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PREMIER TAX EVENT OF THE YEAR  
**NATIONAL TAX CONFERENCE**  
**2020**

**25 & 26 AUGUST 2020 | TUESDAY & WEDNESDAY**  
**VIA LIVE STREAMING**

Panel Member:

**Mr Tan Hooi Beng**  
*Deputy Tax Leader*  
*Deloitte Malaysia*

TOPIC 4:  
**BEPS & MULTILATERAL  
INSTRUMENTS**

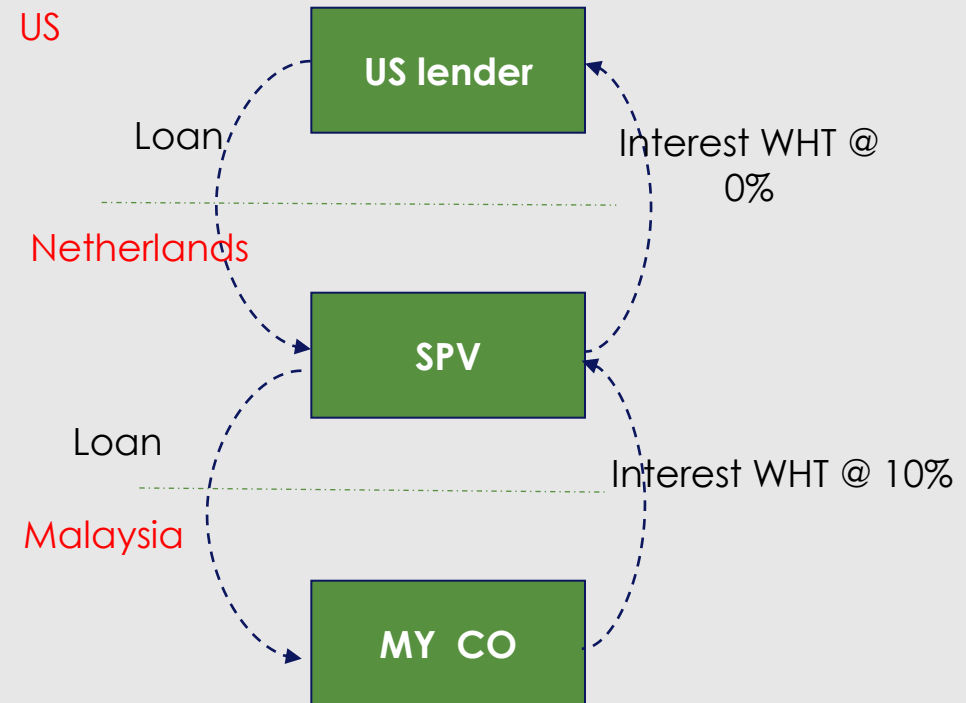
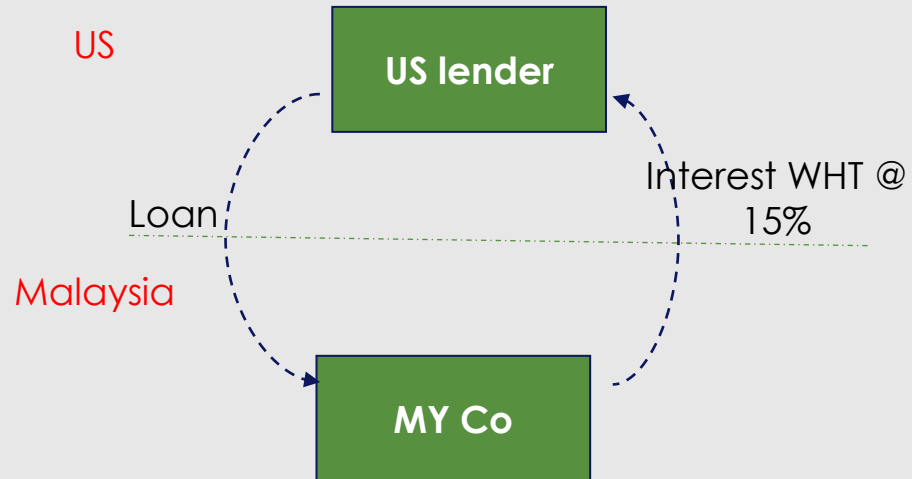
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- **Action 6: Preventing treaty abuse**
- **Action 7: Preventing the artificial avoidance of PE status**

# Action 6: Preventing treaty abuse

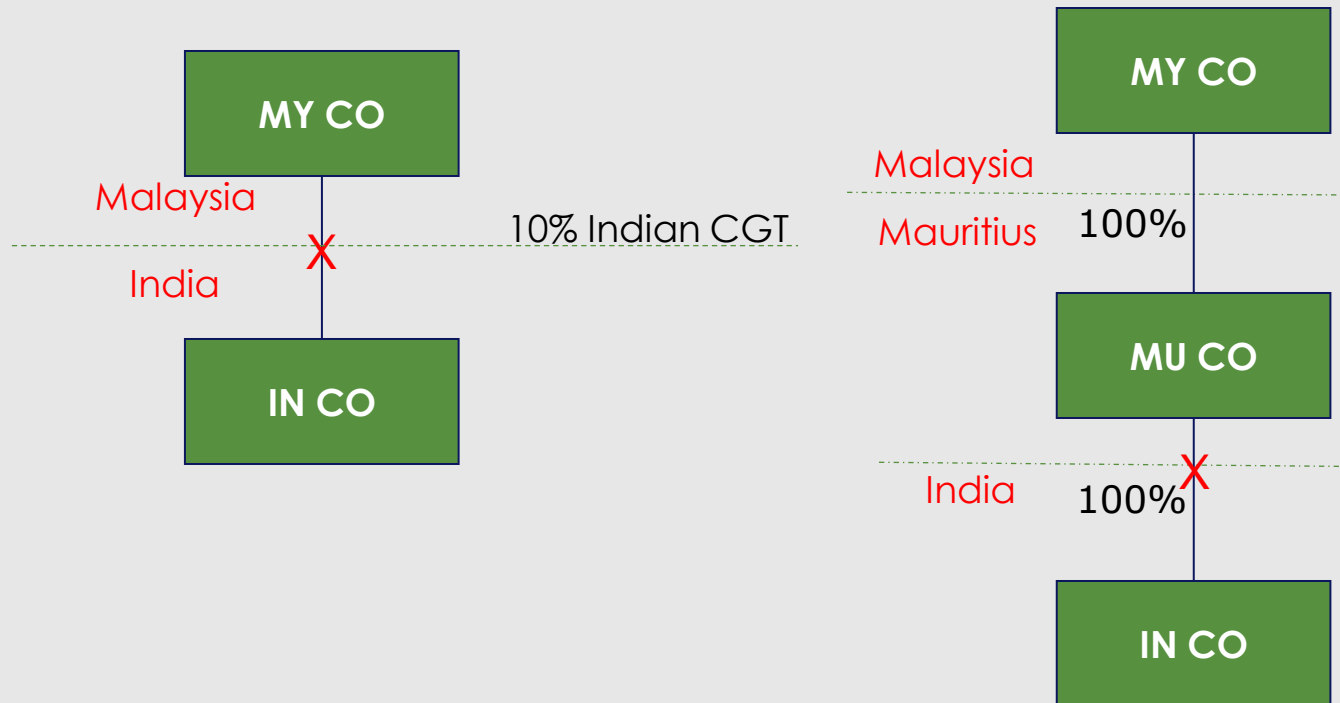
# What led to Action 6?

## Example 1 (Inbound)



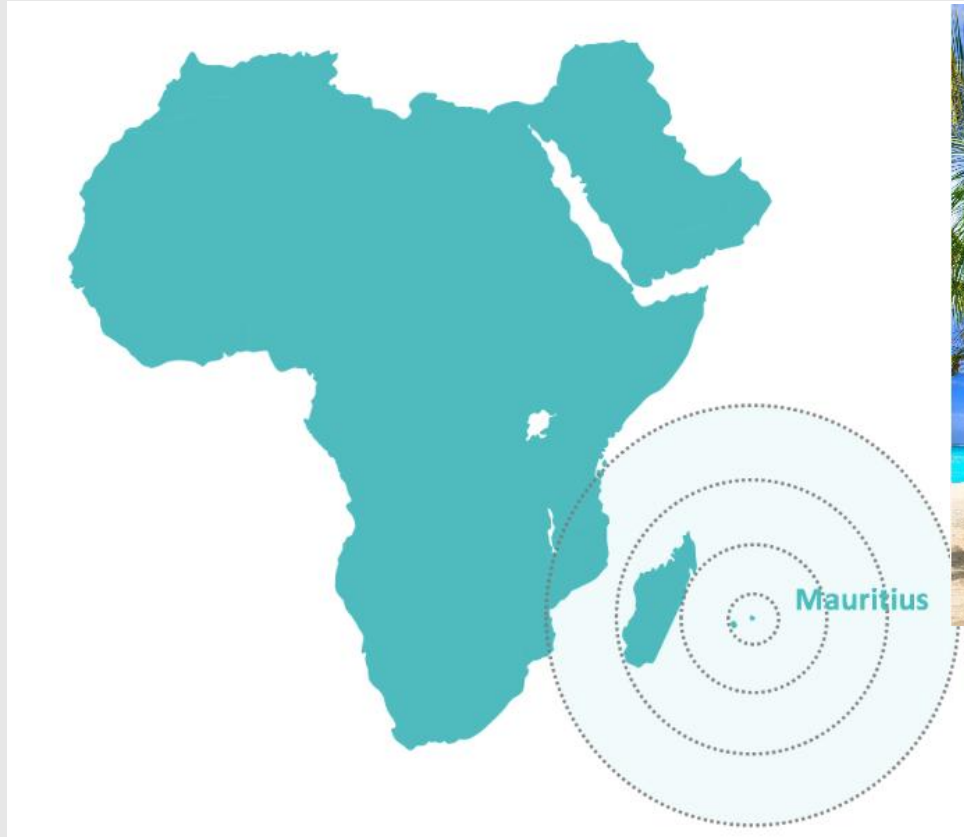
## What led to Action 6? (Cont'd)

### Example 2 (Outbound)\*\*



**\*\*Based on the old India-Mauritius treaty. India has renegotiated with Mauritius**

## What led to Action 6? (Cont'd)

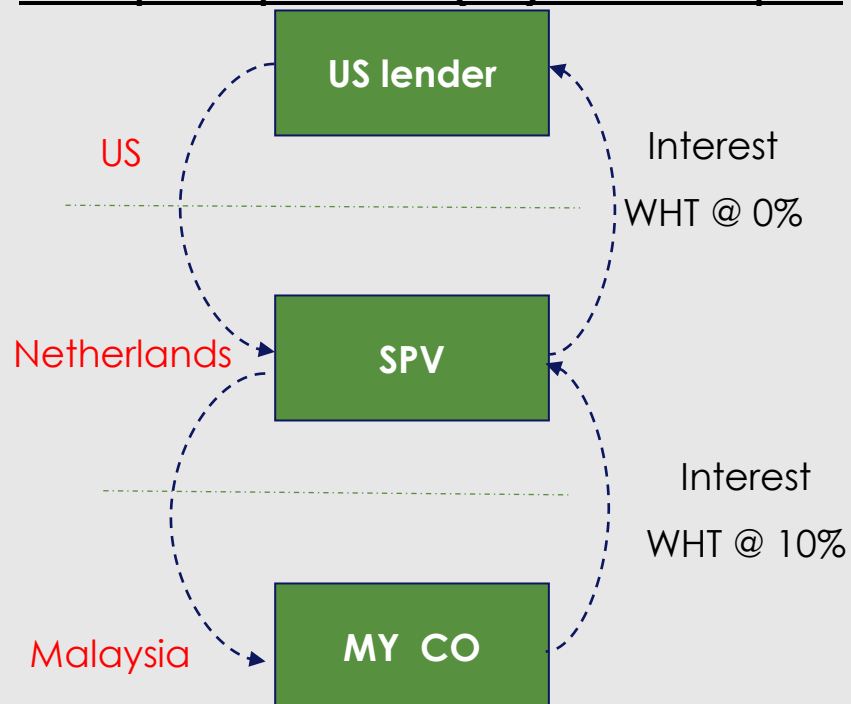




# Action 6: Preventing treaty abuse

## Minimum standard

### "Principal Purpose Test" (PPT) rule - Example 1



- Question: Can the reduced treaty rate at 10% apply?

### Two tests:

#### 1. Subjective test

Was obtaining the benefit one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit?

**YES** - next test

**NO** - eligible for treaty benefit

#### 2. Objective test (exception to first test)

Is granting that benefit in accordance with the object and purpose of the relevant treaty provision(s)?

**Yes** - eligible for treaty benefit

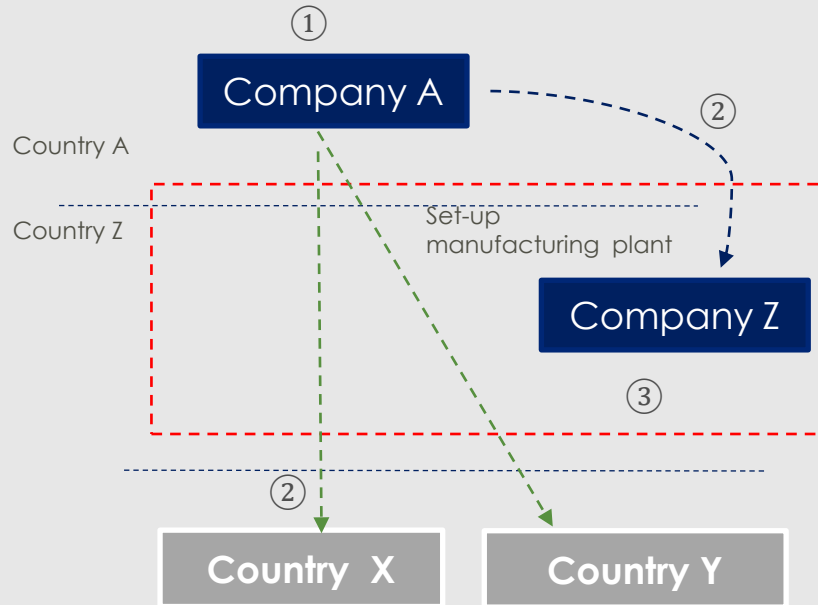
**NO** - not eligible for treaty benefit



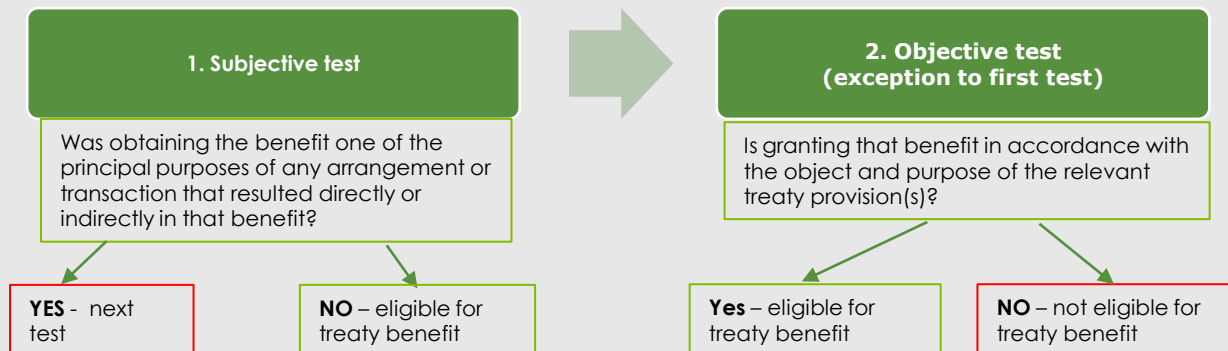
# Action 6: Preventing treaty abuse (Cont'd)

## Minimum standard

### PPT Rule - Example 2



- 1: Manufacturer – Relocating to other jurisdictions with a view to reducing the OPEX.
- 2: The economic and political environments of countries X, Y & Z are similar. Countries X, Y and Z impose WHT on dividend at 20%.
- 3: DTA between Country A and Country Z provides a reduced WHT rate on dividend.
- **Question: Can the treaty benefit under the A/Z treaty apply?**



# Action 7: Preventing the artificial avoidance of PE status

## Action 7: Preventing the artificial avoidance of PE status

- *What is PE?*
  - *Article 5(1) – Fixed place PE*
  - *Article 5(3) – Construction PE*
  - *Article 5(4) – Exceptions to fixed place PE*
  - *Article 5(5) – Contract concluding agency PE (OECD MTC)*
- What's the significance of having a PE in Malaysia / overseas?

# Action 7: Preventing the artificial avoidance of PE status (Cont'd)

## Article 5(4) (the specific activity exceptions from PE status)

a) the use of 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;

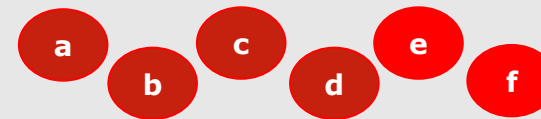
d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;

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), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

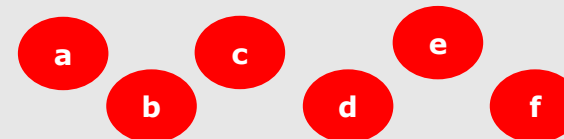
### Existing

"*preparatory or auxiliary character*" condition to be met **only** by exemption **(e) and (f)** :-



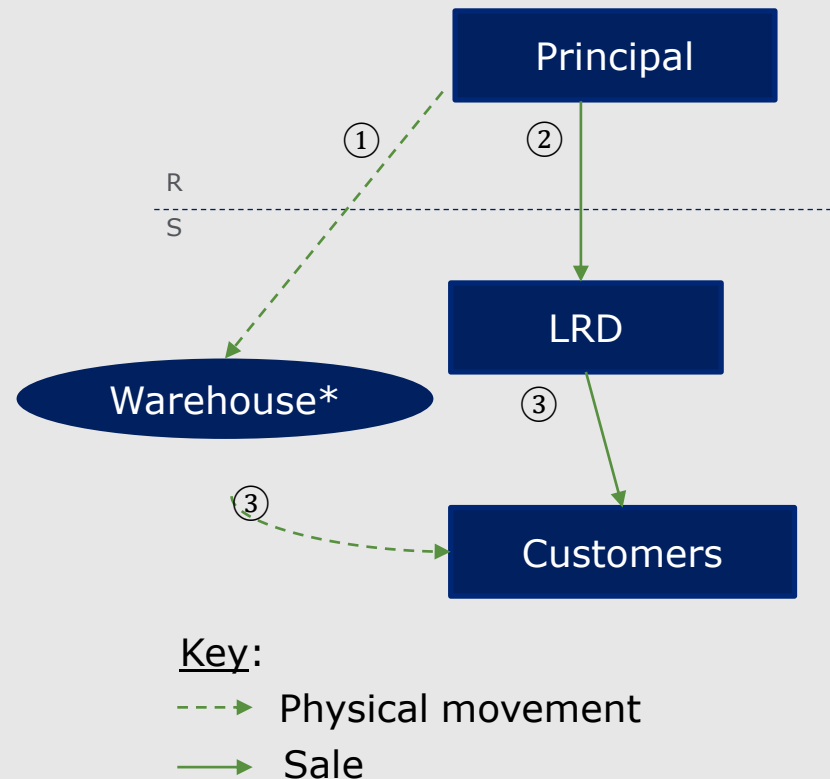
### New

"*preparatory or auxiliary character*" condition to be met by **each** of the exceptions **(a) to (f)** :-



# Action 7: Preventing the artificial avoidance of PE status (Cont'd)

## Article 5(4) (the specific activity exceptions from PE status)



- Step 1: Physical movement of goods to warehouse
- Step 2: Principal sells goods to LRD
- Step 3:
  - LRD enters into sales contracts with Customers
  - Physical movement of goods to Customers

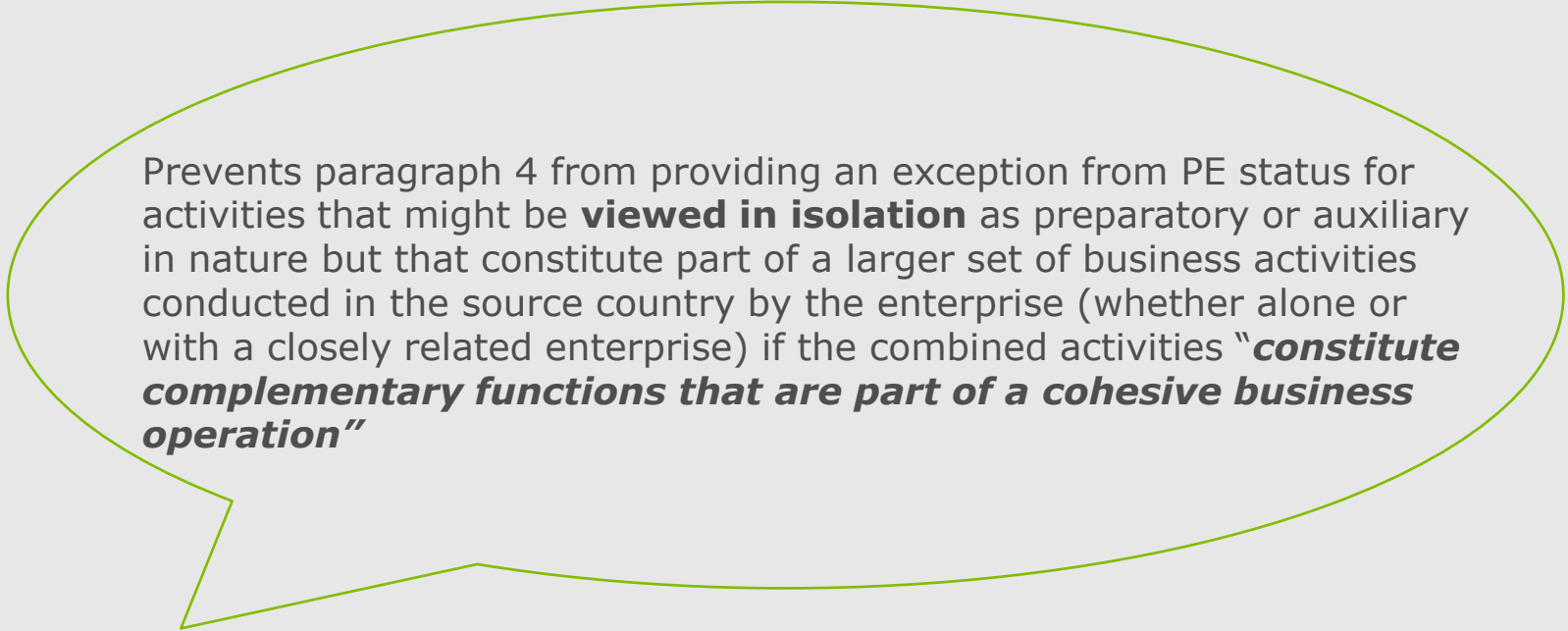
\*Assuming there are significant number of employees working in the warehouse

**Question: Does Principal have a PE in Country S (Pre and Post BEPS)?**

# Action 7: Preventing the artificial avoidance of PE status (Cont'd)

## Article 5(4.1) (Anti-fragmentation Rule)

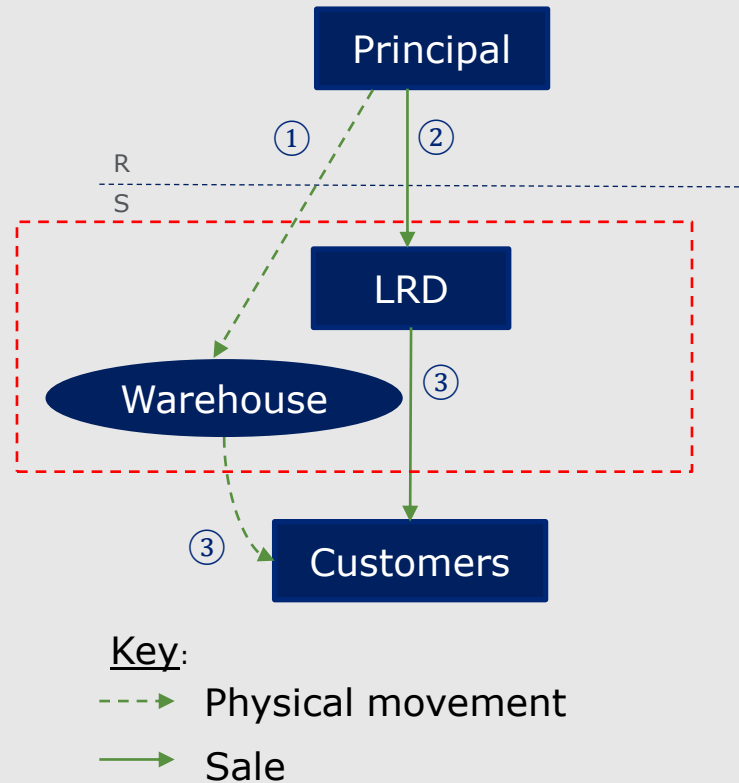
If the activities are preparatory and auxiliary in nature – *End of the story? What's next?*



Prevents paragraph 4 from providing an exception from PE status for activities that might be **viewed in isolation** as preparatory or auxiliary in nature but that constitute part of a larger set of business activities conducted in the source country by the enterprise (whether alone or with a closely related enterprise) if the combined activities “**constitute complementary functions that are part of a cohesive business operation**”

# Action 7: Preventing the artificial avoidance of PE status (Cont'd)

## Article 5(4.1) (Anti-fragmentation Rule)



- Step 1: Physical movement of goods to warehouse
- Step 2: Principal sells goods to LRD
- Step 3:
  - LRD enters into sales contracts with Customers
  - Physical movement of goods to Customers

**\*Assuming the activities carried out in the warehouse are of preparatory or auxiliary nature.**

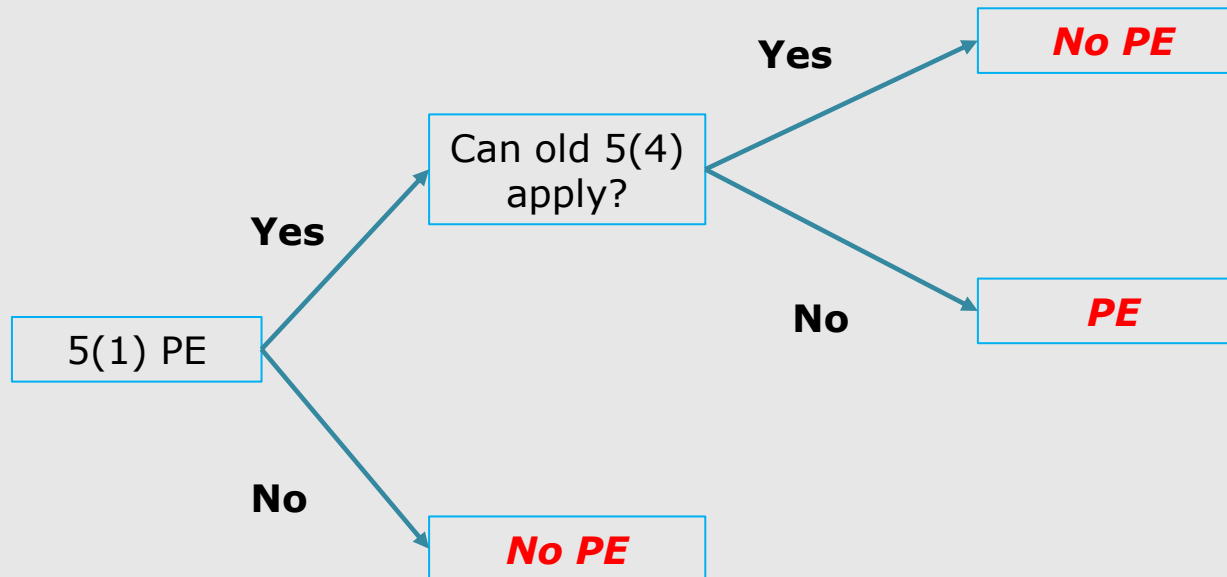
**Question: Does the Principal have a PE in Country S (Pre and Post BEPS)?**



# Action 7: Preventing the artificial avoidance of PE status (Cont'd)

**Article 5(4) (the specific activity exceptions from PE status)**

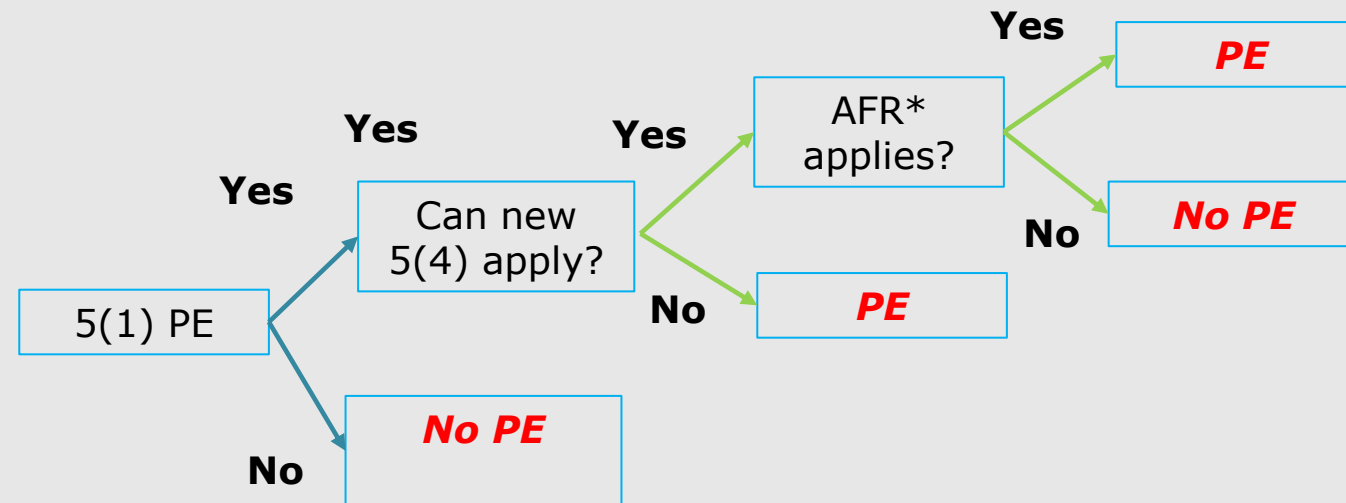
**Application of Article 5(4) exceptions before BEPS**



# Action 7: Preventing the artificial avoidance of PE status (Cont'd)

**Article 5(4) (the specific activity exceptions from PE status)**

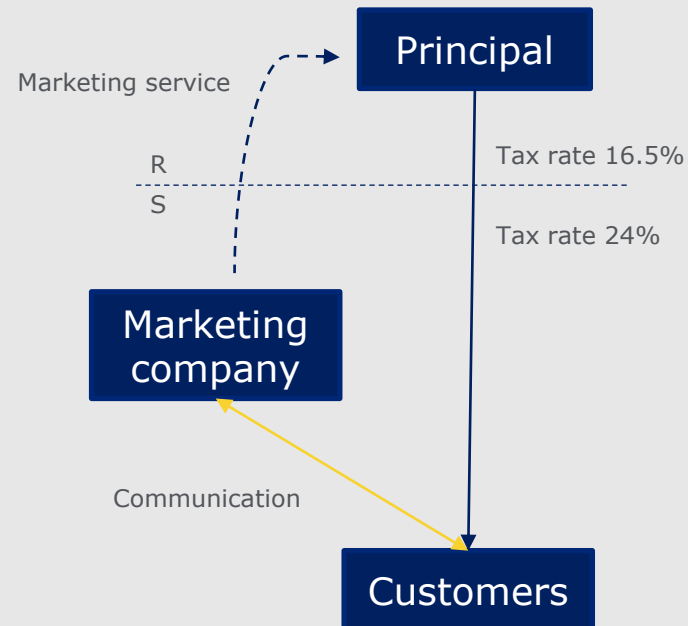
**Application of Article 5(4) exceptions post BEPS**



*\*AFR – Anti-fragmentation rule*

# Action 7: Preventing the artificial avoidance of PE status (Cont'd)

## Article 5(5) (Agency PE)



# Action 7: Preventing the artificial avoidance of PE status (Cont'd)

Article 5(5) (Agency PE)

Existing

"acting on behalf of an enterprise"

"habitually exercises"

"an authority to conclude contracts in the name of the enterprise"

NEW

"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"

- 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) for the **provision of services by that enterprise**,

**Targeted Mischief**

Marketing services company

Civil law commissionaire with indirect representation

Acting in the ordinary course of their business" and must not **and** "not a person acts **exclusively or almost exclusively on behalf of one or more enterprises** to which it is **closely related**"

# THANK YOU