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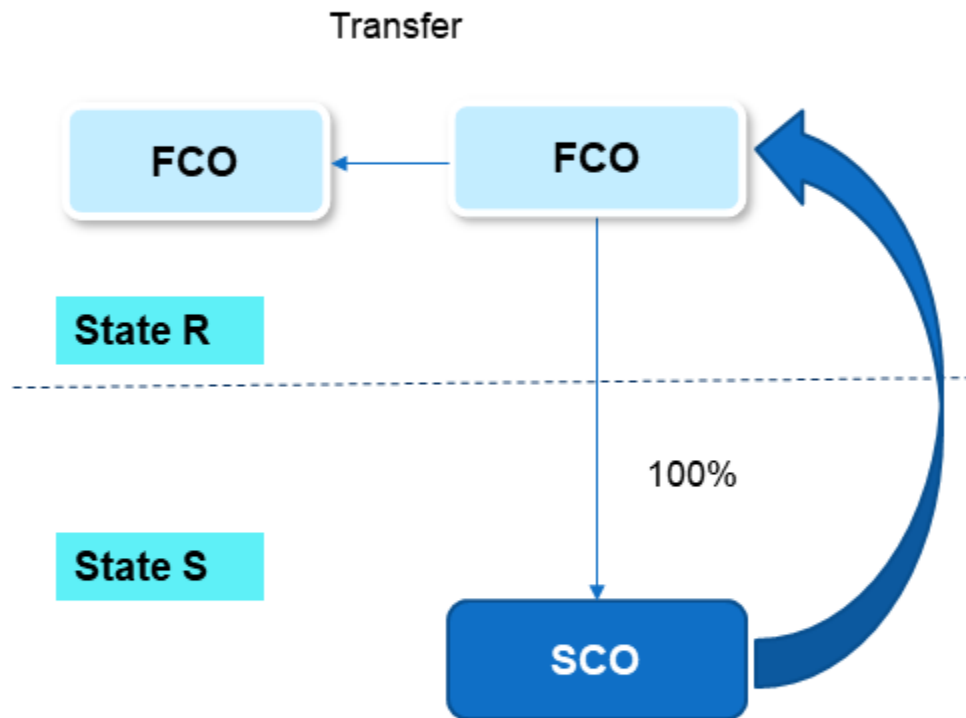
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ARTICLE 13 – CAPITAL GAINS

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WHAT SHOULD WE LEARN FROM THIS PRESENTATION ?

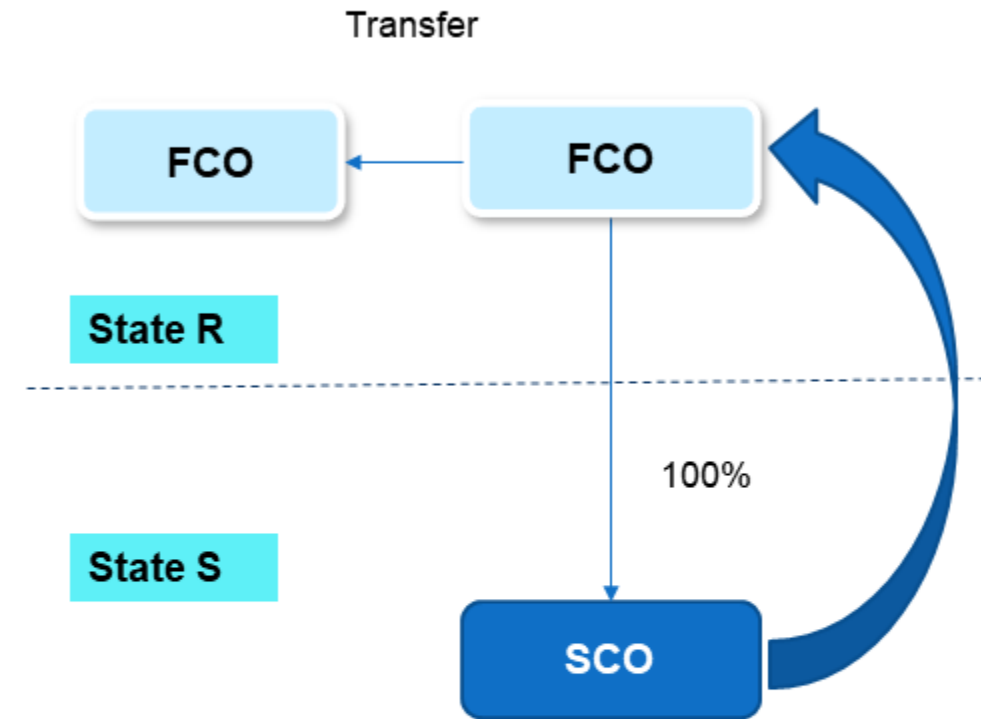
Capital Gains resulting from which of the Assets shall be covered under Article 13 ?

Right of the Source State to tax Capital Gains ?

Right of the State of Residence to tax Capital Gains ?

Would the capital gains treatment be different if the Seller has a Permanent Establishment ("PE") in Source state ?

Specific situation on Capital Gains

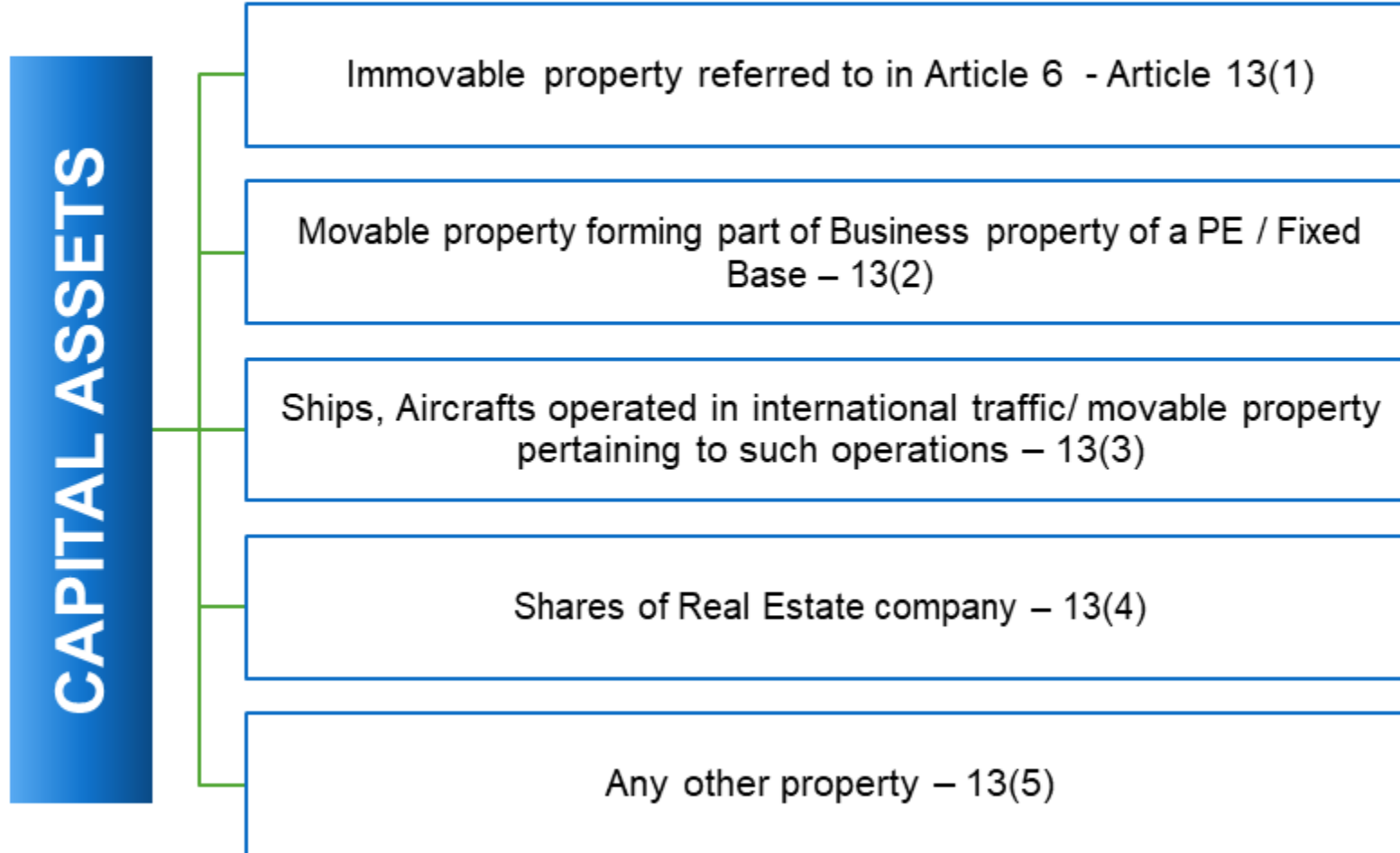


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WHICH ALL “CAPITAL ASSETS” ARE COVERED UNDER ARTICLE 13 ?



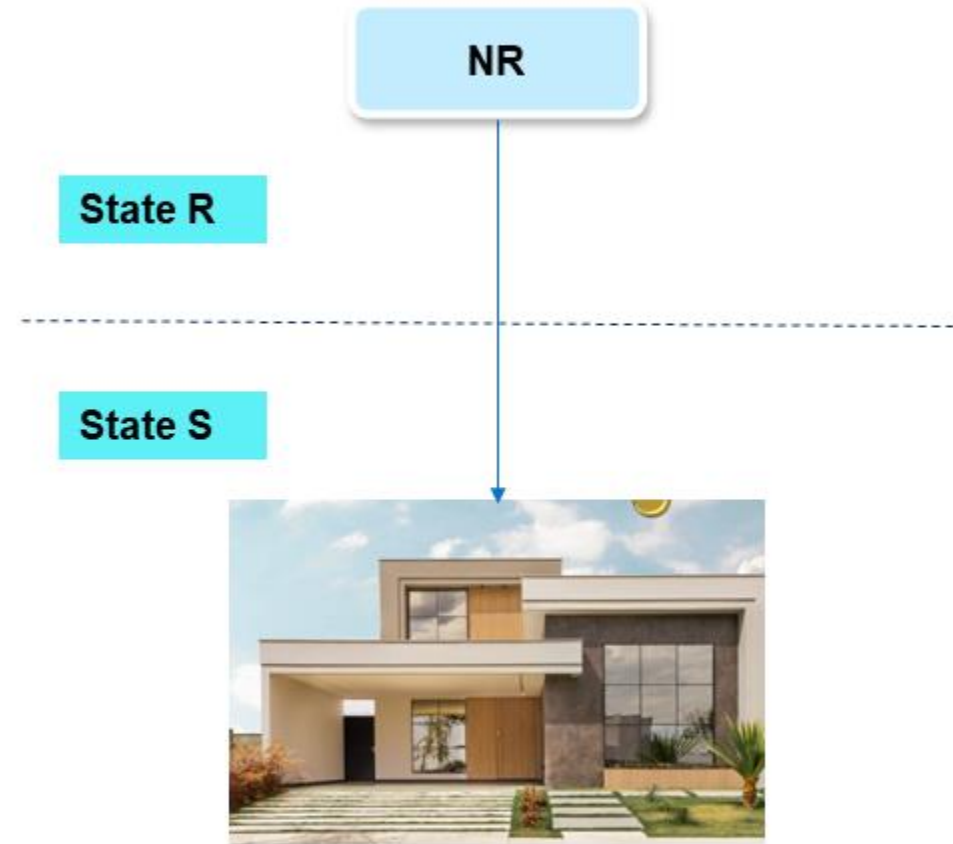
RESIDUARY CLAUSE IS APPLICABLE FOR TRANSFER OF ASSETS NOT COVERED UNDER PRECEDING ARTICLE – CCD

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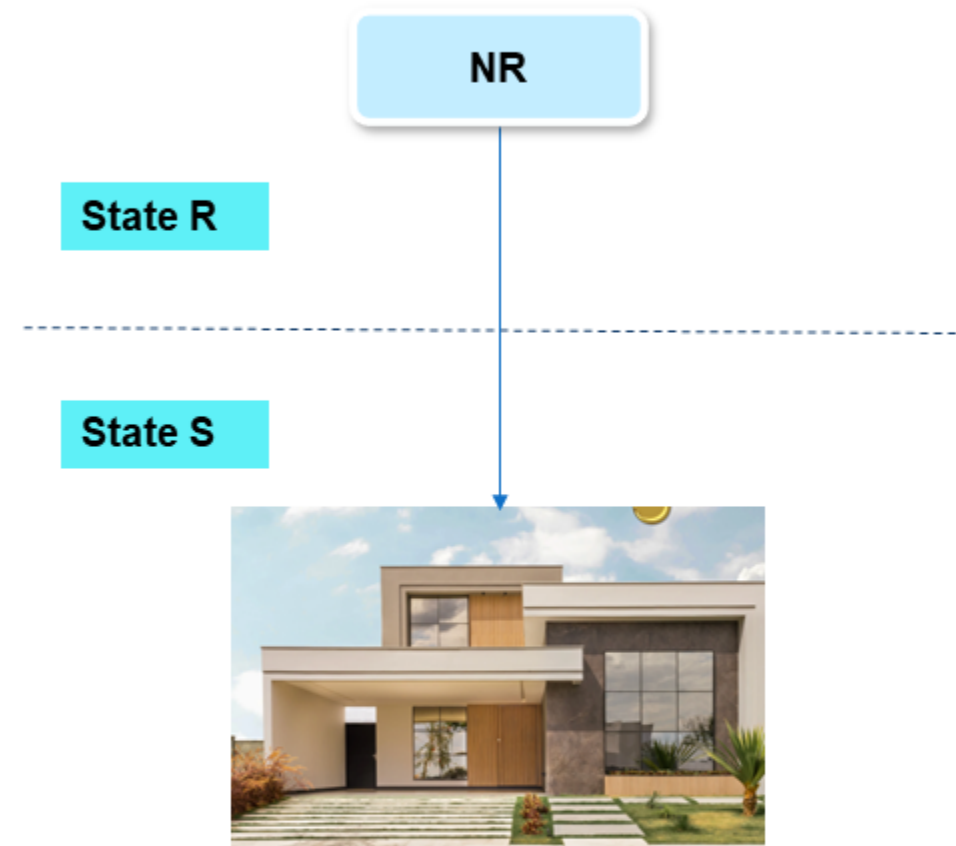
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ARTICLE 13(1) OECD MODEL CONVENTION - GAINS ARISING FROM IMMOVABLE PROPERTY



Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State.



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ARTICLE 13(1) – KEY ASPECTS

What should be derived ?

Gains (shall include losses)

Who should derive ?

Resident of the other Contracting State

What is the subject matter of transfer ?

Immovable property which is situated in other Contracting state and referred to in Article 6

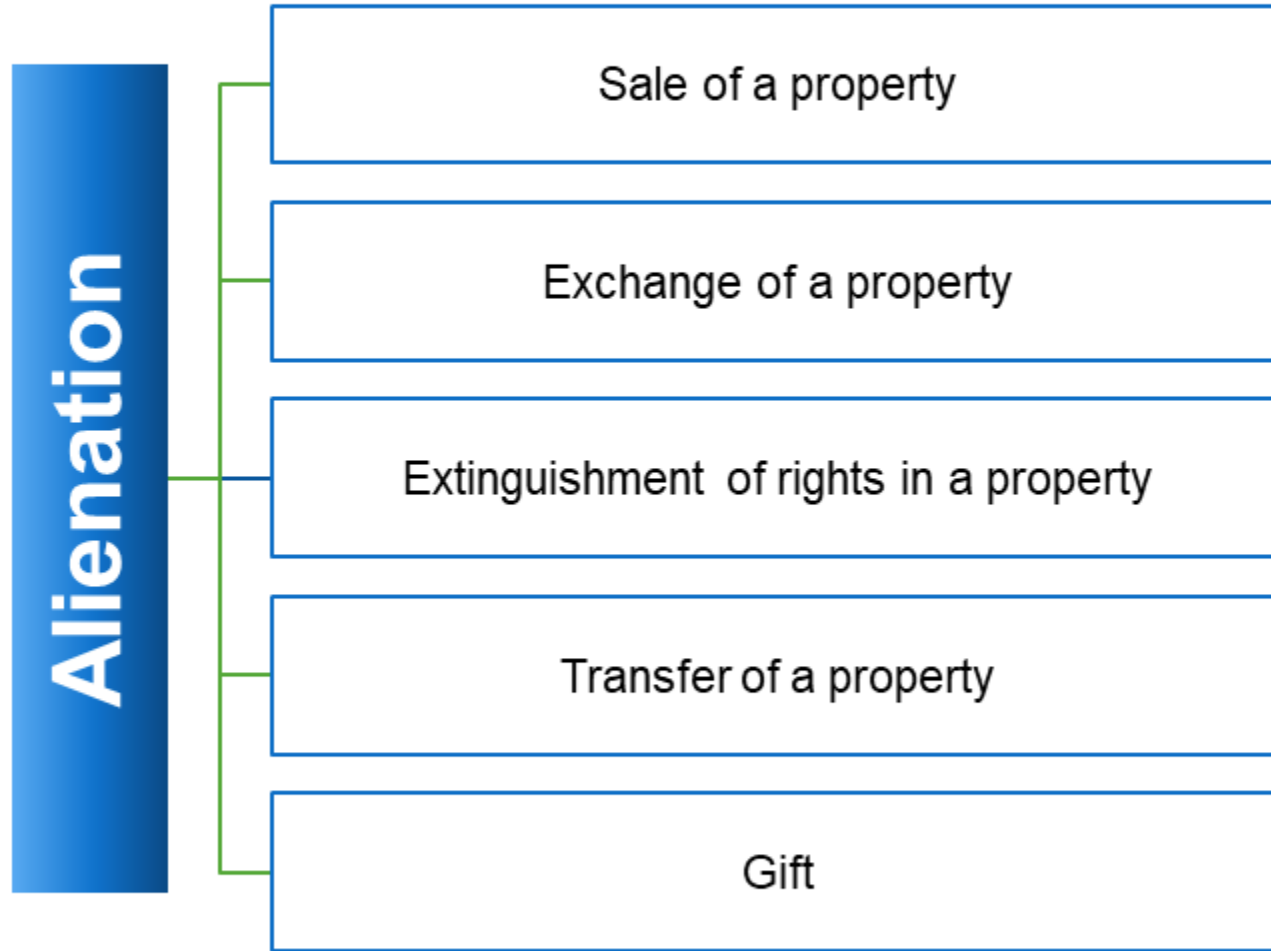
Who has the right to tax ?

Other Contracting state also has the right to tax such gains

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WHAT IS THE MEANING OF “CAPITAL GAINS” ?

1

Term “Capital Gains “ defined under Article 13 ?

2

Article - 3 “General Definitions” requires application of domestic laws to ascertain meaning of terms not defined in Treaty

Capital gains may be Long-term or Short-term capital gain, and may be chargeable to tax at special or normal rates

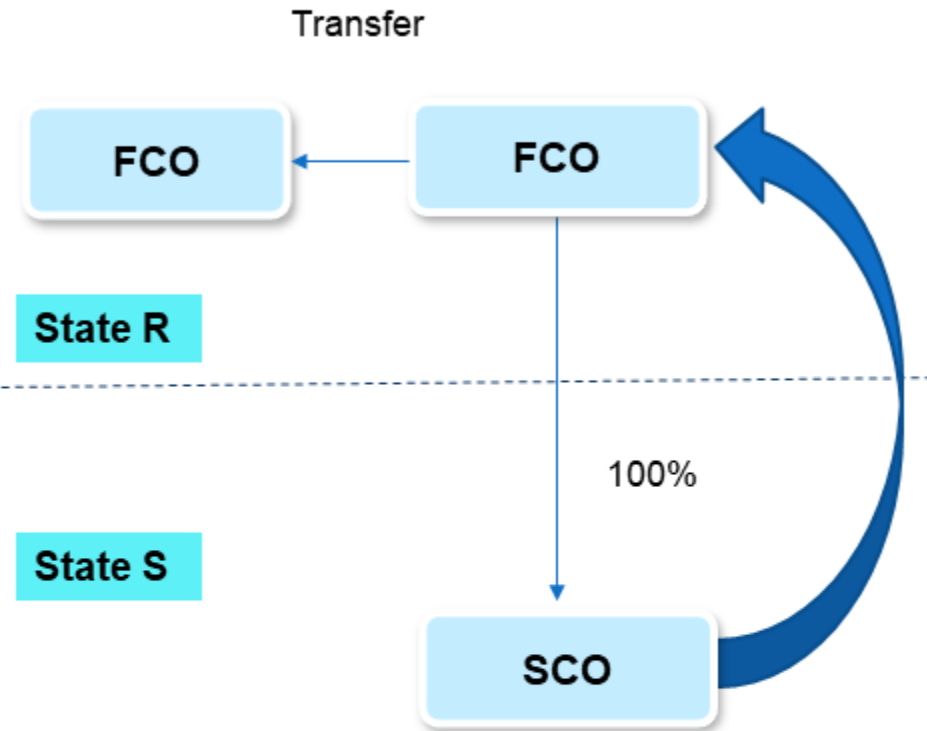
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SALIENT FEATURES

- 1 Double Non-Taxation cases ?
- 2 Different policies to compute capital gains – Depreciation ?
- 3 Transfer from PE in Source State to another State
- 4 Reinvestment of capital gains exempt



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ARTICLE 13(2) OECD MODEL CONVENTION – MOVABLE PROPERTY OF PE BUSINESS



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ARTICLE 13(2) OECD MODEL CONVENTION – MOVABLE PROPERTY OF PE BUSINESS

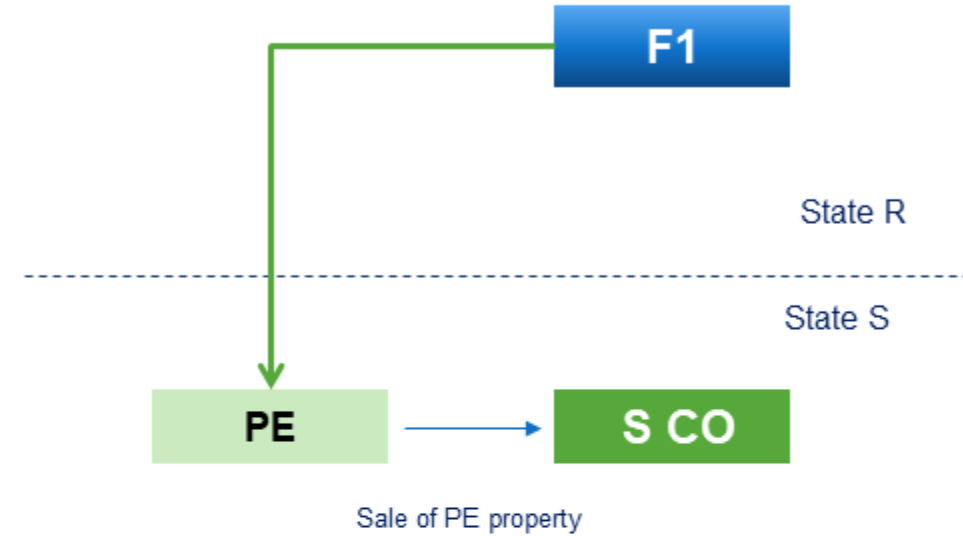
Gains from the alienation of

movable property forming part of the business property of a permanent establishment

which an enterprise of a Contracting State has in the other Contracting State,

including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise),

may be taxed in that other State.



Movable property not forming part of the business property of a PE shall be taxable as per Article 13 (5)

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Application

Alienation of movable property forming part of business property of a PE

Alienation of the PE along with such movable property

Alienation of the whole Enterprise along with the movable property forming part of business property of a PE

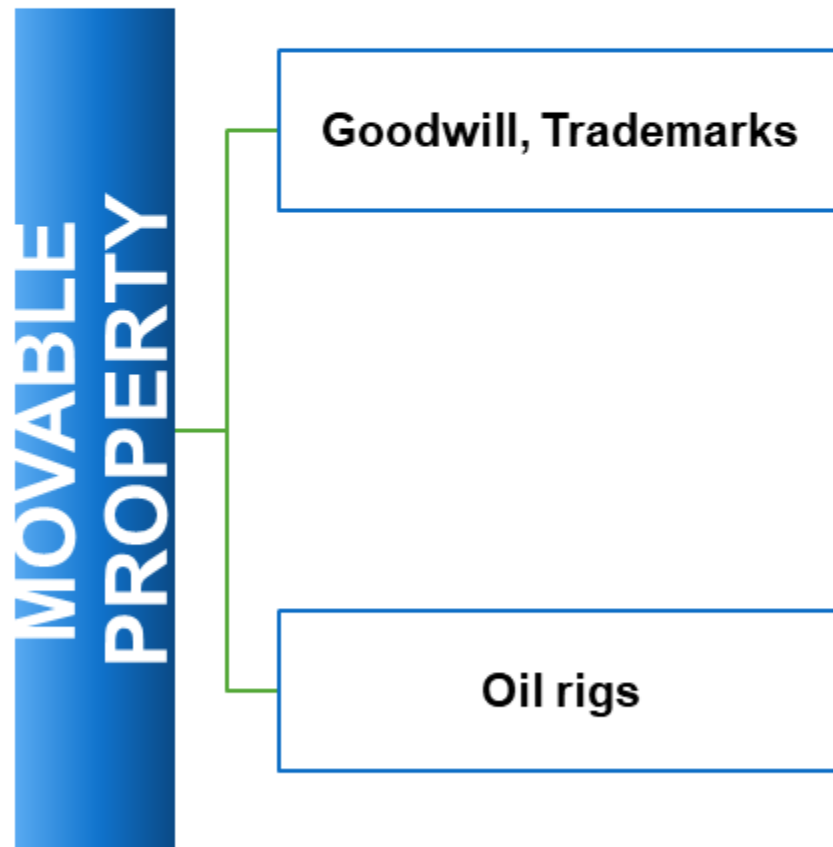
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WHAT IS MOVABLE PROPERTY ?

Generally, not defined in Treaty - Property other than immovable property can be considered

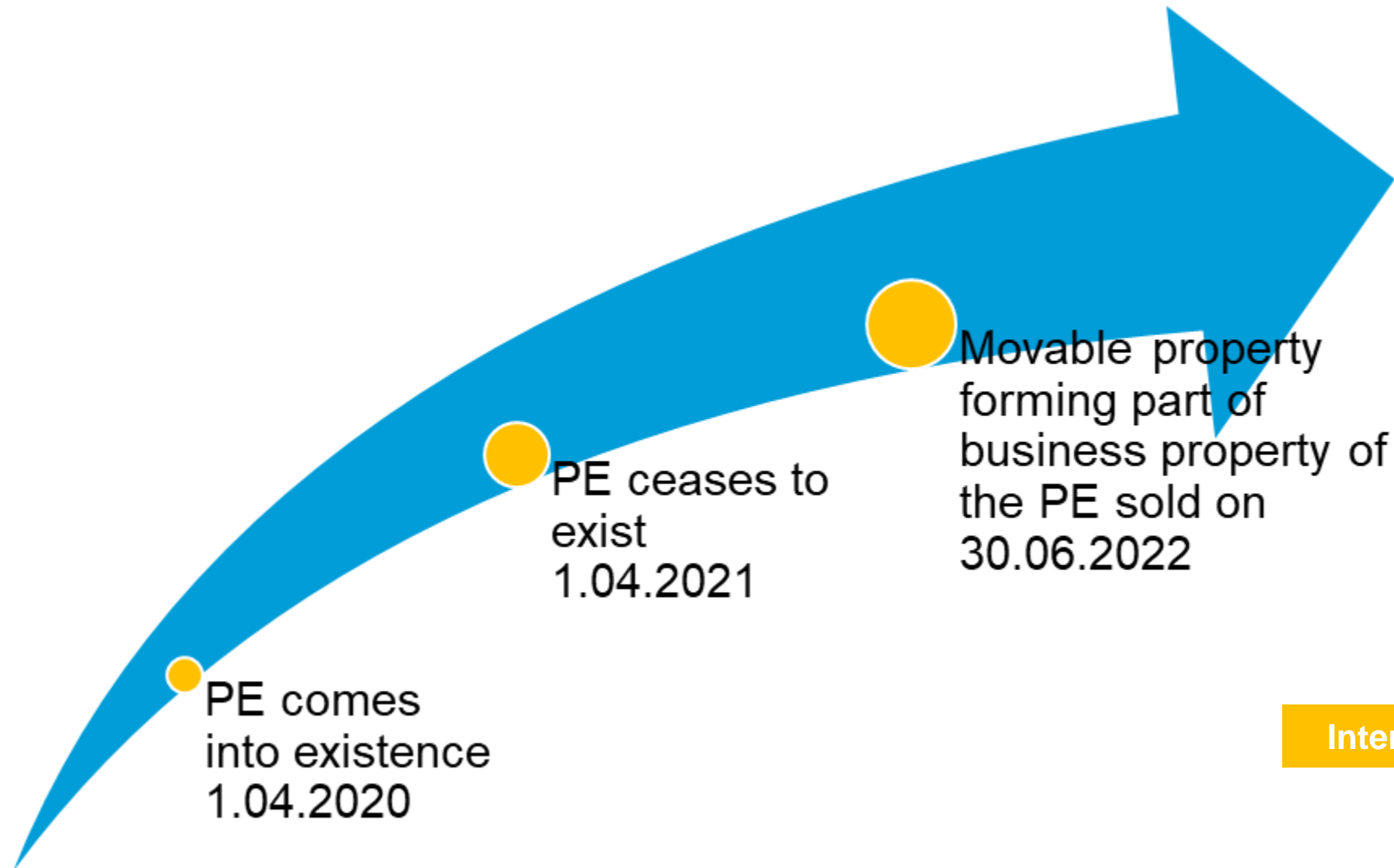


Law of the country where the asset is located is decisive to determine what constitutes immovable property

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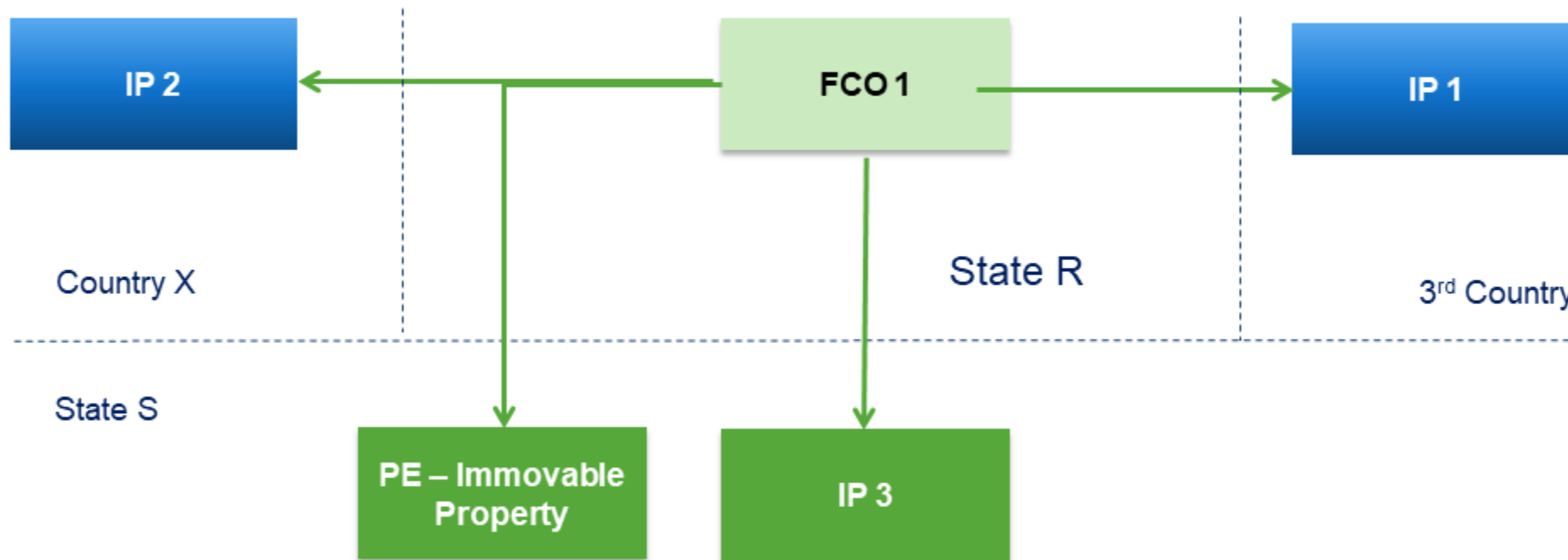
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ARTICLE 13(1) – TRANSFER OF IMMOVABLE PROPERTY

FCO 1 owns immovable property in State S, State R and 3rd Country, and has a PE in Source country which also owns immovable property



Transfer of which properties shall be taxable under Article 13(1) ?

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**ARTICLE 13(3) OECD
MODEL CONVENTION –
GAINS ARISING FROM
SHIPS OR AIRCRAFTS
OPERATED IN
INTERNATIONAL TRAFFIC**

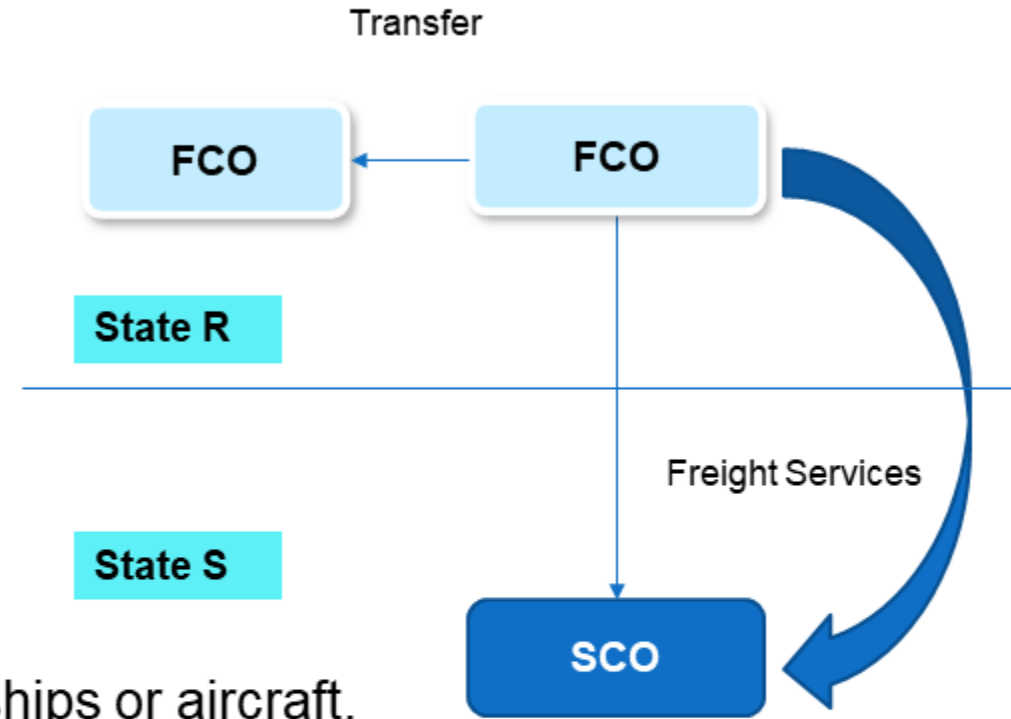


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Gains that an enterprise of a Contracting State that operates ships or aircraft in international traffic derives from the alienation of such ships or aircraft, or of movable property pertaining to the operation of such ships or aircraft, shall be taxable only in that State.



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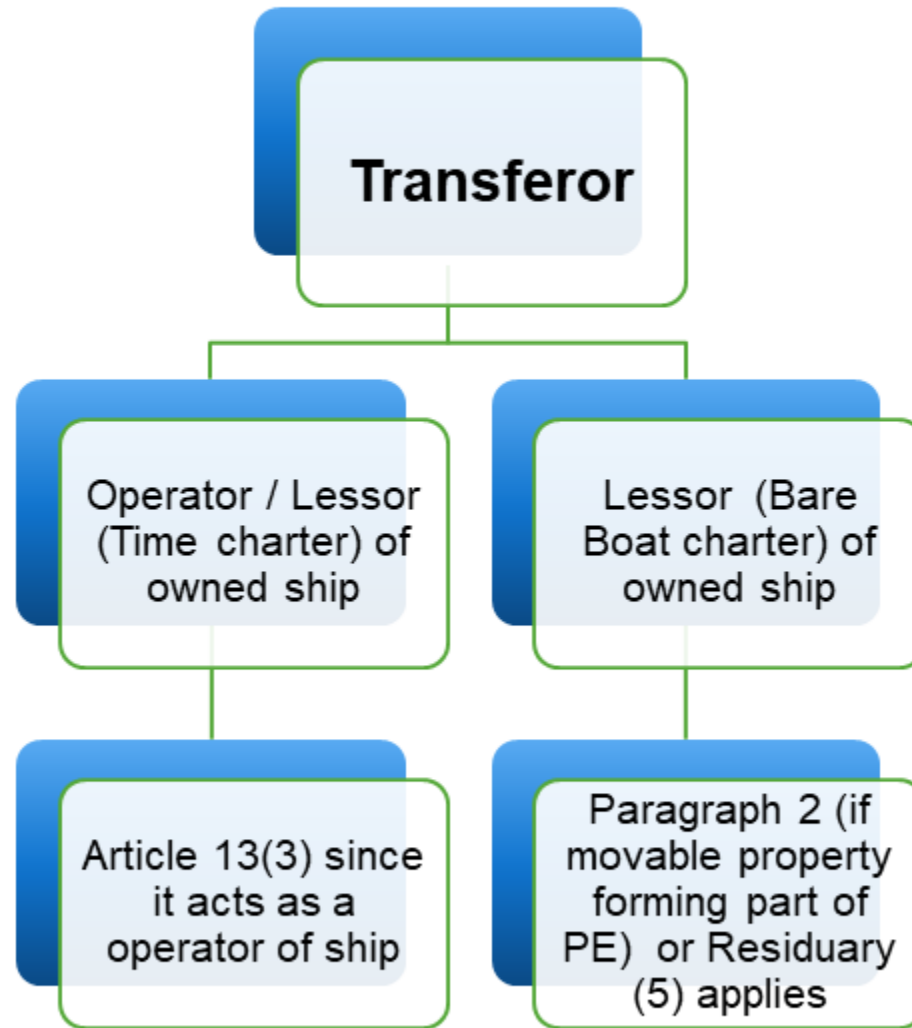


Taxable in the Contracting State of the Operator.

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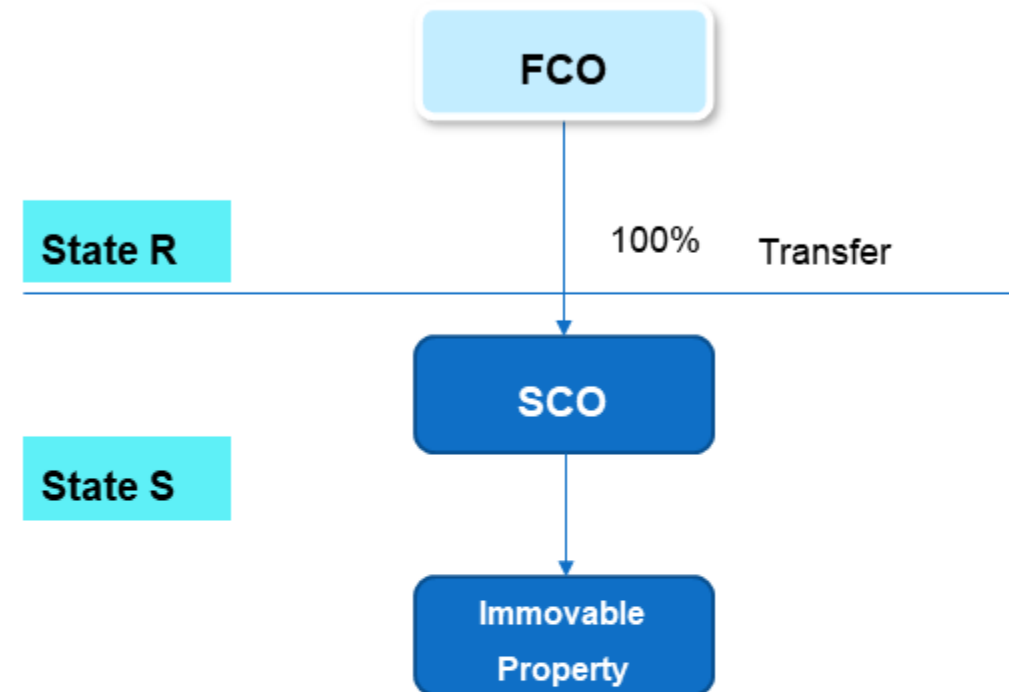


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ARTICLE 13(4) – GAINS ARISING FROM ALIENATION OF SHARES OF REAL ESTATE COMPANY



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ARTICLE 13(4) – GAINS ARISING FROM ALIENATION OF SHARES OF REAL ESTATE COMPANY

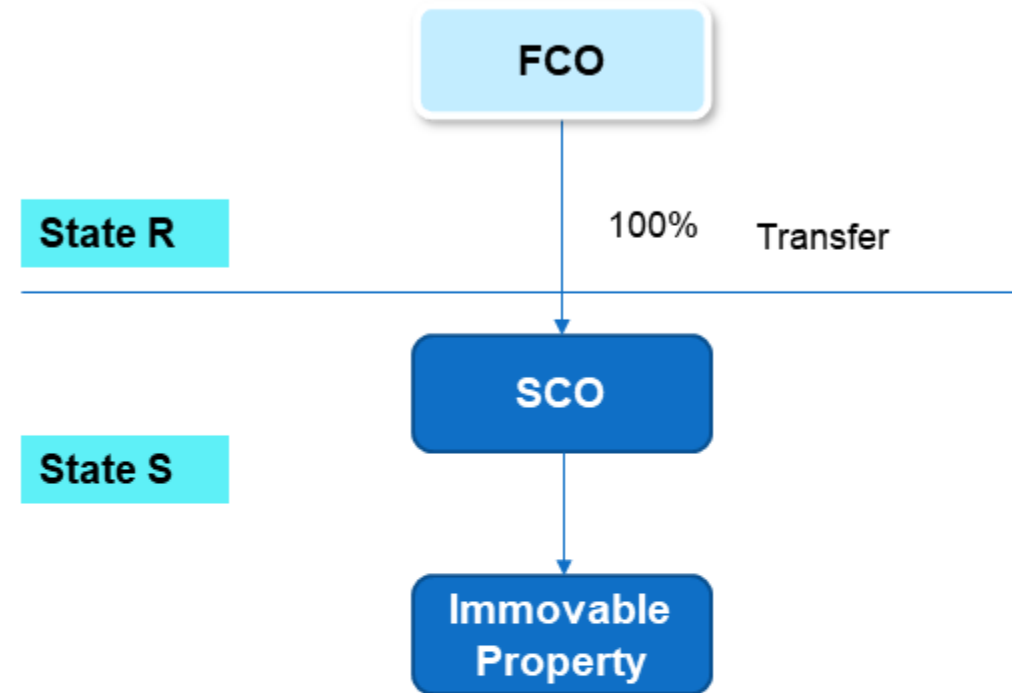
Gains derived by a resident of a Contracting State from the

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may be taxed in the other Contracting State if,

at any time during the 365 days preceding the alienation, these shares or comparable interests

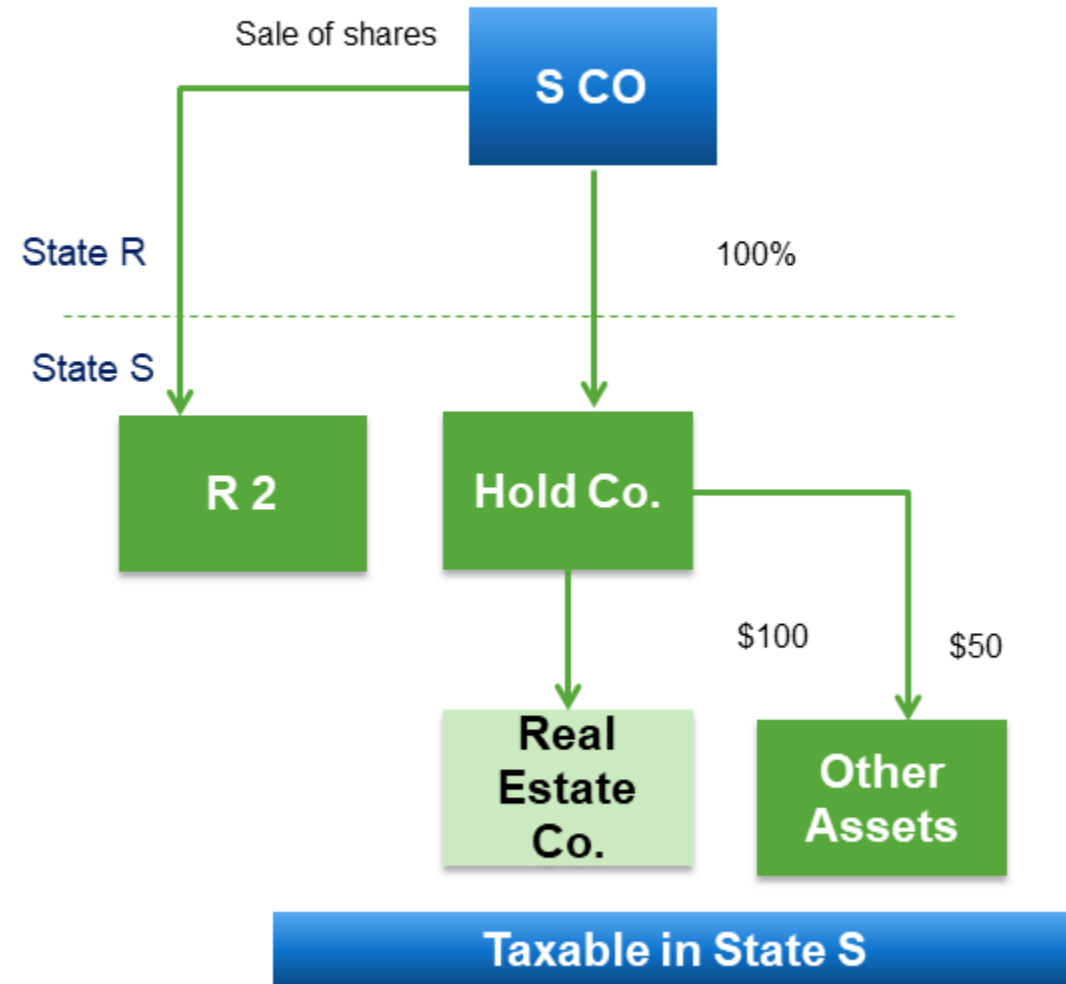
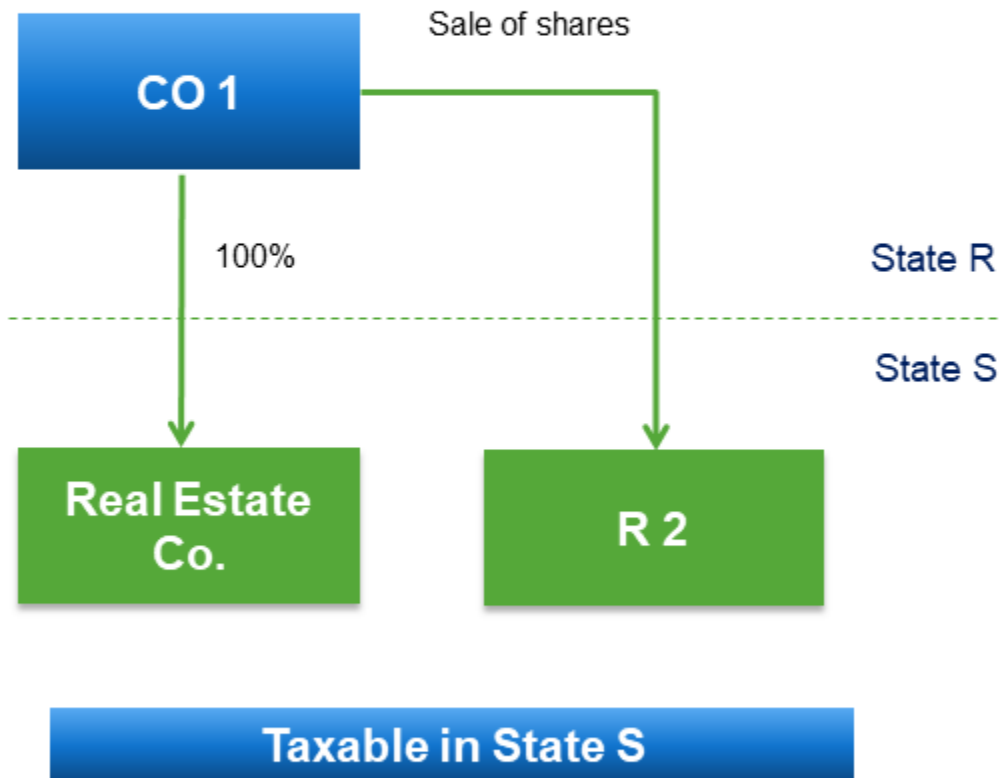
derived more than 50 per cent of their value directly or indirectly from immovable property, as defined in Article 6, situated in that other State.

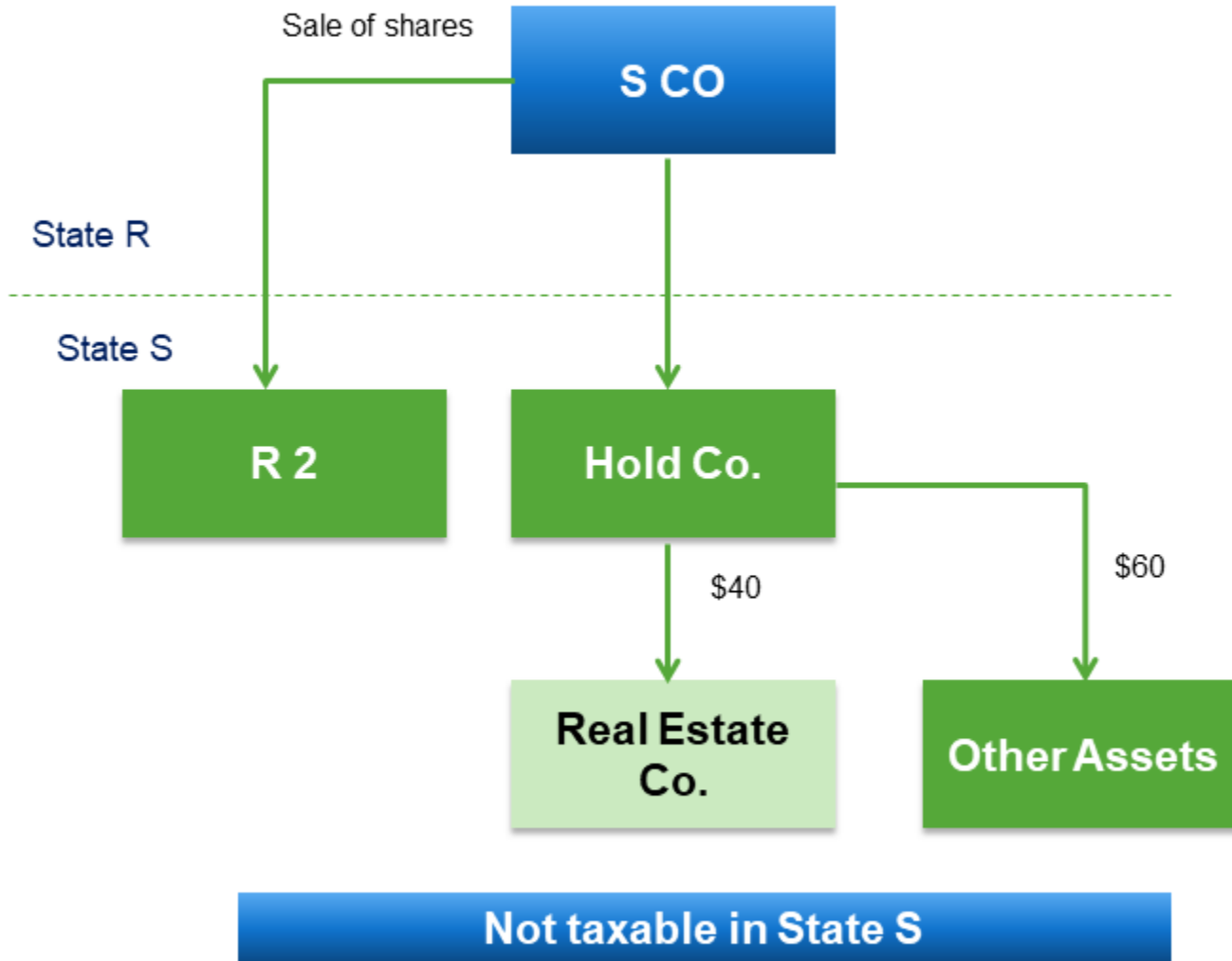


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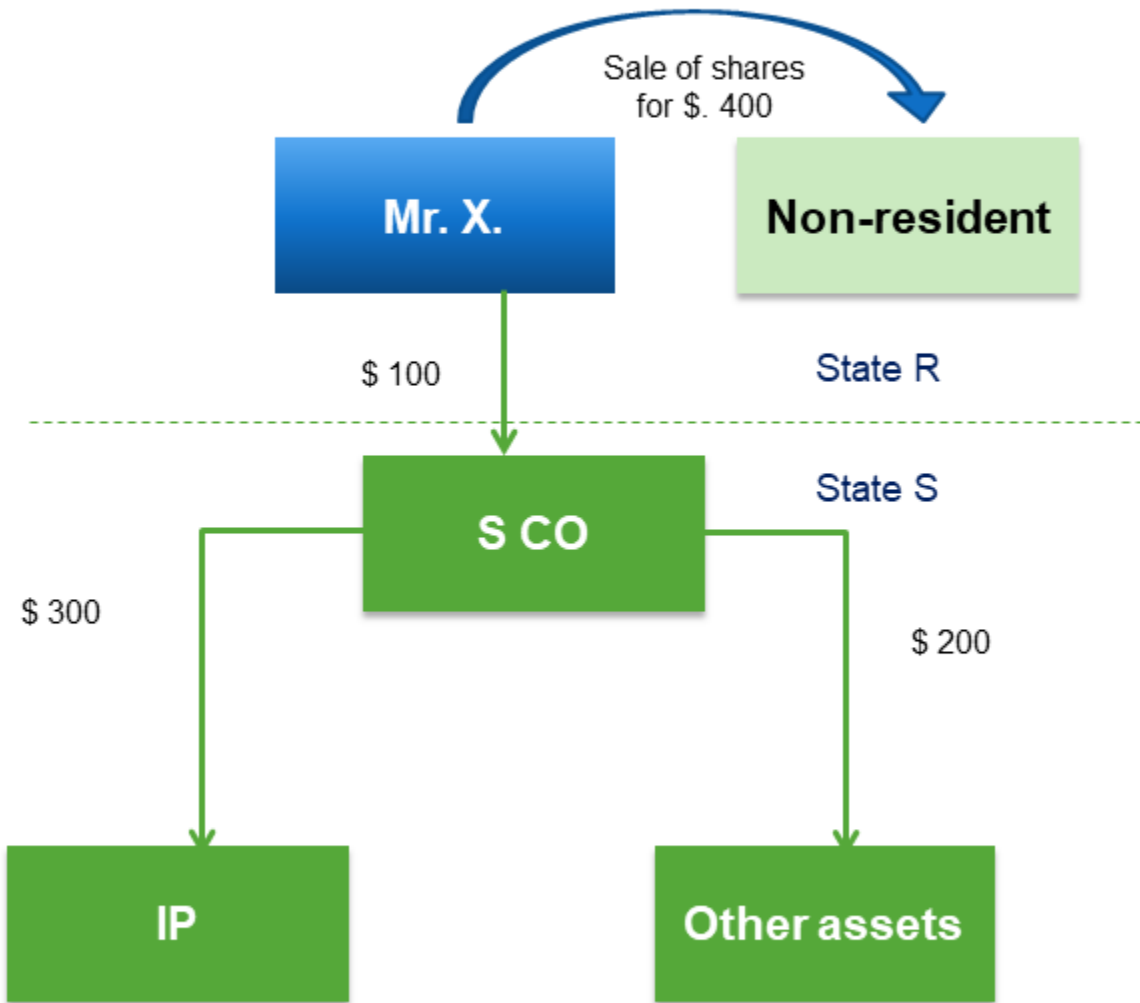




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Liabilities	Amount (USD)	Assets	Amount (USD.)
Share Capital	100	Immovable property	300
Reserve & Surplus	200	Other Assets	200
Loan for immovable property	200		
Total	500	Total	500

Facts:

- Mr. X owns entire Share capital of \$100 in S CO;
- S CO owns immovable property of \$300 & other assets of \$200;
- S CO has taken loan for immovable property of \$200;
- Mr. X sells shares of S CO to a NR for \$400, and derives Capital Gain of \$300.

Issue:

- Whether Capital Gain will be taxable in S CO ?

ARTICLE 13(5) OECD MODEL CONVENTION – ALIENATION OF ANY OTHER PROPERTY

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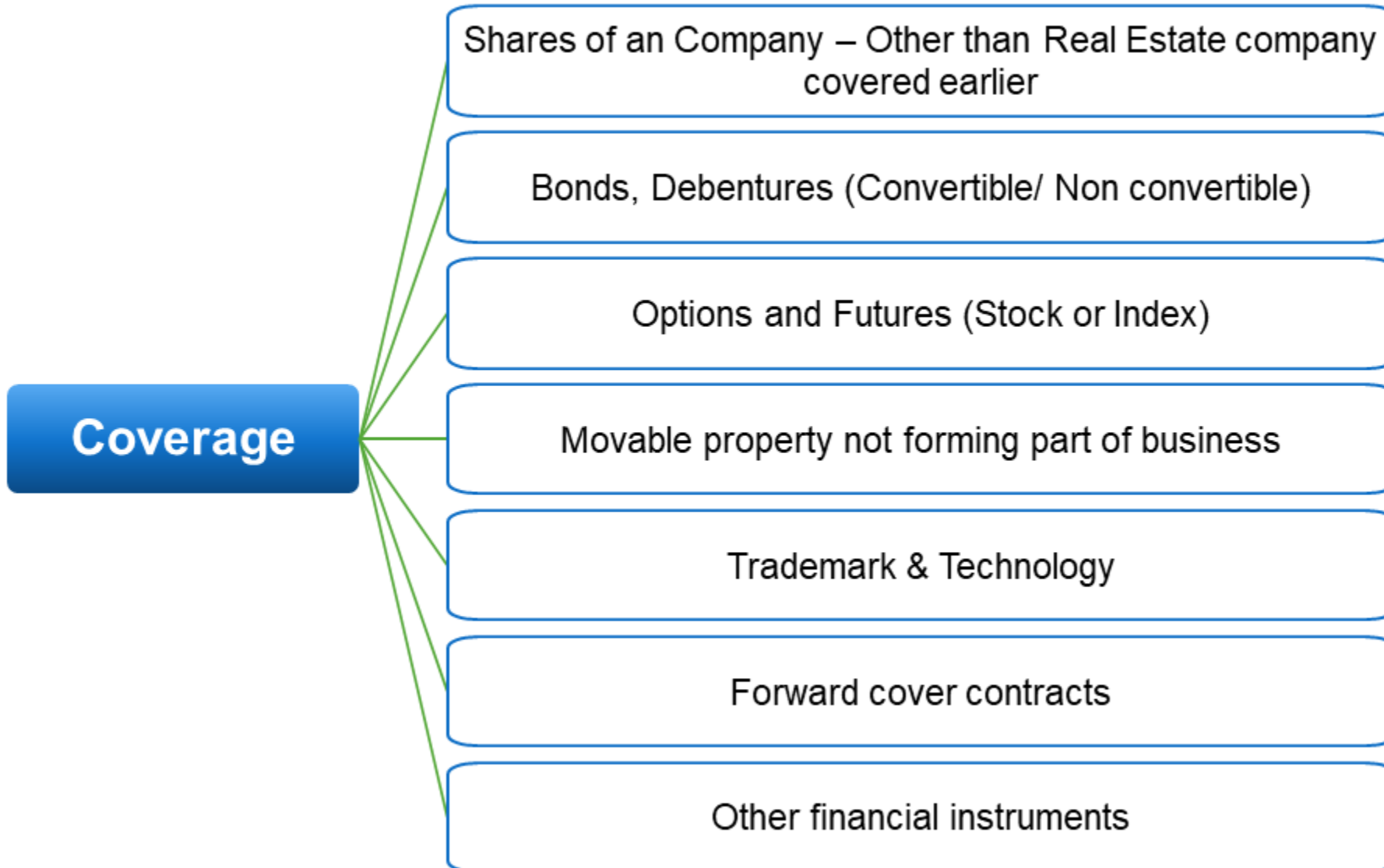
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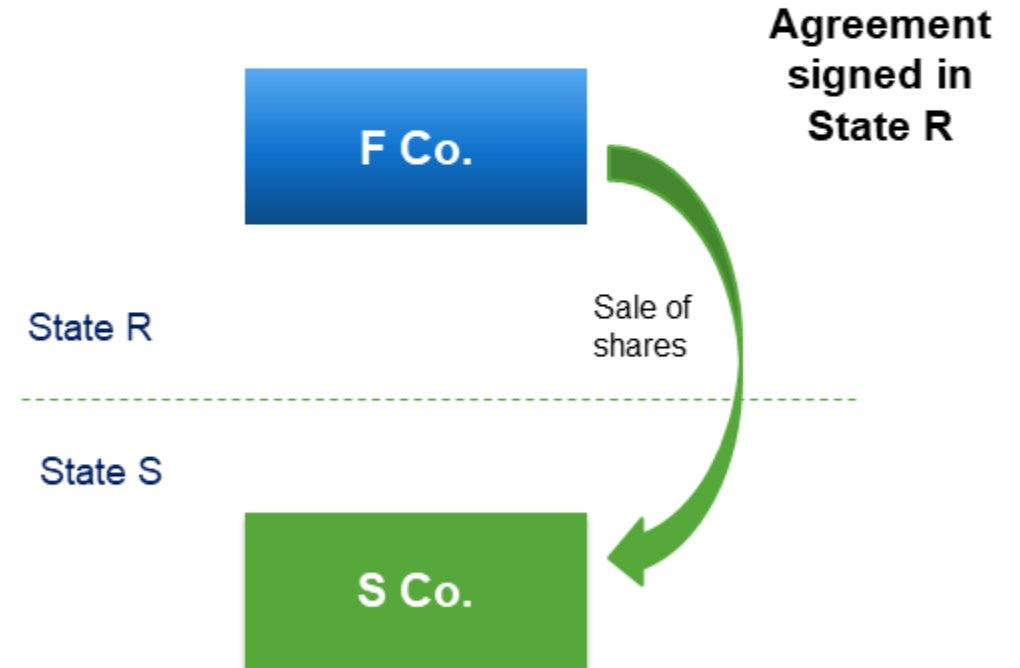
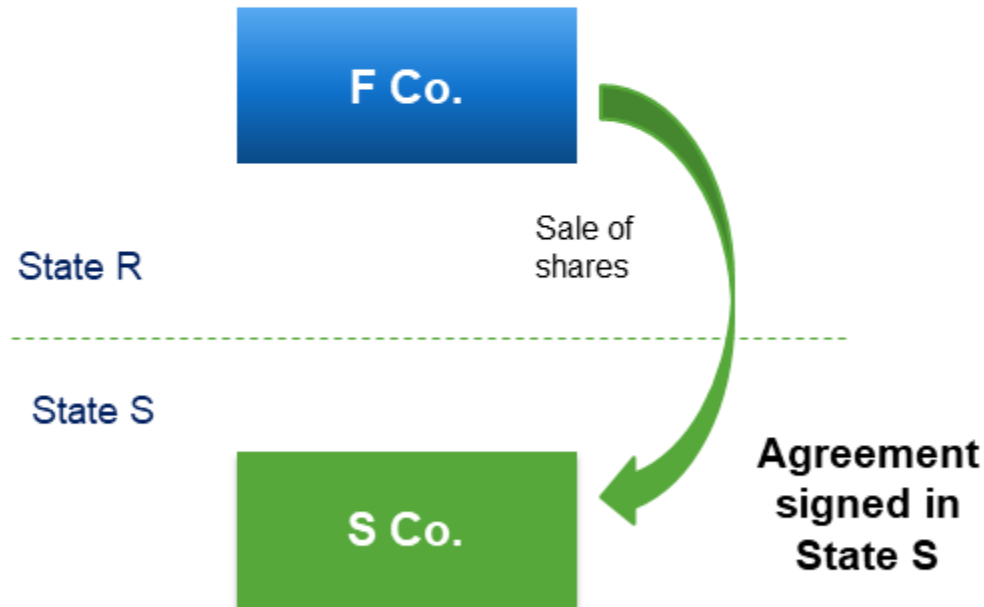
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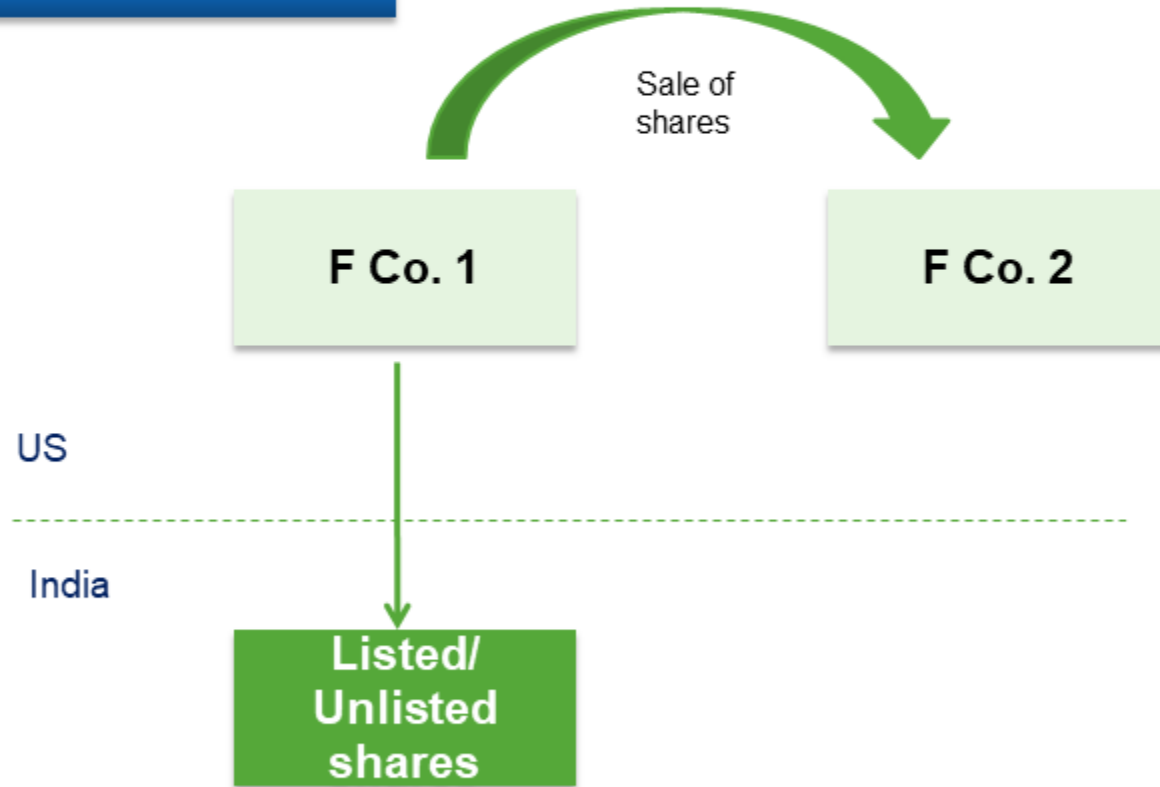
Place of signing the Sale agreement



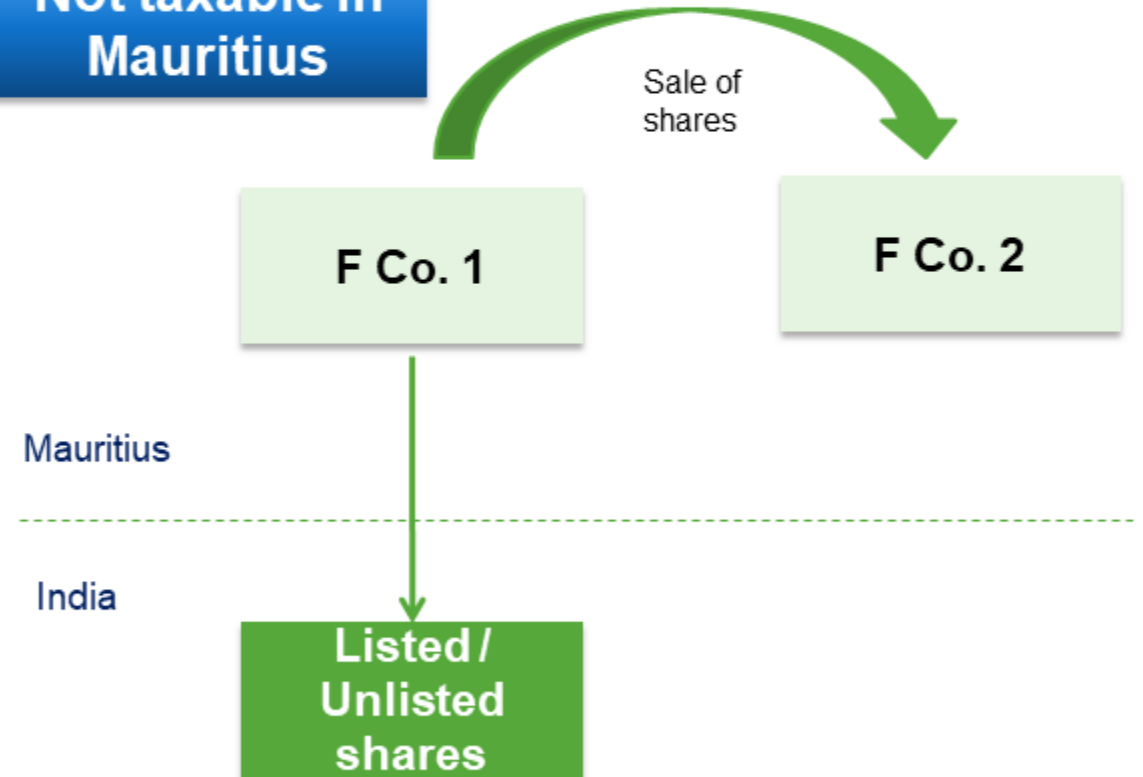
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Mode of taxation of Capital Gains in State of Residence

Taxable in US

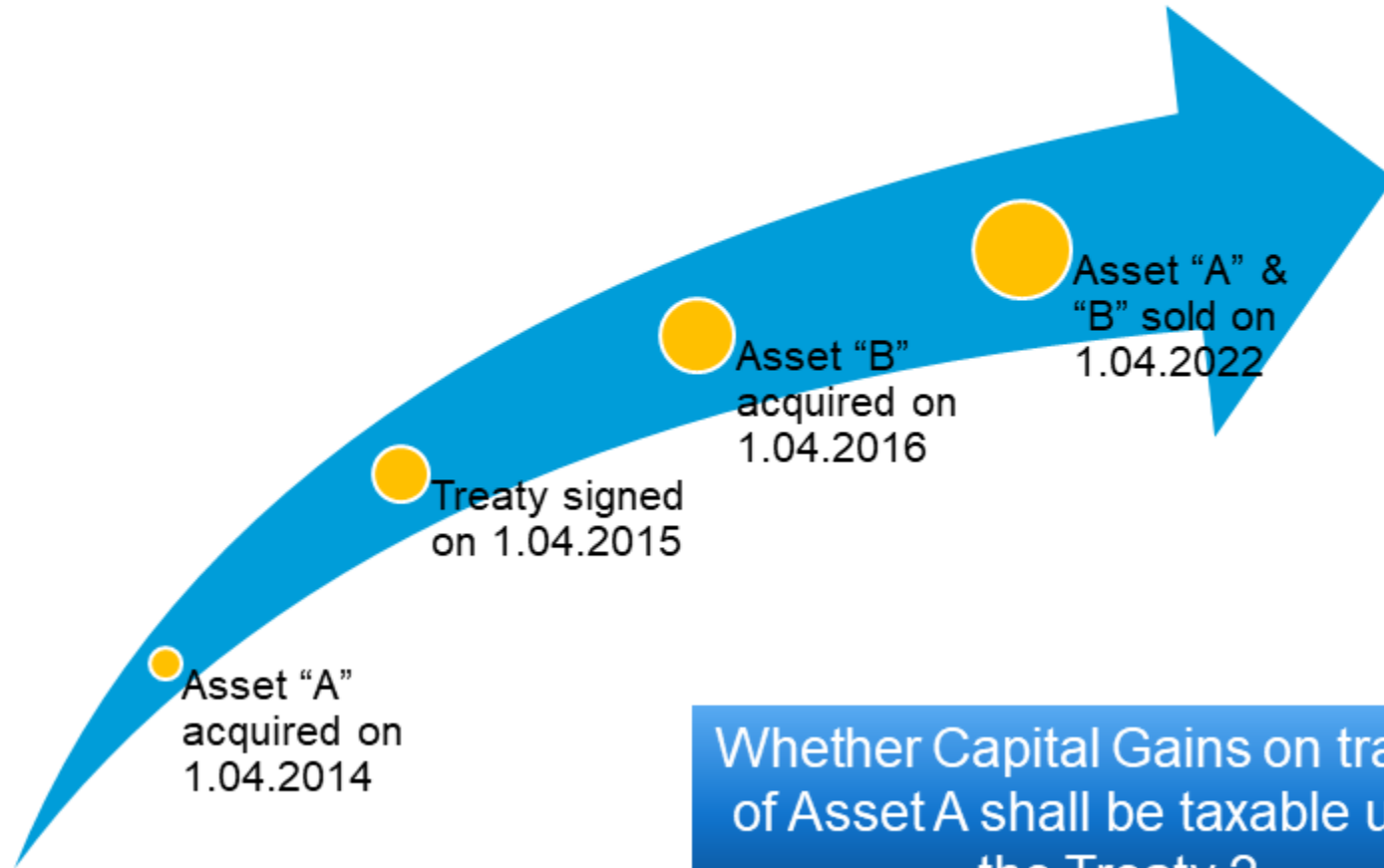


Not taxable in Mauritius



FACTORS NOT CONSIDERED TO BE RELEVANT WHILE APPLYING ARTICLE 13(5)

Timing of acquisition of assets – Before or after the Treaty signing



Whether Capital Gains on transfer of Asset A shall be taxable under the Treaty ?

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Article 13 does not provide methodology of computing income in Source State

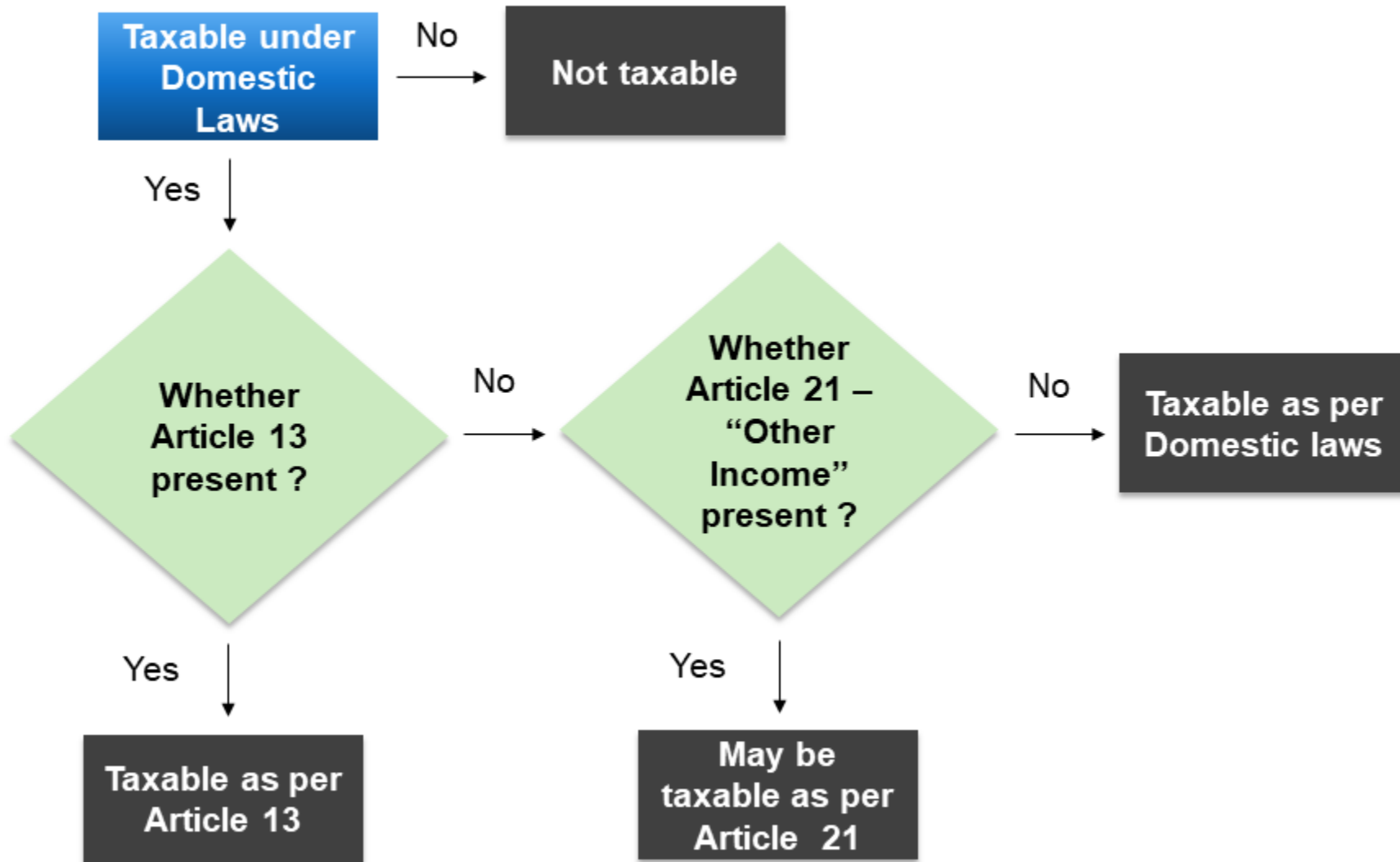
Taxable income should be computed as per Domestic law of Source State

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TAXATION OF CAPITAL GAINS

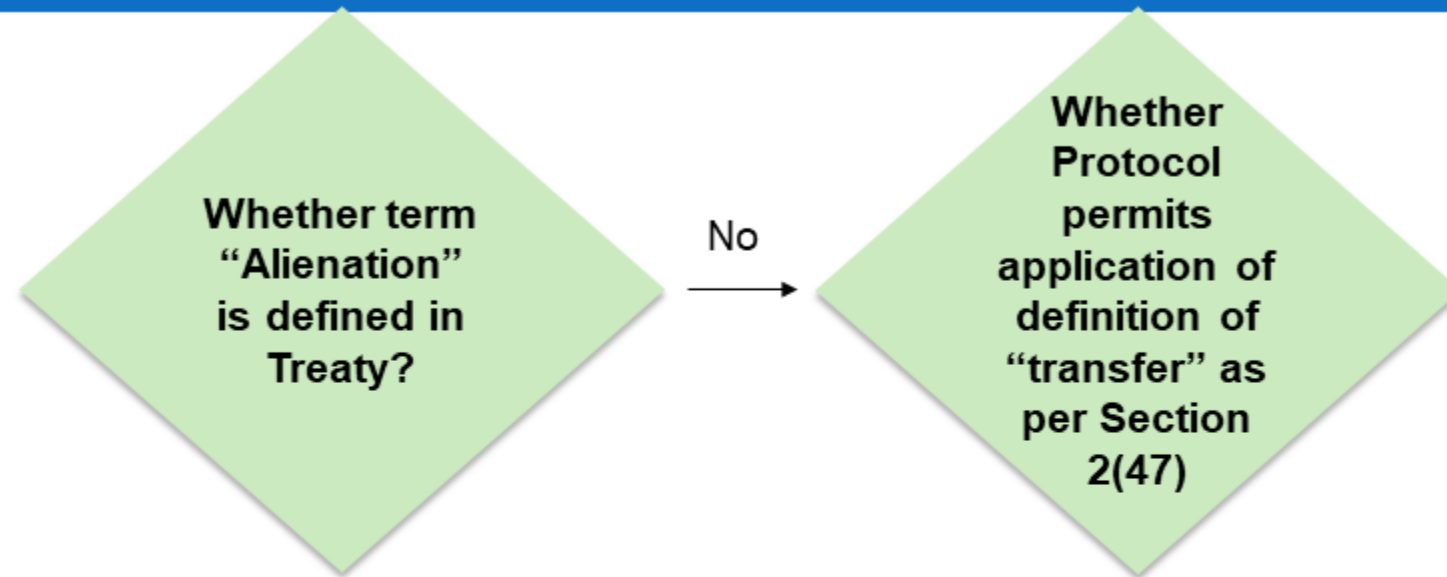


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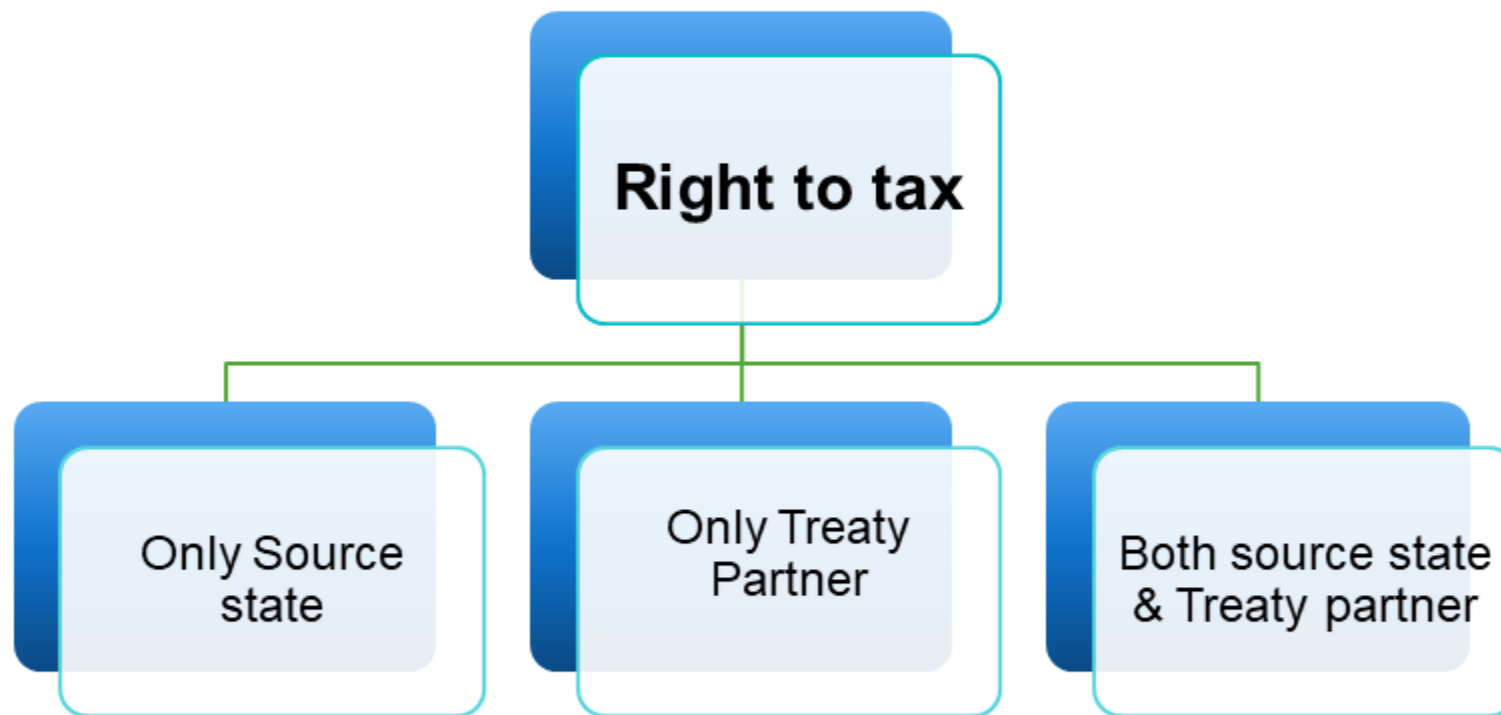
ALIENATION VS TRANSFER



India-Mauritius Treaty

India-Canada Treaty

If above conditions are not satisfied, definition of Transfer cannot be applied to ascertain meaning of "Alienation".

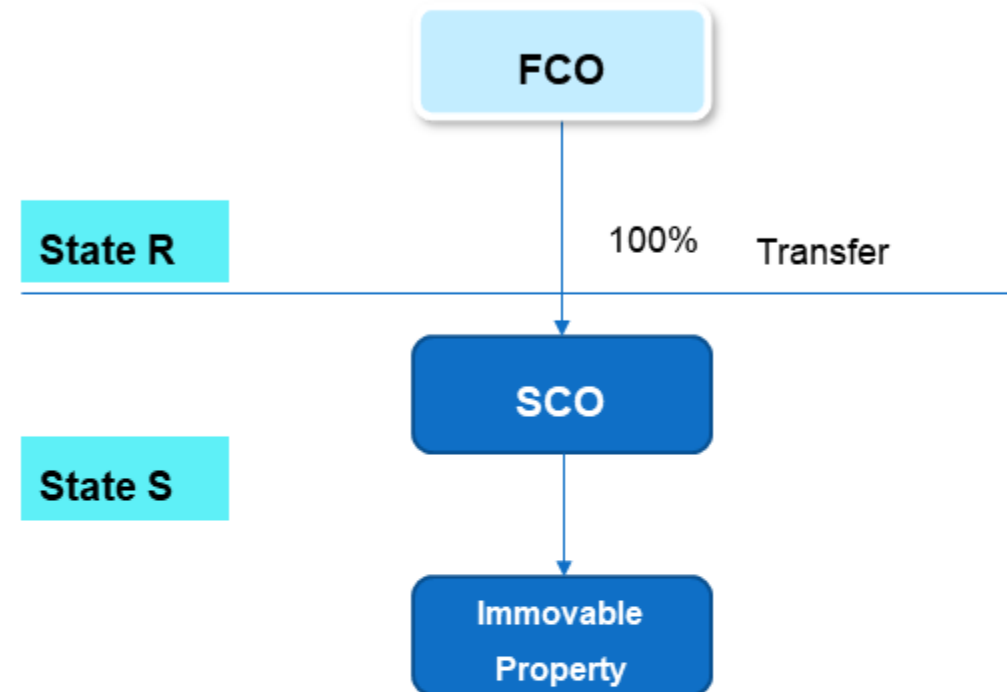


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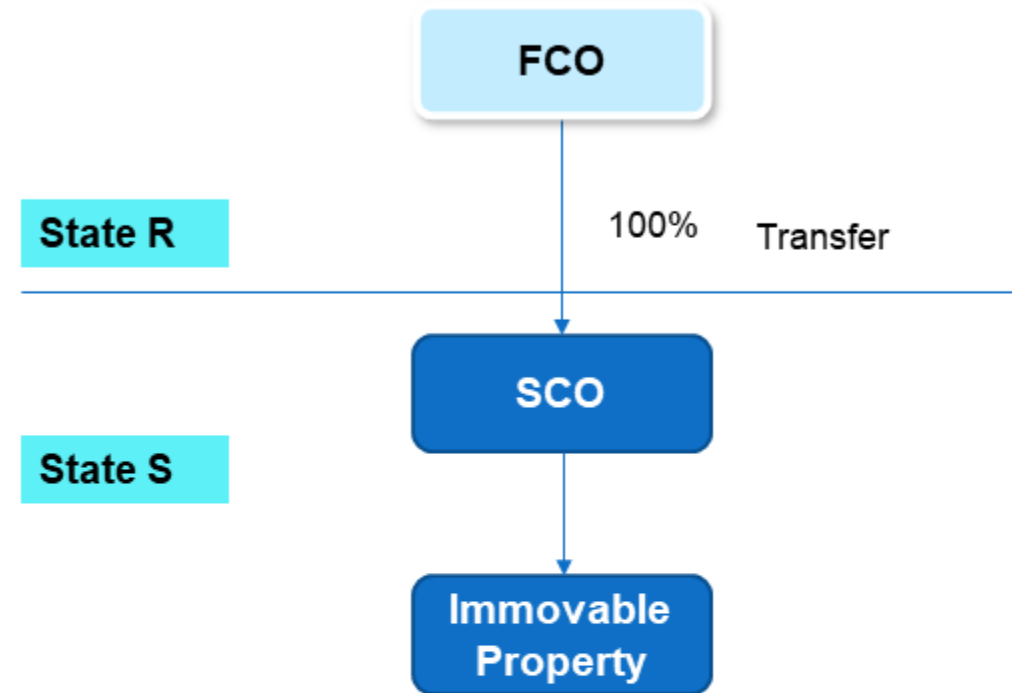
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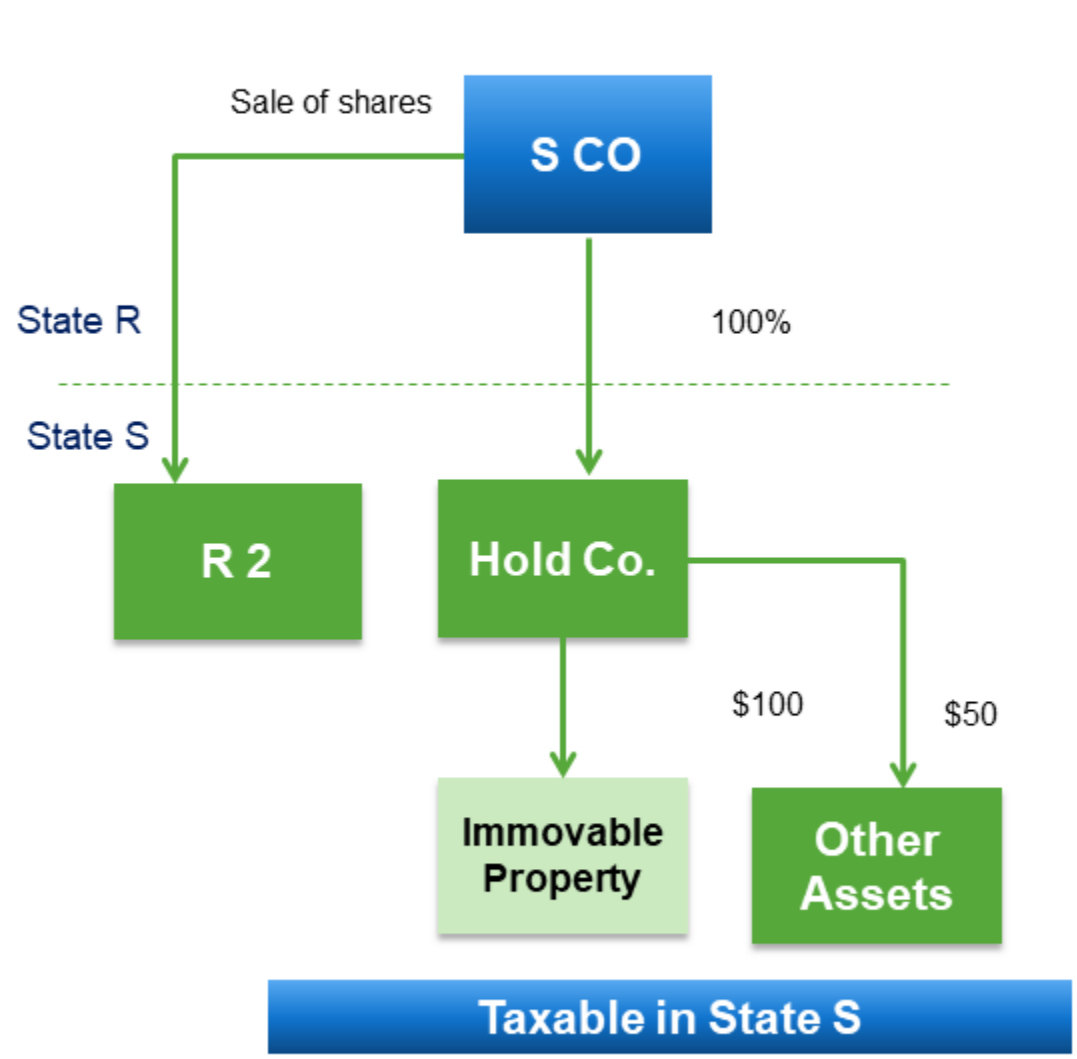
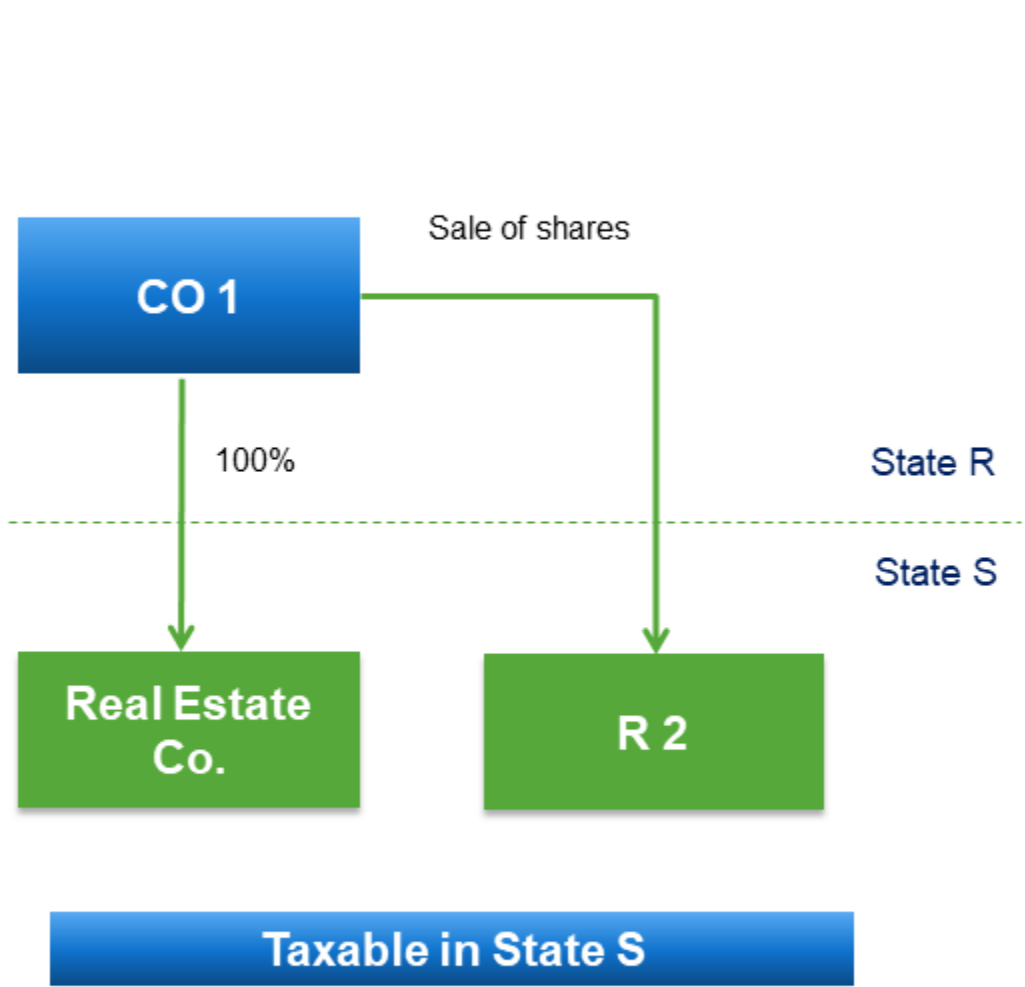
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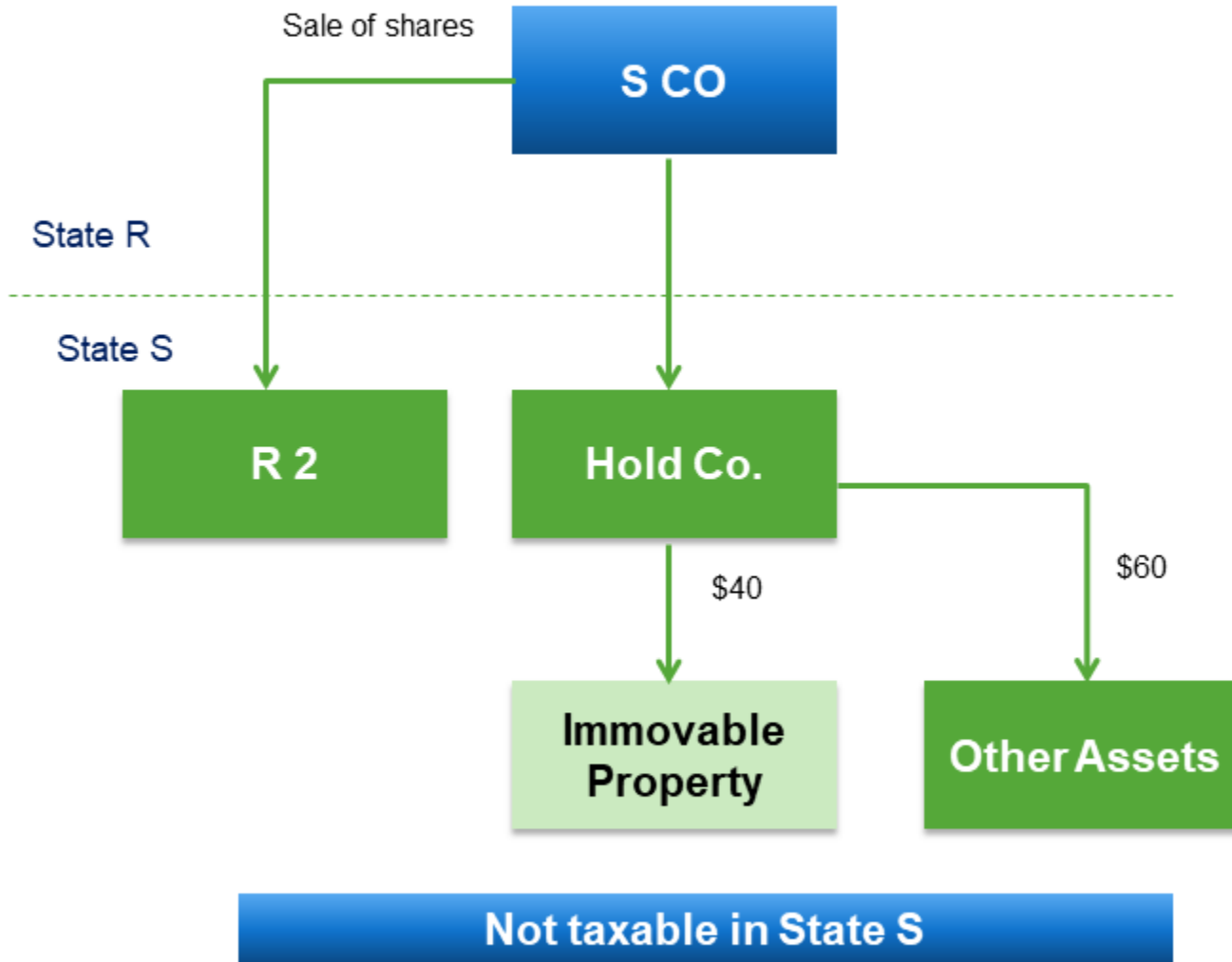


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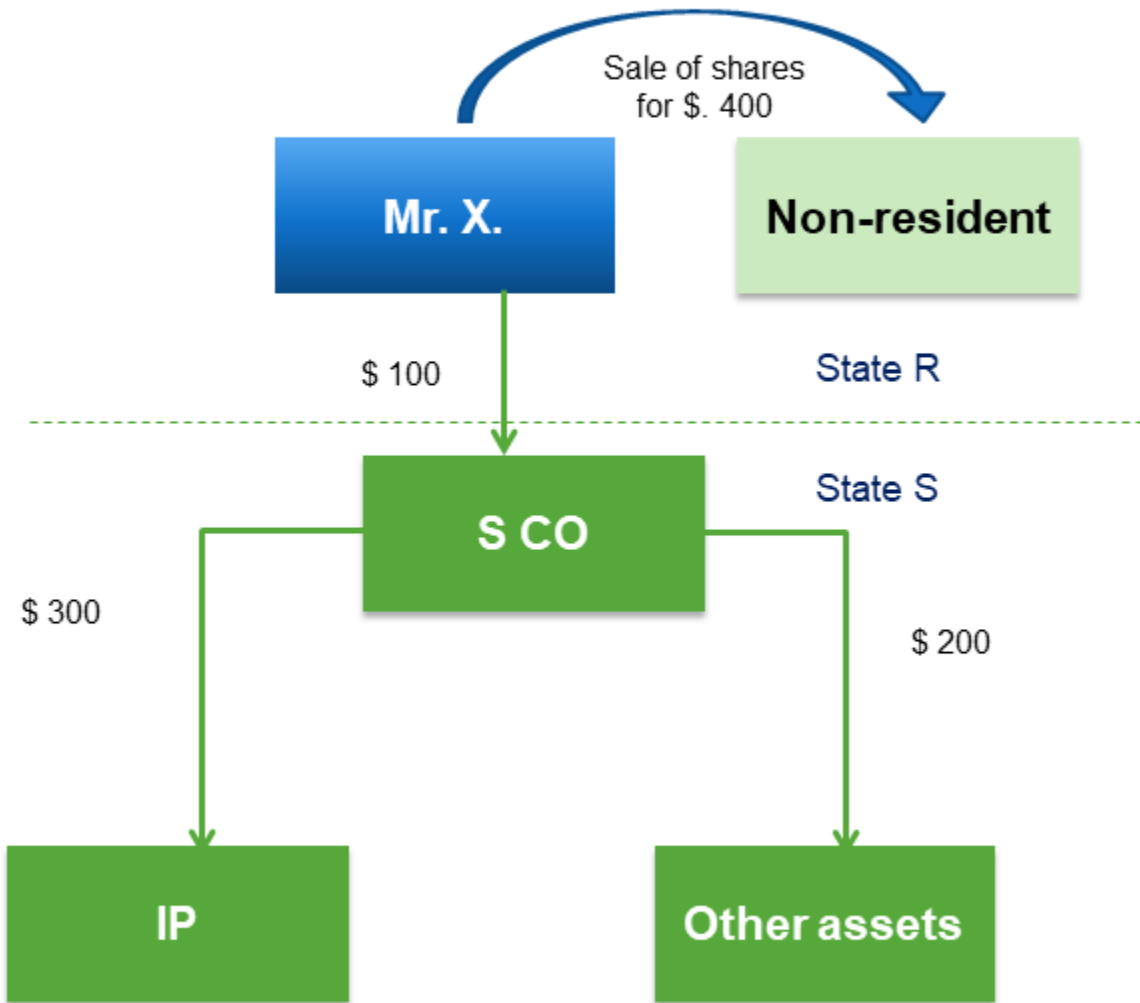




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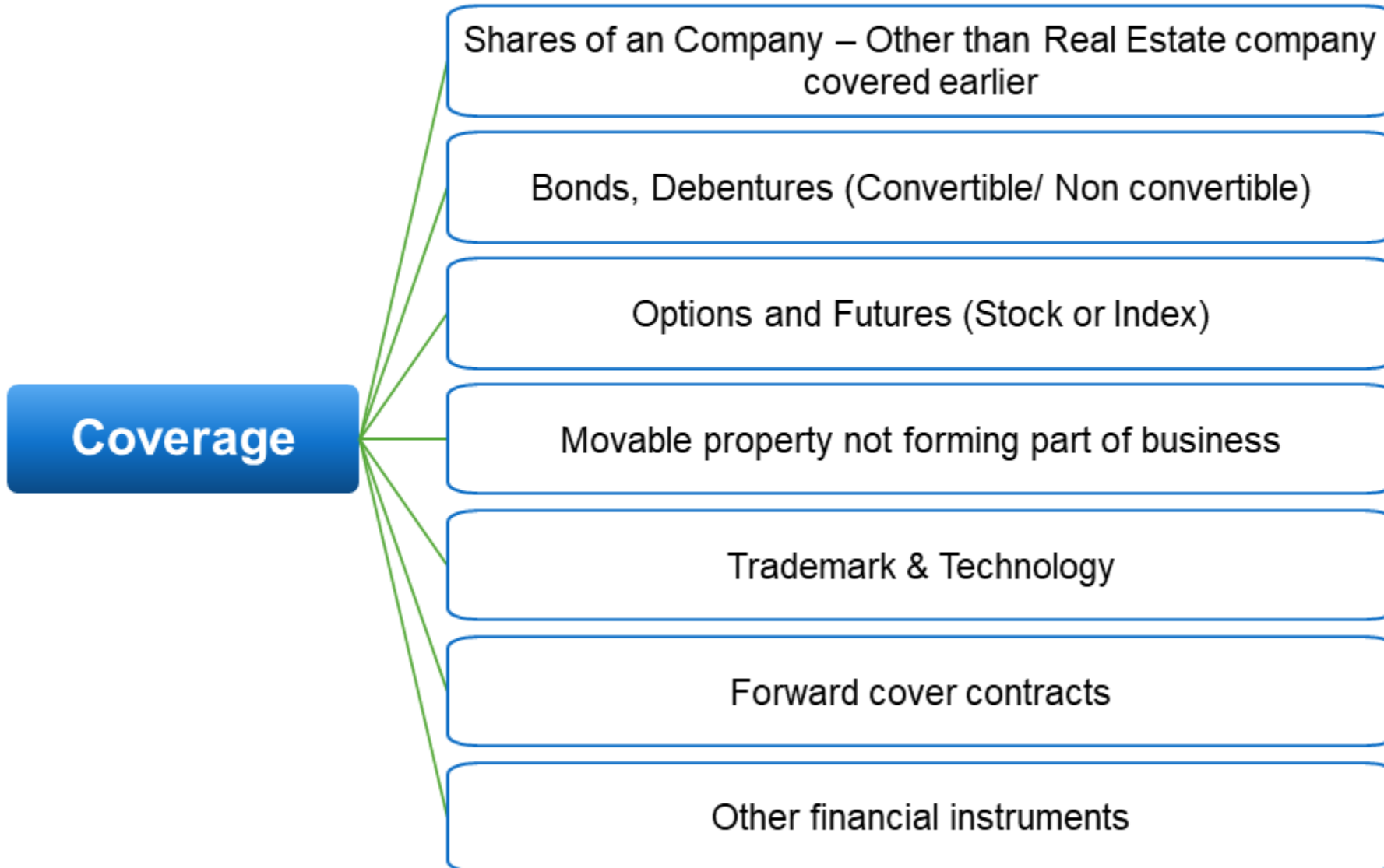
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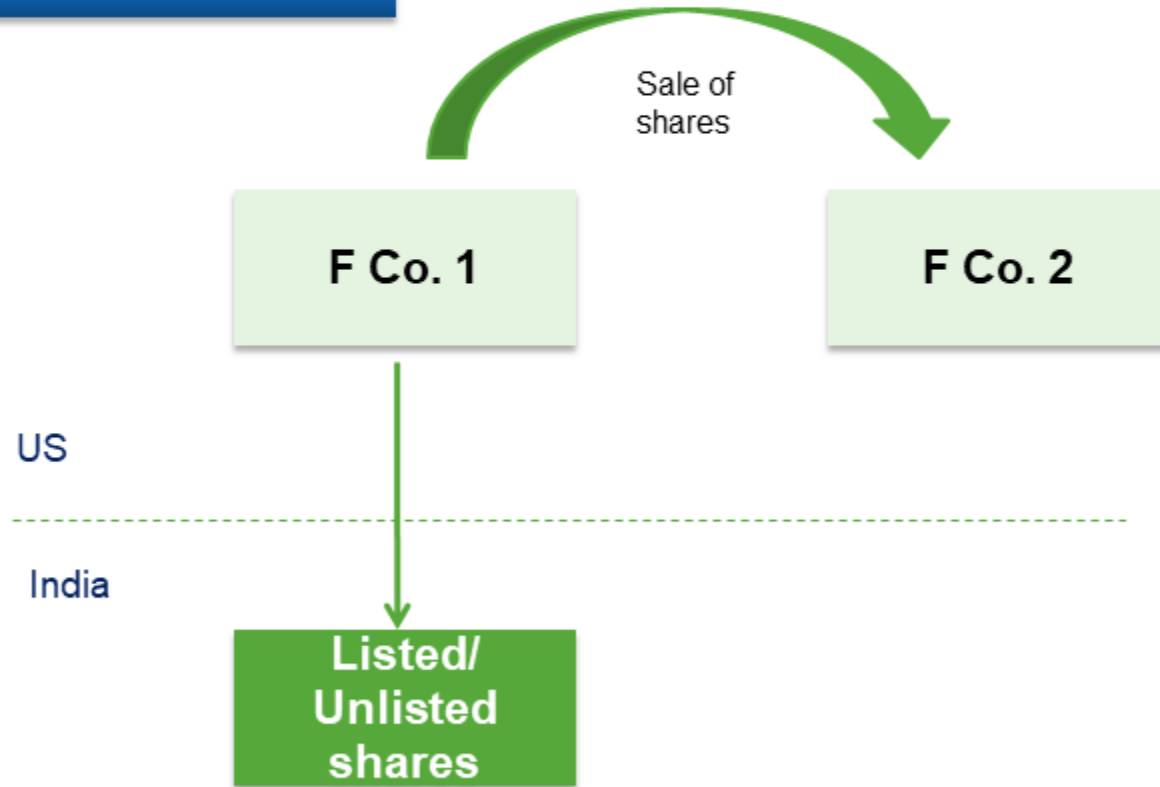
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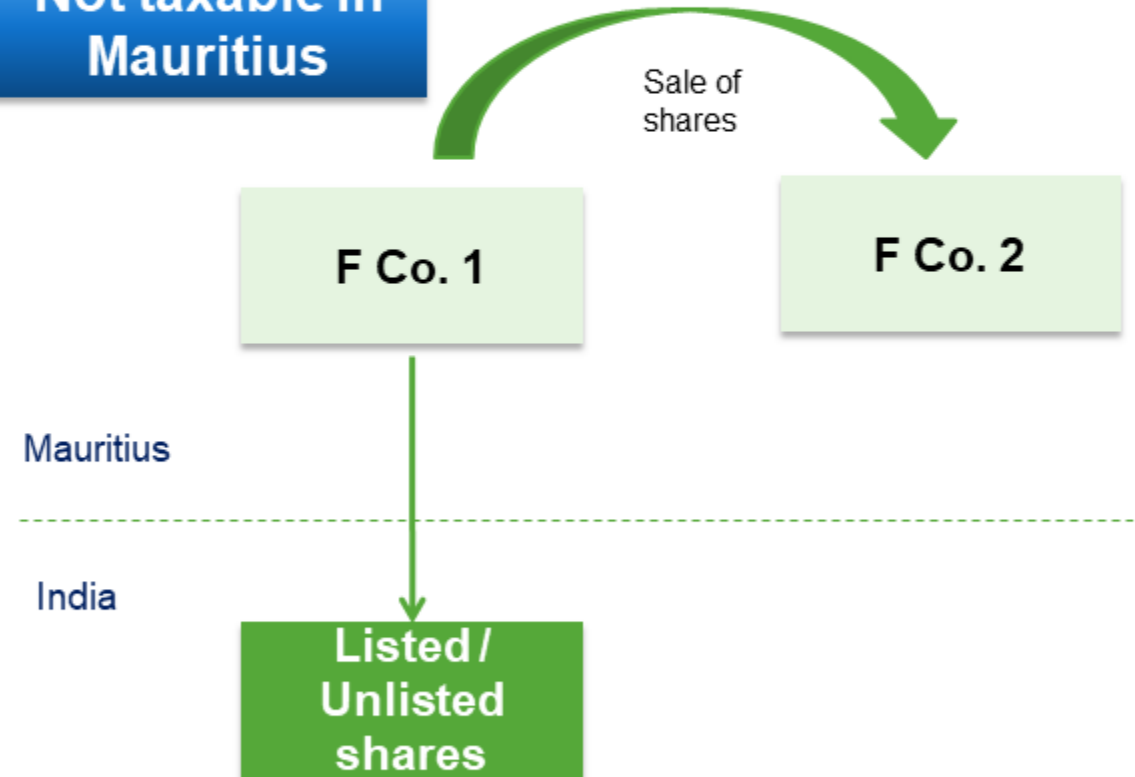
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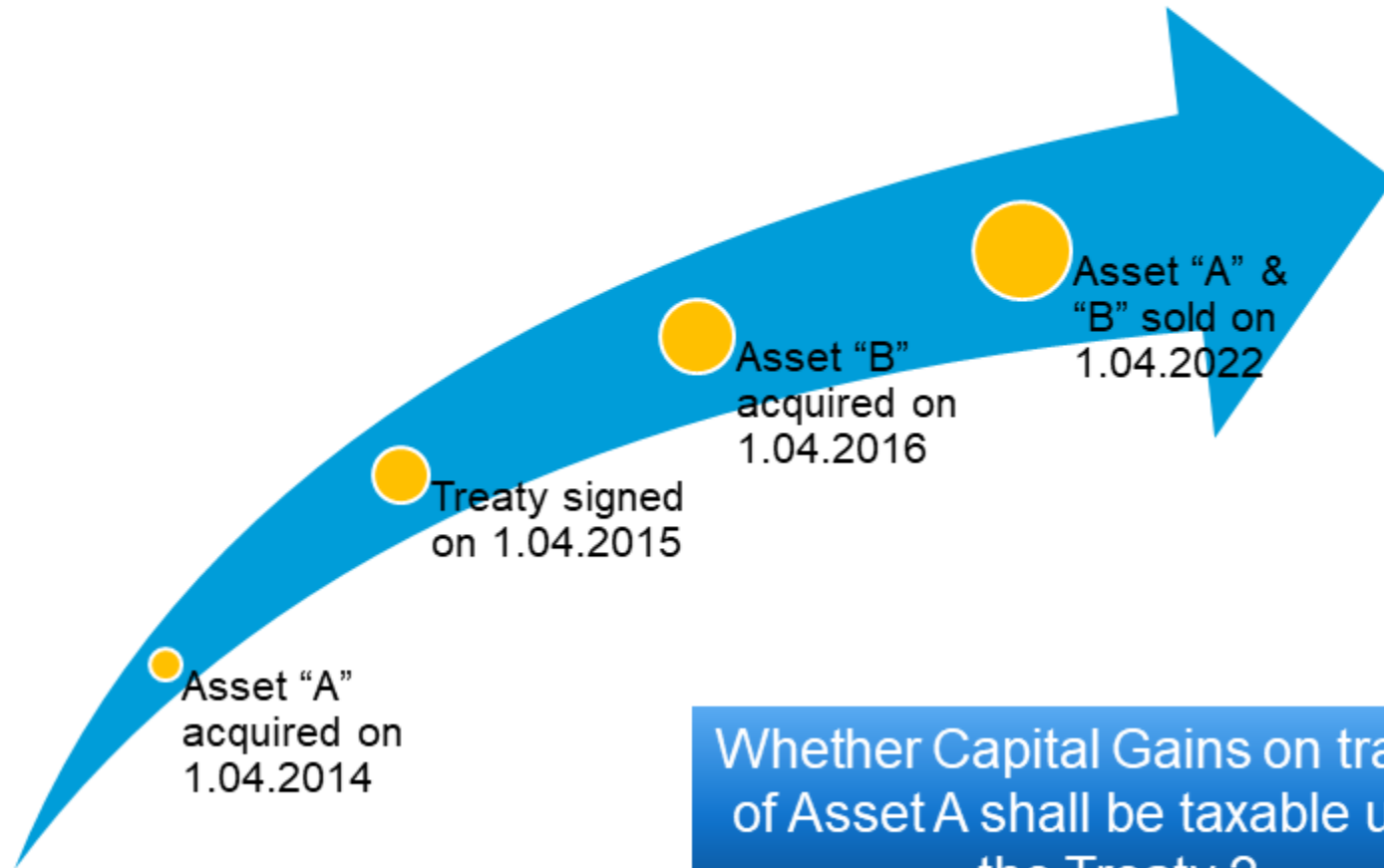


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- Arinjay has worked with over 500 UAE companies on UAE Economic Substance Regulations advisory services, and UAE Corporate Tax (proposed to be introduced from June 1, 2023) ;
- Delivered Live Seminar and Webinar on Economic Substance Regulations and 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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Double taxation avoidance
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