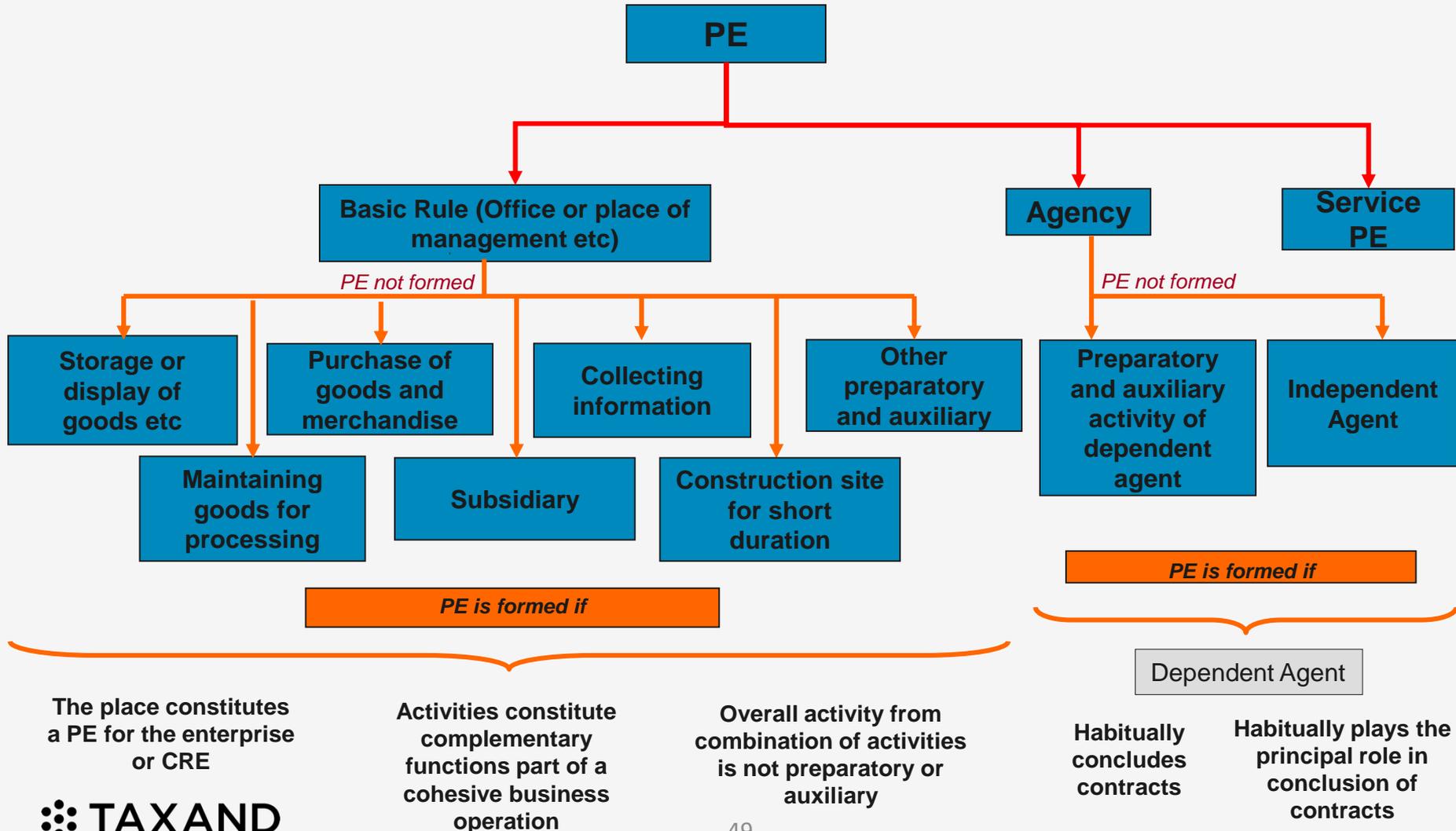
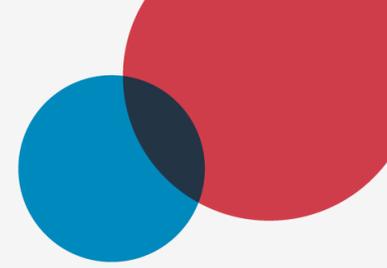


Article 5(7) – Subsidiary



- ❖ A company which is a resident of a Contracting State which 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 shall not be a PE unless it is covered by other clauses
- ❖ A subsidiary is an independent legal entity
- ❖ Even if parent company manages the subsidiary's business, this does not create a PE *per se*
- ❖ Can and under which conditions would a subsidiary can be considered a dependent agent of its parent or other affiliate company?
- ❖ **Ask:** Does parent conduct business through this fixed place?
- ❖ If parent has office at the subsidiary's premises at its disposal, this could constitute a fixed place of business

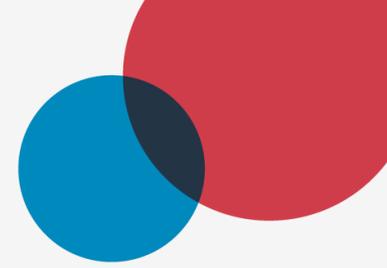
Concepts of PE - summarized



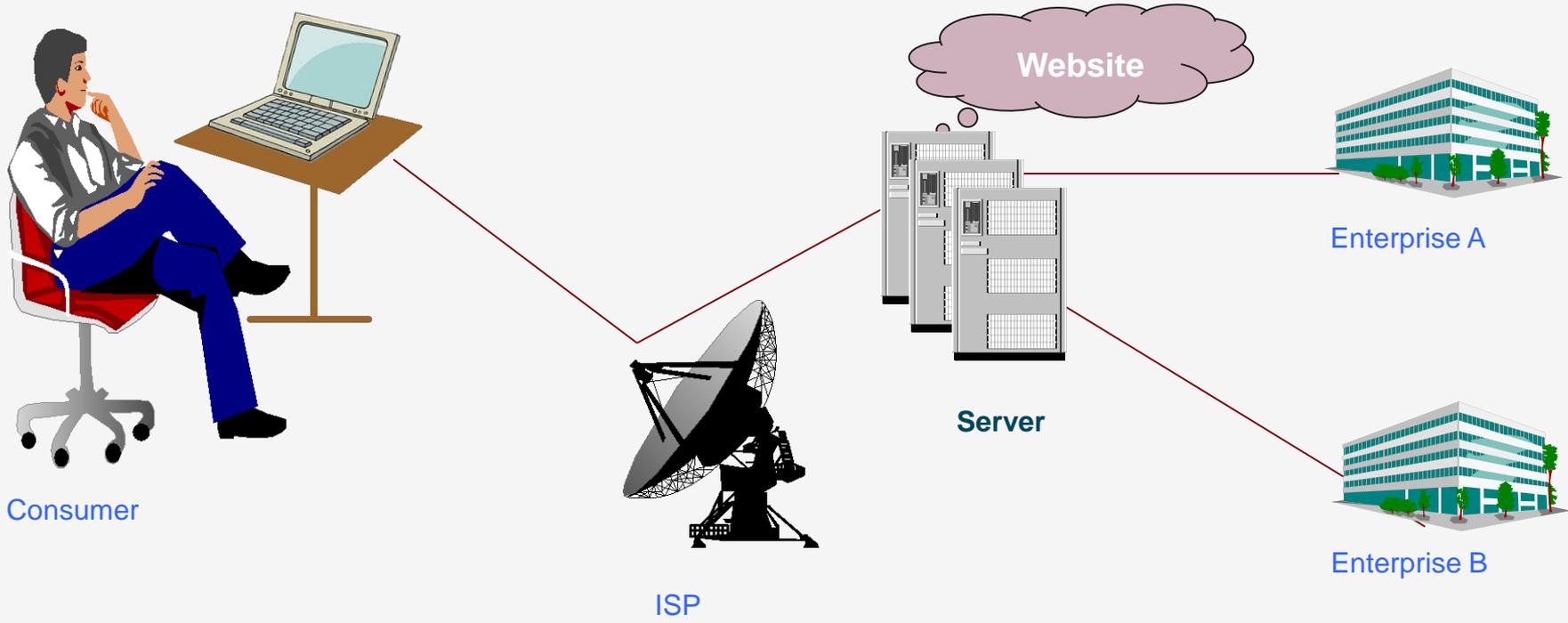
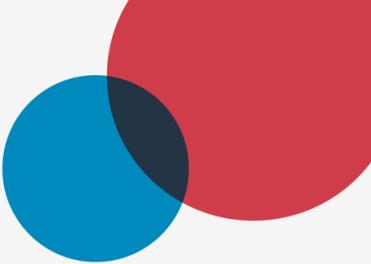


Challenges to PE

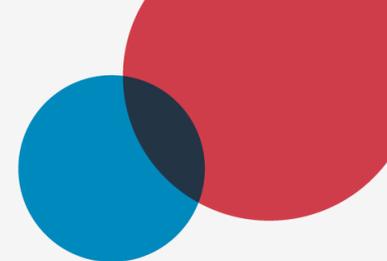
Challenges to Basic Rule PE



- ❖ Challenge in determining basic rule PE due to emergence of e-commerce
 - Websites, electronic hubs and computer mainframes are located in different jurisdictions
 - Commercial activities, transactions and managerial decisions may be at altogether different jurisdictions
- ❖ Concept of 'place of business' evolving and expanding
- ❖ India's reservation to OECD Commentary: IT equipment, websites, tangible or intangible properties could constitute PE; website hosted on a particular server at a particular location could be considered a place of business

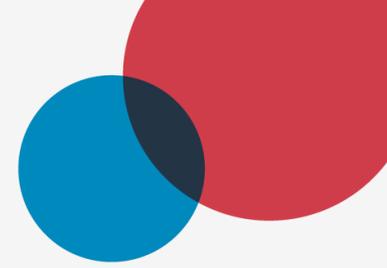


E-Commerce



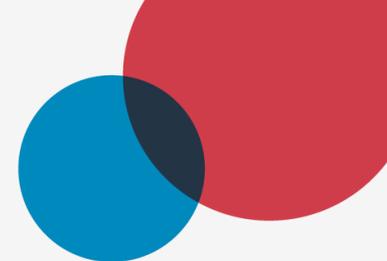
- ❖ E-commerce involves the performance of business activities through information and communication technologies, connecting value chains, between businesses and between businesses and customers
- ❖ E-commerce dissolves the link between an income-producing activity and a specific location; persons engaged in e-commerce could be located anywhere in the world and their customers will be ignorant of, or indifferent to, their location
- ❖ Allows non-resident entities to reap considerable gains from sales in another jurisdiction without establishing physical presence sufficient to constitute a PE
- ❖ Need to shift emphasis from 'location of value-creation' approach to a more comprehensive approach which considers the place of consumption
- ❖ Need to shift parameter from 'type of presence' to 'type of economic activity'

Websites



- ❖ According to OECD, data and software which is used by, or stored on an equipment located in a country may not necessarily form a PE
- ❖ For example, an internet web site, which is a combination of software and electronic data, does not in itself constitute a tangible property and also does not have a location. Hence, it can not constitute a "place of business", and consequentially, a PE
- ❖ A website would fail the following tests even if the website is to be hosted on a particular server at a particular location:
 - The locus test
 - The permanence test
 - The disposal test

Server

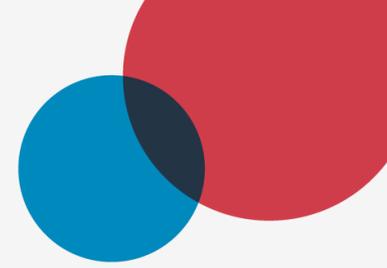


- ❖ A dedicated server which is owned/ leased by an enterprise of one state in another state would constitute a PE for the enterprise
- ❖ Where foreign enterprises host their websites on third party servers, the OECD does not consider the server to constitute a PE since neither the server nor its location is at the disposal of the foreign enterprise
- ❖ India does not agree with the above limitation and holds that, depending on the facts, a foreign enterprise may be considered to have a PE by the virtue of it hosting its website on a particular server in India
- ❖ Under such a scenario, foreign enterprises having internet website hosted on servers located in India owned by third party service providers may constitute PE



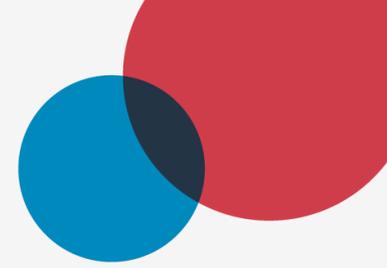
VIRTUAL PE

NEED



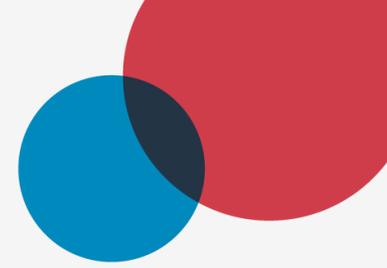
- ❖ Globalization & centralization, sustained and supported by technology
- ❖ International tax law is faced with the following primary issues
 - Accommodating and controlling new, increasingly virtual business models
 - Allocation of profits and losses to specific activities and locations
 - Attribution of taxing authority to specific jurisdictions
 - Growing role of intangible assets in business operations
- ❖ Rationale of fixed place test (regarded as evidence of economic allegiance to the source country) increasingly doubted
 - E-commerce activity possible with no substantive presence – only offices undertaking activities (purchase, storage) – falling within preparatory and auxiliary

NEED



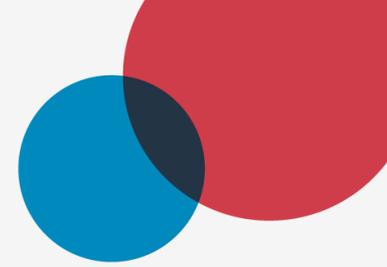
- No need for branch offices, in-country staff – interaction can be done remotely
- People replaced by software

NEED



- ❖ There is increasing fear that e-business would frustrate tax authorities all over the world in obtaining their fair share of tax since e-business is not confined to physical boundaries
- ❖ Tendency of enterprises to locate head office operations in tax havens/ low tax jurisdictions

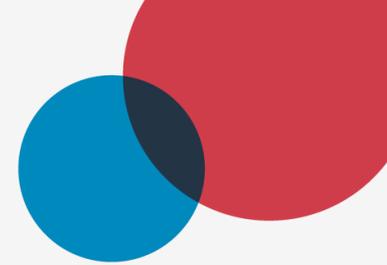
BEPS ACTION PLAN 1



Addressing the tax challenges of the Digital Economy

- ❖ With the rapid penetration of digitization, it is impossible to ring-fence the digital economy from rest of the economy for tax purposes
- ❖ Digital economy and its business models present some key features which are potentially relevant from a tax perspective *viz* mobility, reliance on data, network effects, the spread of multi-sided business models
- ❖ Digital economy raises the following broader tax challenges for policy makers:
 - **Nexus** - Reduced need for physical presence raises question whether current rules to determine nexus with a jurisdiction are appropriate
 - **Data** - Data is a primary input into process of value creation in

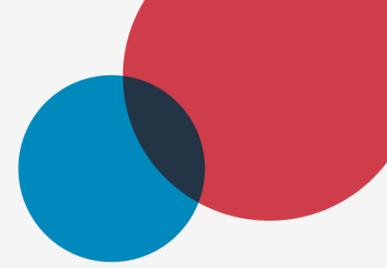
BEPS ACTION PLAN 1



digital economy and possibility to gather and use information from various sources creates problem as to how to attribute value to such data

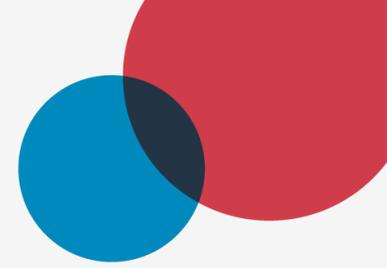
- **Characterization** – Development of new digital products or means of delivering services creates uncertainties in relation to characterization of payments made in context of new business models, cloud computing in particular
- **Collection of VAT** - Absence of an effective international framework to ensure VAT collection in the jurisdiction of consumption as well as a significant administrative burden in managing tax liabilities generated by high volume of low value transactions

BEPS ACTION PLAN 1



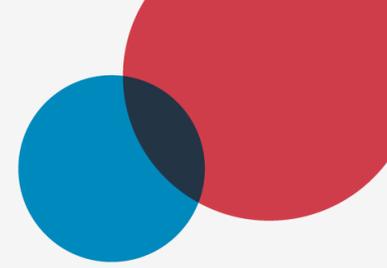
- ❖ Task Force on Digital Economy ('TFDE') discussed and analyzed potential options to address broader tax challenges, and recommended the following:
 - Modify list of exceptions to the definition of Permanent Establishment ('PE') to ensure that it is not possible to benefit from the 'preparatory or auxiliary' activities exception
 - Apply principles of International VAT/ GST Guidelines and introduce collection mechanisms included therein to address issue in collection of VAT /GST on cross-border transactions, particularly in case of B2C transactions
 - Other options analyzed by TFDE but not recommended at this stage include:
 - New nexus based rules on significant economic presence
 - Withholding tax on certain types of digital transactions

BEPS ACTION PLAN 1



- Equalization levy to ensure ‘equal treatment’ of foreign and domestic suppliers
- Aforesaid options could, however, be introduced by countries in their domestic laws, provided they respect existing treaty obligations, or in their bilateral tax treaties

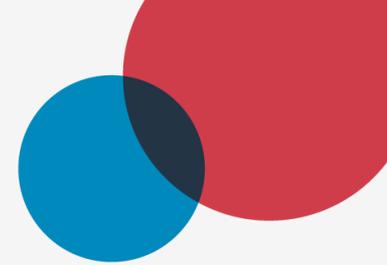
BEPS ACTION PLAN 7



Action 7: Prevent the artificial avoidance of PE status

- ❖ Develop changes to the definition of PE to prevent the artificial avoidance of PE status, including
 - Use of commissionaire arrangements instead of traditional distributor models
 - Use of preparatory and auxiliary exemptions – artificial fragmentation of operations among multiple group entities
- ❖ Thus:
 - Where the activities of an intermediary in a country are intended to result in the regular conclusion of contracts to be performed by a foreign enterprise, the enterprise should be considered to have a taxable presence
 - The exceptions under Article 5(4) are modified to ensure that the exceptions are restricted to activities that are of a “preparatory or auxiliary” character

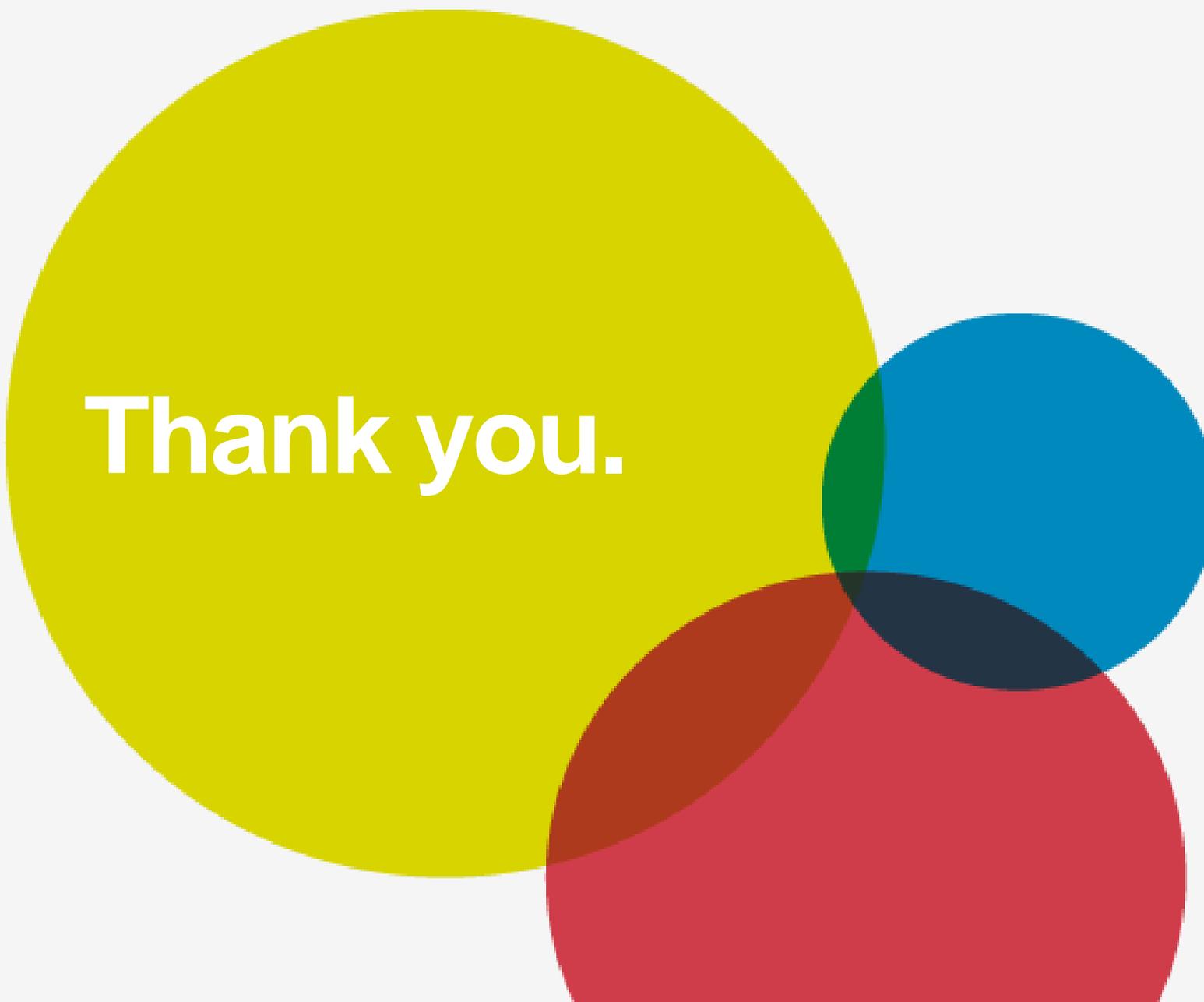
BEPS Action Plan – PE Avoidance



Action 7: Prevent the artificial avoidance of PE status

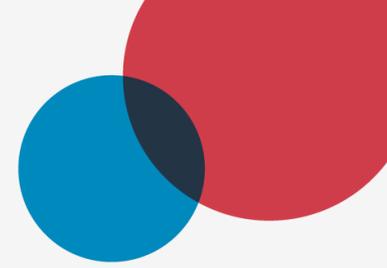
❖ Thus:

- It is not possible to avoid PE status by fragmenting a cohesive operating business into several operations in order to argue that each part is merely engaged in preparatory or auxiliary activities that benefit from the exceptions of Article 5(4)
- ❖ The changes to the definition of PE in this report will be among the changes proposed for inclusion in the multilateral instrument that will implement the results of the work on treaty issues mandated by the BEPS Action Plan



Thank you.

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