

# Investment in Education Sector

---

January 2018

---

## Investment in Education Sector

---

January 2018

[ndaconnect@nishithdesai.com](mailto:ndaconnect@nishithdesai.com)

# Contents

|   |           |
|---|-----------|
| <b>1. INTRODUCTION</b>  | <b>01</b> |
| I. Expected Growth in the Market Size   | 01        |
| II. Scalable Investment   | 01        |
| III. Migration to Quality   | 01        |
| <b>2. THE INDIAN EDUCATION SYSTEM</b>   | <b>02</b> |
| I. Pre-School   | 02        |
| II. Primary & Secondary Education   | 03        |
| III. Other General Aspects to be Considered While Setting up Schools            | 05        |
| IV. Higher Education  | 09        |
| <b>3. PARTICIPATION OF FOREIGN EDUCATIONAL INSTITUTIONS IN HIGHER EDUCATION</b> | <b>17</b> |
| I. Tie-ups with Indian Institutions for Twinning Programmes                     | 17        |
| <b>4. FOREIGN INVESTMENT IN THE EDUCATION SECTOR</b>                            | <b>20</b> |
| I. Possible Structure in Case of Schools & Higher Education                     | 21        |
| II. Other Segments of Investment in the Education Space                         | 22        |
| <b>5. TAXATION</b>  | <b>25</b> |
| I. On the Entity Setting up the Institution                                     | 25        |
| II. On the Education Services Company   | 25        |
| III. On the Foreign Investor  | 26        |
| <b>6. IDENTIFYING THE RIGHT OPPORTUNITIES</b>                                   | <b>29</b> |
| <b>7. CONCLUSION</b>  | <b>30</b> |

# 1. Introduction

The education sector in India has witnessed a paradigm shift in recent times. Once viewed largely as a charitable or philanthropic activity, it has since metamorphosed into an ‘industry’ in its own right.

So far, basic primary education and certain technical institutions for higher education, like the Indian Institutes of Technology (IITs) and the Indian Institutes of Management (IIMs) have been the mainstay of the Indian education sector. However, due to an increase in the competitiveness in the marketplace coupled with the increasing need to expand quality education at the grassroots level, policy makers in India have slowly but surely set the Indian education sector on the reforms track.

Several initiatives are being taken by the government to encourage investments in education sector including greater participation by Foreign Educational Institutions (“FEI”) and educational service providers. The Public Private Partnership (“PPP”) model has also been introduced in this sector to facilitate greater Foreign Direct Investments (“FDI”). In addition to this, efforts have been taken to develop strong collaborations between well-established foreign universities and Indian universities in order to facilitate greater academic exchange among students. Such progressive development has attracted the eye of private equity players and venture capital funds as well, who have also shown interest in this unique and emerging business opportunity, which balances investor returns with social responsibilities.

Various factors have contributed to the growing interest in the education sector. Some of these are:

## I. Expected Growth in the Market Size

According to a report by rating agency CARE Ltd, the market size of the Indian education industry is pegged around USD 100 billion and is expected to nearly double to USD 180 billion by 2020.<sup>1</sup> Education industry is thus attracting sizeable investment, most notably in primary, secondary and higher education.

Further, education sector has attracted FDI worth USD 1465.44 million during April 2000 to June 2017, according to the data released by the Department of Industrial Policy and Promotion (DIPP).<sup>2</sup>

## II. Scalable Investment

The absence of adequate educational facilities and institutions coupled with an overwhelming demand for quality education presents opportunities for operational scale-growth and top-line growth.

## III. Migration to Quality

Usually, students in private institutes mostly perform better than students in the Government-run institutes. Parents have come to recognize the difference in quality. This has resulted in the growth of international schools providing higher quality education.

Needless to say, all these measures go a long way in improving and enhancing India’s globally competitive skilled workforce.

1. Education sector in India, available at: <https://www.ibef.org/industry/education-sector-india.aspx> (last visited on January 03, 2018).
2. Fact Sheet on Foreign Direct Investment (FDI) From April, 2000 to June, 2017, available at: [http://dipp.nic.in/sites/default/files/FDI\\_FactSheet\\_June2017\\_2\\_0.pdf](http://dipp.nic.in/sites/default/files/FDI_FactSheet_June2017_2_0.pdf) (last visited on January 03, 2018).

## 2. The Indian Education System

Education falls in the Concurrent List of the Constitution of India i.e. both the centre and the states have the authority to legislate on it. In addition, the center has the power to determine standards for higher educational institutions while the states can incorporate and regulate universities through private or state university legislations.

At the centre, the Ministry of Human Resource Development (“MHRD”) is the nodal ministry for education. MHRD initiates and frames major policies relating to higher education and provides budgetary grant to the University Grants Commission (“UGC”).

The main objectives of MHRD include<sup>3</sup>:

- Formulating the National Policy on Education and to ensure that it is implemented in letter and spirit.
- Planned development, including expanding access and improving quality of educational institutions throughout the country, including in the regions where people do not have easy access to education.
- Paying special attention to disadvantaged groups like the poor, females and the minorities.
- Provide financial help in the form of scholarships, loan subsidies etc. to deserving students from deprived sections of the society.
- Encouraging international cooperation in the field of education, including working closely with the UNESCO and foreign governments as well as Universities, to enhance the educational opportunities in the country.

The other regulatory bodies involved in regulating and maintaining standards at the school/ higher education level include the

National Council of Educational Research and Training (“NCERT”), the UGC, and the All India Council of Technical Education (“AICTE”). State governments are responsible for providing grants and for establishment of state universities and colleges. At the state level, the Department of Education and the State Council of Educational Research and Training (“SCERT”) have important roles to play.

The education sector in India comprises of pre- school, primary and higher secondary education. This is then followed by the higher education segment, which includes professional and technical education. In addition, the segment also comprises of vocational training, coaching classes, distance education through e-learning platforms and the like. With different regulatory bodies governing each segment of the education sector, all such segments are fraught with their unique challenges.

### I. Pre-School

The day care and pre-schools segment (also known as kindergarten in India) is currently unregulated in India except in a few states such as Delhi, Karnataka, Andhra Pradesh etc. The National Commission for Protection of Child Rights has, on January 2, 2017,<sup>4</sup> released the “Regulatory Guidelines for Private Play Schools” (“Guidelines”). The objective of these Guidelines is to regulate private play schools (referred to by varied names such as play groups, play schools, pre-schools, nursery schools etc.) for children of the age of three to six year.

The Guidelines, inter alia provide:

- that playschools cannot be established without the recognition of the competent authority;
- minimum mandatory requirements to establish and run a play school;

3. See <http://mhrd.gov.in/node/16> (last visited on December 26, 2014).

4. <http://ncpcr.gov.in/index1.php?lang=1&level=1&&sublinkid=690&lid=1048>

- every private educational institution coming under the purview of these Guidelines is required to include the word 'play school' in its name;
- fees charged by the play school is to be regulated by the appropriate government, collected on monthly or quarterly basis, and accounts are to be audited.

These Guidelines however provide the option to the states to notify these Guidelines or adopt content of these Guidelines as legislation to regulate private play schools in their respective States. Thus, they are merely recommendatory in nature.

These Guidelines are also not applicable to institutions/organizations/establishments/centres/or any such entity providing any kind of early childhood services to children in the age group of 0-3 years

Given the fact that most of the states have not included pre-primary schools within their regulatory ambit, many pre- primary schools have been set up across the country.

Absence of regulatory bottlenecks, low investment costs and ability to expand in geography using the franchise structures and high rate of return on investments has led to the establishment of various such schools across the country. Kangaroo Kids, Eurokids, Kidzee are some such names in the pre- school segment which operate in various cities of India.

## II. Primary & Secondary Education

Unlike pre-schools, primary & secondary education in India is subject to regulatory control, and educational institutions need to comply with central as well as state-specific regulations (unless expressly excluded).

The first and the foremost step toward providing primary & secondary education is to obtain necessary permissions from government authorities for setting up a school. Further, affiliation to one of the following key boards/ authorities is necessary in order to ensure recognition of the education and qualification provided by the school.

- Central Board of Secondary Education
- Council for the Indian School Certificate Examinations
- International Baccalaureate (“IB”) from Geneva
- State Boards

### A. Central Board of Secondary Education (“CBSE”)

The CBSE functions under the overall supervision of the Department of Education which comes under the MHRD.<sup>5</sup> It was set up with the view to:

- prescribe conditions of examinations and conducting public examinations at the end of Class X and XII;
- grant qualifying certificates to successful candidates of the affiliated schools;
- prescribe and update the course of instructions of examinations;
- affiliate institutions for the purpose of examinations and to raise the academic standards of the country.<sup>6</sup>

Schools partaking examination pattern prescribed by CBSE are required to be associated or affiliated with them. Affiliation to the CBSE is governed by its affiliation bye-laws which prescribe certain pre- conditions and requirements.

5. Central Board of Secondary Education, CBSE Overview, available at: <http://cbse.nic.in/newsite/aboutCbse.html> (last visited on January 03, 2018).

6. *Ibid.*

## B. Council for the Indian School Certificate Examinations (“CISCE”)

CISCE is a private, non-governmental board of school education and conducts two examinations in India: the Indian Certificate of Secondary Education (“ICSE”) and the Indian School Certificate (“ISC”). The ICSE Examination presupposes a school course of ten years duration (Classes I to X).

The ISC Examination on the other hand has been designed as an examination after a two-year course of studies beyond the ICSE Examination (Class X) or its equivalent. However, no permission for running a ISC course of study is given unless the school also runs an ICSE programme i.e. Class X.

Similar to the CBSE, schools intending to follow the CISCE course of study and examination are required to be affiliated with the CISCE. Affiliation to the CISCE is also governed by its own guidelines for affiliation much like the CBSE.<sup>7</sup>

## C. IB Schools

International Baccalaureate Organization (“IBO”) is a non-profit educational organization based in Geneva, Switzerland. IBO is not associated with any particular country and runs its programme across several nations.<sup>8</sup> In India, there are more than hundred IB World Schools offering one or more of the three IB programmes. Seventy five (75) schools offer the Primary Years Programmes, twenty eight (28) schools offer the Middle Years Programme and one-hundred and sixteen (116) schools offer the Diploma Programmes.<sup>9</sup>

The IB Diploma, at par with +2 stage qualifications, is recognized by the Association of Indian Universities (“AIU”) for equivalence purposes i.e. a process under which AIU assesses the similarity of studies and grants a certificate recognizing such similarity by issuing an equivalence degree certificate. Since 1983, IB Diploma awarded by the IBO has been equated with +2 stage (Grade 12) qualification of an Indian Board, for the purposes of admitting students to Bachelor’s degree programmes at Indian universities. However, only about 223 universities currently recognize the IB Diploma.<sup>10</sup> Several colleges and universities do not recognize the IB Diploma, despite the fact that it is recognized by AIU.<sup>11</sup>

While the affiliation bye-laws / guidelines of CBSE and ICSE schools require that schools can only be set up by a non-profit entity, no such rules/ bye-laws are prescribed for IB schools. However, IB schools are also subject to local compliances. Since the local law of most of the States (except Haryana) require that schools should be set up on a not-for-profit basis, IB schools would also need to follow these laws (such as The Right of Children to Free and Compulsory Education Act, 2009) incorporating an entity for running schools in India.

## D. State Boards (under State Acts/ Regulations/ Authorities)

Besides CBSE or ICSE boards which provide affiliation and accreditation to schools across states, at the state level the Department of Education regulates the state specific boards. Thus, schools run by the state government or aided schools that are privately managed but funded by the state are affiliated and accredited to the state boards. Such state boards

7. CISCE Rules for Affiliation, available at: <http://www.cisce.org/pdf/AffiliationGuidelines.pdf> (last visited on January 03, 2018).

8. Frequently Asked Questions, Amity University, available at: <http://www.amity.edu/ais/aisg2/amitywebsite.pdf> (last visited on June 10, 2013).

9. International Baccalaureate - India, available at: <http://www.ibo.org/about-the-ib/the-ib-by-country/i/india/> (last visited on January 03, 2018).

10. *Ibid.*

11. Not all colleges accept global school diploma, The Times of India (Aug 2, 2011), available at: <http://timesofindia.indiatimes.com/city/chennai/Not-all-colleges-accept-global-school-diploma/articleshow/9450574.cms> (last visited on December 30, 2014); Red signal: IB prog hits roadblock in India, Careers 360 (January 4, 2014), available at: <http://www.university.careers360.com/articles/red-signal-ib-prog-hits-roadblock-in-india> (last visited on December 30, 2014).

are formed through state-specific education acts. Thus, schools under state boards have to follow regulations of their respective state governments.

### III. Other General Aspects to be Considered While Setting up Schools

#### A. Regulatory Requirements

Under Indian laws, predominantly, an educational institution school can only be set up in the form of a non-profit entity i.e. either as a charitable trust or a society or a Section 8 Company (a non-profit company under the Companies Act, 2013), which are of a not-for-profit character.

Once established, the schools have to seek affiliation from one of the boards (mentioned above), for which they need to comply with the specific conditions set out in the affiliation rules/ bye laws. For instance, there is a requirement to obtain a 'No Objection Certificate' ("NOC") from the concerned State Education Department before the school can be granted affiliation. NOC is a formal prior recognition which the education department grants to any school independent of its affiliation status. Further the schools also have to comply with certain infrastructure and financial requirements, as set out in the relevant affiliation rules/ bye laws.

In addition to obtaining an affiliation from one of the state or school boards, additional requirements include obtaining number of approvals from different public authorities as well. This would include the procurement of water testing reports, health certificates, an essentiality certificate, a land use permission certificate (in case of rented land), etc.

In addition, there are certain state specific requirements as well. For example, Section 30 of the Karnataka Education Act, 1983 ("KEA") prescribes registration with the appropriate authority (as authorized by the state government) of every private educational

institution and prohibits the establishment, administration or maintenance of any such institution unless the requisite registration has been obtained. The registration is also subject to additional requirement of maintaining minimum infrastructure and financial requirements. Similarly, Section 4 of the Delhi State Education Act, 1973 ("DSEA") makes registration with the appropriate authority, authorized by the Delhi government, compulsory for all schools notwithstanding the board with which the institute is affiliated. Further, Section 2(e) of the DSEA specifically declares the prescribed authority from which recognition is to be obtained in case the institute does not require affiliation from any other Indian government authority.

In Maharashtra, Maharashtra Self-financed Schools (Establishment and Regulation) Act, 2012 ("MSSA") mandates permission to be sought from the state government (by moving an application to the Director of Education (Primary Education/Secondary & Higher Education, as the case may be) for opening or upgrading a self-financed/unaided school. Section 15 of MSSA is applicable to all schools in the state of Maharashtra notwithstanding their affiliation to any board whether domestic or international.

While most of the states grant permission or issue NOC only to non-profit entities imparting or intending to impart primary or secondary education in India, the state of Haryana permits even a company (which may either be for-profit or non-profit) incorporated under the Companies Act to establish and maintain schools. Section 3(1) of the Haryana School Education Act, 1995 ("Haryana Education Act") provides that the state government may regulate education in 'all schools', wide enough to include private unaided schools not affiliated to any central or state board within its ambit. Rule 29(1) of the Haryana School Education Rules, 2003 permits every individual or association of individual or firm or society registered under Societies Registration Act, 1860 or trust created under the Indian Trusts Act, 1882 or 'company' registered under the



Indian Companies Act, 1956<sup>12</sup> to apply to the appropriate authority in the prescribed form for setting up primary, middle, high and senior secondary schools in Haryana. Thus, unlike other states' regulations and central board bye-laws, this rule does not expressly require that a school must be established purely by a non-profit entity. Thus, under the Haryana Education Act, for-profit companies could set up IB affiliated schools.

## B. Regulation of Fee and Capitation

Under the existing laws, private unaided schools are free to determine their own fee structure, provided that the fee does not result in profiteering and commercialization.<sup>13</sup> Thus, the freedom to fix fee is not an absolute right, and is subject to the assessment by the state authorities to ensure reasonableness of the fees charged.

Further, legislations regulating fee have been enacted in a few states, and have a direct bearing on the fee that can be changed by schools, specifically private unaided schools, which receive no grant or aid from the government.

In Maharashtra, the relevant law is the Maharashtra Educational Institutions (Regulation of Fee) Act, 2011 ("**Maharashtra Fee Regulation Act**") which provides the procedure to be followed for determining school fee.

This said law provides that the management of a private un-aided schools and permanently un-aided schools are competent to propose the fees in private unaided schools.<sup>14</sup> The factors to be considered by the school for deciding fee

are set out in Section 9<sup>15</sup> of the Maharashtra Fee Regulation Act lays and includes infrastructure, location of the school etc.

The proposed fee and the relevant record are to be submitted by the management to the Executive Committee<sup>16</sup> ("EC") six months before the commencement of the next academic year.<sup>17</sup> If the EC fails to approve the proposed fee within thirty days from the receipt of the details or if the difference between the fee approved by the management and the fee communicated by the EC is more than fifteen percent, the school management may prefer an appeal to the Divisional Fee Regulatory

15. Section 9 of the Maharashtra Fee Regulation Act: Factors for determination of fee

- (1) The following factors shall be considered while deciding the fee leviable by a school, namely:
- (a) the location of the school;
  - (b) the infrastructure made available to the students for the qualitative education, the facilities provided and as mentioned in the prospectus or web-site of the school;
  - (c) the educational standard of the school as the State Government or the competent authority may prescribe;
  - (d) the expenditure on administration and maintenance;
  - (e) the excess fund generated from non-resident Indians, as a part of charity by the management and contribution by the Government for providing free-ship in fee or for other items under various Government schemes given to the school for the Scheduled Castes, the Scheduled Tribes and Vimukta Jatis and Nomadic Tribes students;
  - (f) qualified teaching and non-teaching staff as per the norms and their salary components;
  - (g) reasonable amount for yearly salary increments;
  - (h) expenditure incurred on the students over total income of the school and the reasonable surplus for qualitative development of the students;
  - (i) any other factor as may be prescribed.
- (2) The Divisional Fee Regulatory Committee shall indicate the different heads under which the fee shall be levied.
- (3) Every private school preferring an appeal before the Divisional Fee Regulatory Committee shall place the copy of decision in appeal on its notice board, and if such school has web-site, on its web-site.

16. Section 2(j) of the Maharashtra Fee Regulation Act defines "Executive Committee" to mean the Executive Committee of the Parent-Teachers Association.

17. Section 6(2) of the Maharashtra Fee Regulation Act states that on the formation of the Executive Committee, the management of the school shall submit the details of the proposed fee along with the relevant record to the Executive Committee for its approval at least six months before the commencement of the next academic year. While giving the approval, the Executive Committee shall have the authority to decide the amount of fee afresh.

12. Companies Act, 1956 has been replaced with the Companies Act, 2013. Section 8 of the Companies Act, 2013 contains provisions relating to not-for-profit companies that were earlier contained in Section 25 of the Companies Act, 1956.

13. *Vibgyor High School v, The State of Maharashtra*, (2012) 114 BOMLR 270.

14. Section 6(1) of the Maharashtra Fee Regulation Act

Committee<sup>18</sup> (“DFRC”), which is the appellate authority constituted to adjudicate disputes. During the pendency of the referral, the management can collect the fee of the previous year plus fifteen percent increase in the fee, till the final decision of the DFRC.<sup>19</sup>

However, what is critical is that if the difference between the fees proposed by management and decided by EC is less than fifteen percent then the fees communicated by the EC will be binding on the management.<sup>20</sup> This substantially takes the right of the school to decide on their own fee.

A fee decided as per the procedure of this act is to remain in force for two academic years.<sup>21</sup>

- The constitution validity of the Maharashtra Fee Regulation Act has been challenged before the High Court of Mumbai in the case of *Association of International Schools of India and Anr v. State of Maharashtra and*

*Anr.*<sup>22</sup> *inter alia* on the ground that the DFRC, being the appellate authority under the Fee Regulation Act was not constituted and the rules under the Maharashtra Fee Regulation Act were not being framed.

In Andhra Pradesh, regulations titled “*Andhra Pradesh Regulation of Fee Structure in Private Unaided School in the State*” (“**AP State Fee Regulation**”) issued under the AP Capitation Fee Act provides for regulation of fee.

As per AP State Fee Regulation, the DFRC is required to approve the fee for each private unaided school within its jurisdiction.<sup>23</sup> The fee structure approved by the DFRC will be valid for a period of 3 academic years.<sup>24</sup> The management can increase the fee every year, based on increase in Consumer Price Index.<sup>25</sup> What is meant by Consumer Price Index has not been defined under the relevant law or regulations.

Similar fee regulation laws have been framed in other States as well. The recent being the State of Gujarat, where a challenge to the validity of this law has also been upheld by the Gujarat High Court.

In addition, capitation, being any amount, by whatever name called, whether in cash or kind, in excess of the prescribed fee or, as the case may be, approved, is also a prohibited and punishable under Central and State laws.

18. Section 7(1) of the Maharashtra Fee Regulation Act states that the Government, by notification in the Official Gazette, is to constitute a Divisional Fee Regulatory Committee for each Educational Division.

Section 2(h) of the Maharashtra Fee Regulation Act defines “Educational Division” to mean an Educational Division notified by the State Government in the Official Gazette.

19. Section 6(4) of the Maharashtra Fee Regulation Act states that if the Executive Committee fails to decide the fees within the period specified in sub-section (3), the management shall immediately refer the matter to the Divisional Fee Regulatory Committee for its decision under intimation to the Executive Committee in such manner as may be prescribed. During the pendency of the reference, the management of school shall be at liberty to collect the fee of the previous academic year plus fifteen per cent., increase in such fee till the final decision of the Divisional Fee Regulatory Committee.

20. Section 6(5) of the Maharashtra Fee Regulation Act states that If the difference between the fees decided by the management and the fees approved by the Executive Committee is not more than fifteen per cent., then the fees communicated by the Executive Committee under sub-section (3) shall be binding on the management and if the difference is more than fifteen per cent., then management may prefer an appeal to the Divisional Fee Regulatory Committee, within a period of thirty days from the date of such communication under sub-section (3) in such manner as may be prescribed: Provided that, the Divisional Fee Regulatory Committee may entertain such appeal or reference after the expiry of the period of thirty days, if it is satisfied that there are sufficient reasons for not preferring an appeal or reference within time.

21. Section 10(4) of the Maharashtra Fee Regulation Act.

22. Writ Petition (L) No 3244 of 201. Association of International Schools of India represented by Nishith Desai Associates

23. Regulation 3 of the AP State Fee Regulation states that:  
(i) DFRC shall approve the fee for each private unaided school within its jurisdiction.  
(ii) If schools collect fee more than the fee approved by the DFRC, it shall be treated as capitation fee and Management shall be liable for action under the provisions of *Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983*. The recognition granted to the school and NOC issued shall be withdrawn after giving due notice.

24. Regulation 6 of the AP State Fee Regulation

25. *Ibid.*

## C. The Right of Children to Free and Compulsory Education Act, 2009 (“RTE Act”)

The RTE Act, which came into force in the year 2011, seeks to provide free and compulsory elementary education to all children. It thereby give effect to the principles enshrined in the Constitution of India, which states that the ‘State shall provide free and compulsory education to all children between the age of six to fourteen years in such manner as the State may, by law, determine’.<sup>26</sup>

The RTE Act, inter alia mandates that the Central/ State Governments, as well as the local authorities, are obligated to provide free and compulsory elementary education to every child.

The following provisions of RTE are applicable to private schools:

- An unaided private school not receiving any kind of aid or grants from the Government is required to reserve at least 25% of the strength of a class for children belonging to weaker sections and disadvantaged groups in the neighborhood and provide free and compulsory elementary education to such children [S. 12(1)(c)]. The expenditure incurred by an unaided school is required to be reimbursed by the Government to the extent of per-child-expenditure incurred by the state or the actual amount charged from the child, whichever is less.
- Schools (including private schools) are prohibited from subjecting any child or its parents to any method of selection for admission of a child, in preference over another, other than a random method.
- The RTE Act completely prohibits the charge of any capitation fee by any private or government school and stipulates imposition of penalty on contravention.
- The Delhi HC in the case of *Social Jurist, A Civil Rights Group v. Govt. of NCT of Delhi*<sup>27</sup> held that the provisions of the RTE Act, which prohibit capitation fee and screening tests and prescribe teacher-pupil ratio, will be applicable on private unaided schools not only with respect to students for whom reservation is made under the Act but on the school as such and hence, would cover all students. However, the Court clarified that the RTE Act is meant to guarantee and regulate elementary education only and hence has no impact on the pre-nursery schools. The HC in the above case gave a free hand to the private unaided schools in matters of admission procedure in nursery schools (pre-elementary school) along with screening procedure and capitation fees.
- Most importantly, a certificate of recognition is to be obtained from the concerned authority for the establishment or functioning of a private school [S. 18]. A school in order to obtain the certificate of recognition would have to fulfill the norms and standards set out under the Schedule to the RTE Act. Failure to obtain a certificate of recognition would attract penalties.
- The provision of RTE Act is not applicable to un-aided minority schools.<sup>28</sup> Recently, the Apex Court held that the minority aided or unaided schools are exempt from the provisions of the RTE Act,<sup>29</sup> including the requirement to reserve 25% seats for weaker sections and disadvantaged groups.

26. Article 21A

27. AIR 2013 Delhi 52.

28. *Society for Un-aided Private Schools of Rajasthan v Union of India* [WP(C) No. 95/2010].

29. *Pramati Educational and Cultural Trust and Ors. v Union of India and Ors.* [2014(2)KLT547].

While the above stipulations appear to promote a noble and vital cause, there have been issues pertaining to effective implementation and concerns surrounding the potential outcome of implementation, and there is a growing demand for their re-examination.<sup>30</sup>

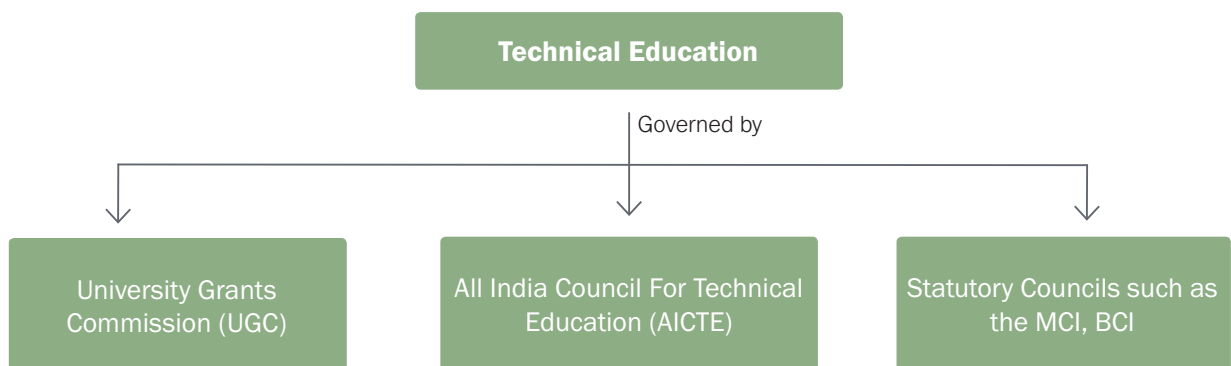
## IV. Higher Education

Higher Education in India comprises of Diploma Courses, Bachelor's/Undergraduate Degrees, Master's/Post-graduate Degrees and Pre-Doctoral/ Doctoral programmes. It may also be broadly classified into technical and non-technical education. Technical Education as defined under the AICTE Act means “*programs of education, research and training in engineering technology, architecture, town planning, management, pharmacy and applied arts and*

*crafts and such other programme or areas as the Central Government may, in consultation with the Council, by notification in the Official Gazette, declare*”.<sup>31</sup> Non-Technical Education would, thus, refer to the courses, other than technical courses.

At present, India's Gross Enrollment Ratio (GER) is 24.5 per cent in higher education.<sup>32</sup> The aim is to increase the GER to 30 per cent by 2020.<sup>33</sup> The number of unaided higher education institutions is on the rise, and currently almost 65 per cent of higher educational institutions are in the private sector.<sup>34</sup> Private sector educational institutions have improved access to higher education and accommodate more than 50 per cent share in students' enrolment.

In India, there are different bodies/authorities regulating technical education, as indicated below:



30. Bring back exams, more weight on learning, teachers, Indian Express (September 23, 2014), available at: <http://indianexpress.com/article/india/education/bring-back-exams-more-weight-on-learning-teachers/99/#sthash.Nxgb8rOs.dpuf> (last visited on December 30, 2014).

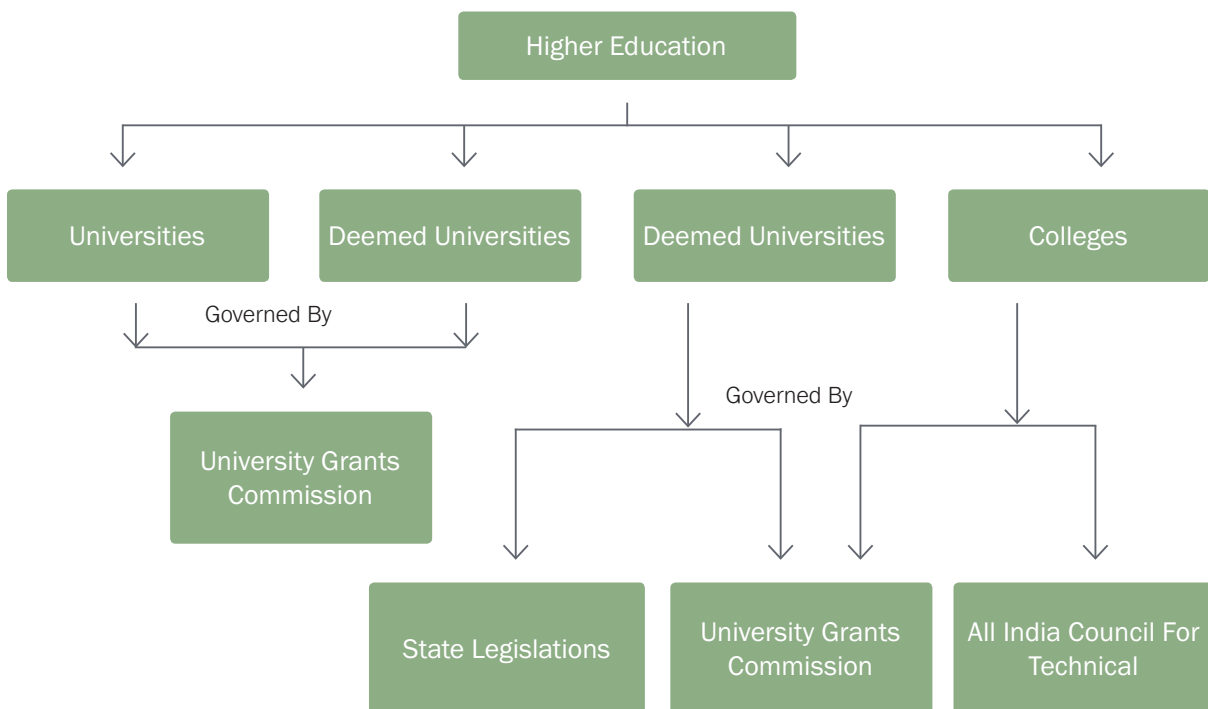
31. Section 2(g) of the, AICTE Act.

32. All India Survey on Higher Education (2015-2016), available at: [http://mhrd.gov.in/sites/upload\\_files/mhrd/files/statistics/AISHE2015-16.pdf](http://mhrd.gov.in/sites/upload_files/mhrd/files/statistics/AISHE2015-16.pdf) (last visited on December 28, 2017).

33. M.R. Madhavan & Kaushiki Sanyal, “Regulation in the Education Sector”, available at: [http://www.idfc.com/pdf/report/2012/Chapter\\_1.pdf](http://www.idfc.com/pdf/report/2012/Chapter_1.pdf) (last visited on December 28, 2017).

34. *Ibid.*

The recognized establishments providing higher education include Universities, Colleges and Deemed Universities. Each of these establishments is governed by different bodies as indicated hereunder:



## A. Regulatory Bodies

### i. University Grants Commission

The UGC was set up under the University Grants Commission Act, 1956 (“UGC Act”) to make provisions for the co-ordination and determination of standards in universities. Its mandate includes:

- Promoting and coordinating university education;
- Determining and maintaining standards of teaching, examination and research in universities;
- Framing regulations on minimum standards of education;
- Monitoring developments in the field of collegiate and university education;
- Disbursing grants to universities and colleges;
- Serving as a vital link between the Central and State Governments and institutions of higher learning;

- Advising the Central and State Governments on measures necessary to improve university education.

The UGC, therefore, prescribes the minimum standards that are to be adhered to by universities and colleges affiliated to such universities. It also has the unique distinction of being the only government agency in the country which has been vested with the responsibility of providing grants to universities in furtherance of its (UGC’s) objectives.

The salient features of the UGC Act, apart from stipulating the powers and functions of the UGC, include provisions stipulating the criteria for qualifying as universities, deemed universities and provisions dealing with the pre-requisites / eligibility for grants of degrees.

### ii. All India Council for Technical Education

The AICTE was set up under the All India Council for Technical Education Act, 1987 (“AICTE Act”) with a view to ensure proper planning and coordinated development

of the technical education system throughout the country; qualitative improvement of such education in relation to planned quantitative growth; the regulation and proper maintenance of norms and standards in the technical education system; and for matters connected therewith.

The origin of AICTE can be traced back to 1945 when it was set up as an advisory body on technical education which gained statutory recognition in 1987 by an Act of Parliament.<sup>35</sup> The AICTE Act provides regulatory powers to the AICTE with respect to institutions imparting 'Technical Education'. The UGC on the other hand, also set up by way of a statute in 1956, performs the role of regulating education at the University level, and is the apex body for providing recognition and affiliation to universities.

The AICTE oversees technical education and the functioning of technical institutions within the country. 'Technical Institution', accordingly, under the AICTE Act, refers to the institutions, other than universities, conducting the courses or programmes in the field of Technical Education.

The AICTE has been endowed with a wide array of powers under the AICTE Act such as regulation and proper maintenance of norms and standards in the technical education system, planning, formulation and accreditation of technical institutions etc.

### iii. Statutory Professional Councils

Statutory Professional Councils are responsible for recognition of courses, promotion of professional institutions and providing grants to undergraduate programmes and various awards. The Medical Council of India, for instance, is empowered to prescribe minimum standards for medical education required for grant of recognized medical qualifications by universities or medical institutions in India. It is also responsible to give its recommendations to the Government for establishing new medical

colleges. Similarly, Bar Council of India, Dental Council of India, Indian Nursing Council, etc., are some of the notable councils. These councils have been empowered to prescribe standards and formulate regulations with respect to their field of involvement.

## B. Educational Institutes

### i. Universities

According to the information available on the website of the UGC, there are about 47 Central universities,<sup>36</sup> 377 state universities,<sup>37</sup> 123 deemed to be universities<sup>38</sup> and 282 private universities.<sup>39</sup> Section 2(f) of the UGC Act defines a university as that which is established or incorporated by or under a Central Act, a Provincial Act or a State Act, and includes any such institution as may, in consultation with the University concerned, be recognized by the UGC in accordance with the regulations made in this behalf under the UGC Act.

Universities are set up mostly under State Acts. Private universities are unitary institutions established within a state and cannot run or establish off-campus centre(s) outside their state of incorporation. A private university can, however, open off-campus centre(s) after the completion of five academic years from its date of incorporation and prior approval of the UGC.

All universities are required to adhere to the provisions and directions of the UGC with respect to maintenance of academic norms and standards of teaching. To this end, the UGC has introduced standards and regulations that private universities have to maintain under the

36. See <https://www.ugc.ac.in/oldpdf/Consolidated%2olist%20of%20Central%20Universities%20as%20on%2029.06.2017.pdf> (last visited on January 15, 2018)

37. See [https://www.ugc.ac.in/print\\_stateuniversity.aspx](https://www.ugc.ac.in/print_stateuniversity.aspx) (last visited on January 2, 2018).

38. See <https://www.ugc.ac.in/oldpdf/Deemed%20University/Deemed%20University%20Final%20List%20as%20on%2006-10-2017.pdf> (last visited on January 15, 2018)

39. See <https://www.ugc.ac.in/oldpdf/Private%20University/Private%20University%20Consolidated%20List%20Private%20Universities%20as%20on%2006.10.2017.pdf> (last visited on January 2, 2018).

35. The AICTE Act, 1987.

UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003. A Private University, under the aforesaid regulation, has been defined as a university duly established through a State/Central Act by a sponsoring body viz. a Society registered under the Societies Registration Act, 1860 or any other corresponding law for the time being in force in a State or a Public Trust or a Company registered under Section 8 of the Companies Act.

In light of Section 22 of the UGC Act, the right of conferring or granting degrees specified by the UGC can be exercised only by a university or an institution deemed to be a university under Section 3 of the UGC Act or an institution specially empowered by an Act of Parliament to confer or grant degrees. Thus, only universities or institutes deemed to be universities are eligible to grant degrees. Further, it is pertinent to note that Section 23 of the UGC Act provides that no institution, whether a corporate body or not, other than a university established or incorporated by or under a Central Act, a Provincial Act or a State Act shall be entitled to have the word “University” associated with its name in any manner whatsoever.

## ii. Deemed Universities

Under Section 3 of the UGC Act, the Central Government may, on the advice of the UGC, declare that any institution for higher education, other than a university, be deemed to be a university for the purposes of the UGC Act, and on such a declaration being made, all the provisions of the said Act, including the power to award degrees under Section 22 of the UGC Act, shall apply to such institution as if it were a university within the meaning of the Act.

The provision for deemed universities under the UGC Act was made in order to bring institutions under the purview of the UGC, which for various reasons did not qualify as universities and yet were carrying out work of high standard

in a specialized academic field comparable to that of a university and grant of university status to which would enable them to further contribute to the cause of higher education, which would mutually enrich the institution and the university system.

Regulations for deemed universities are presently covered under the ‘UGC (Institutions Deemed to be Universities) Regulation, 2016’ (“**Deemed Universities Regulations**”). The Deemed Universities Regulations prescribe certain requirements to qualify for the grant of status as a university such as minimum land area and infrastructure requirements, financial requirements, etc. The institution should have, among its primary objectives, the provision for higher education leading to excellence and innovations in such branches of knowledge as may be deemed fit primarily at post-graduate and research degree levels fully conforming to the standards of a university. The institution should have been accredited with highest grade by National Assessment and Accreditation Council (NAAC) and/or by NBA continuously for two cycles and should get highest grade in the third cycle continuously (five year cycle) or should have the highest NAAC/NBA category at the time of making an application and in the immediately previous NAAC/NBA cycle, and also at the time of making such application and in immediately previous two years, the institution should be in top 20 in any specific category or in top 100 of overall ranking of National Institute Ranking Framework,<sup>40</sup> for being recognized as a deemed university, unless made under the De-novo category (institutions devoted to innovations in teaching and research in unique and emerging areas of knowledge).<sup>41</sup> The status of deemed university granted to such institutions is, initially made for a period of 5 years, on the basis of the satisfactory performance and compliance with the provisions of the Deemed Universities Regulations.<sup>42</sup>

40. Regulation 4.1. of Deemed Universities Regulations

41. Regulation 9.1.2 of Deemed Universities Regulations

42. Regulation 8.12 of Deemed Universities Regulations

The advantages of a deemed university when compared to an ordinary institution are many. A deemed university has much more freedom as compared to an ordinary institution in terms of academic, administrative, finance, research, evaluation and extension aspects, etc.

Further, despite being entitled to privileges similar to that of universities, deemed universities are, however, unitary institutions similar to private universities. Thus, they cannot affiliate institutions/ colleges unlike ordinary universities. The colleges or institutes may form constituents of a deemed university only where they belong to the same Trust or Society managing the deemed university. There are also some restrictions imposed on deemed to be universities under law. Further, a deemed to be universities are also restrained from using the word “University” as part of its name.<sup>43</sup>

Also, with respect to deemed universities, the University Grants Commission (Open and Distance Learning) Regulations, 2017 (“**ODL Regulation 2017**”), specifically states that:<sup>44</sup>

- an institute declared to be deemed to be university after May 26, 2010 is not allowed to conduct courses in the distance education mode;
- institute declared to be deemed to be university before May 26, 2010 is not allowed to conduct courses in distance mode from any of its off-campus centres or off-shore campuses approved after 26th May, 2010;
- that a deemed to be university can operate only through its headquarters or from Government approved off-campus or off-shore campuses;
- approval for new courses and extension of approval of the courses already run by the deemed to be university under the distance mode would be granted by the UGC, subject to fulfillment of conditions laid down by the UGC.

Institutions deemed to be universities have, however, in the recent past attracted the ire of regulatory authorities owing to the revelation of severe mal practices being perpetrated by persons in charge of such institutions.

### iii. College

The difference between a college and university is that colleges facilitate the grant of a degree but does not grant it, while a university awards a degree either through its own departments or through colleges affiliated to it. A college’s ability to facilitate such grant of degrees by a university is by virtue of its “affiliation” with such university and is governed by the terms and conditions of the affiliation. The UGC (Minimum Standards of Instruction for the Grant of the First Degree through Formal Education) Regulations, 2003 lays down standards for instructions and ensures uniformity in terms of admission, working days, syllabus, examination and evaluation, physical facilities, award of degrees etc., to be followed in all colleges and universities in the country. It is important to bear in mind that in India, much like schools, setting up of a college would have to be carried out either by a Trust or a Society under the UGC (Affiliation of Colleges by Universities) Regulations, 2009.

### iv. Autonomous Colleges

They refer to colleges which have been conferred such status by the university with which they are affiliated. Such status is conferred with the concurrence of the state government and the UGC.<sup>45</sup> Autonomous colleges have the freedom to design their course curriculum and have flexible teaching methods and modules unlike affiliated colleges. As per the status list of approved autonomous colleges under the UGC Scheme, India has 621

43. Orissa Lift Irrigation Corp. Ltd. v. Rabi Sankar Patro & Ors.

44. Annexure IV, Part B of the ODL Regulation 2017

45. See UGC Guidelines for Autonomous Colleges 2017, available at: <https://www.ugc.ac.in/pdfnews/AutonomousColleges.pdf> (last visited on January 16, 2018)



autonomous colleges<sup>46</sup> which conduct their own examinations and set their own curricula, but degrees are provided by the university to which they are affiliated.

The autonomy granted to them is institutional and they can run undergraduate, post-graduate, diploma and M.Phil. courses that were being run at the time of conferment of autonomous status. Further, all courses introduced by the Institution after the conferment of autonomous status shall automatically come under the purview of their autonomy.

## V. Institutes Providing Distance Education

Distance education was initially governed by two regulatory bodies in India –

- a. The UGC
- b. The Distance Education Council (“DEC”) which was set up under the Indira Gandhi National Open University Act, 1985, for the purpose of co-ordination and determination of standards of teaching, evaluation and standards in the open and distance learning (“ODL”) model of education in India.

While private universities set up under State Acts, were governed by the UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003 (“**UGC Regulations**”), any university that intended to offer programmes and courses via distance education mode were required to take approval from the DEC, and were also governed by the various guidelines and regulations implemented by the DEC. Under the UGC Regulations and DEC guidelines, universities were typically required to take specific approval from the UGC and/or the DEC for the purpose of offering distance education courses to students,

opening new campuses, setting up or affiliating with any private institutions in the nature of franchises, study centers, learning centers etc.

However, there have been a number of changes in the governance of higher education in India and the most recent and significant one being the dissolution of DEC on May 4, 2013. This also meant that all regulations and guidelines enacted by the DEC stood repealed.

Subsequently, the Government on May 28, 2013 issued a notification transferring DEC’s responsibilities including the responsibility for regulating ODL in India and developing appropriate regulations governing ODL to the UGC.<sup>47</sup> This marked a paradigm shift in the governance of higher education in India and also confirmed that going forward UGC would be the central authority for ODL in India excluding technical education which would continue to be under the jurisdiction of the AICTE.

Pursuant to the above, UGC on June 17, 2013 notified that the existing ‘Guidelines of DEC on Minimum Requirements for Recognition of ODL Institutions’ (“**DEC Guidelines**”), previously implemented by the DEC, will continue to be in force till such time new regulations are notified.<sup>48</sup>

Further, the UGC on June 27, 2013 issued a public notice<sup>49</sup> (“**Notice**”) whereby it raised concerns on advertisements (published in national dailies) for offering university degrees through franchise programmes conducted by private institutions claiming to be study/ learning centers. The UGC in the Notice also stated that such arrangements, wherein the university only provided the syllabus and the teaching material and had no mechanism to monitor / maintain academic standards, had led to a blatant compromise in the standards of education. Among other things, this Notice clarified that (i) private universities cannot

46. The figure provided by the UGC is updated till 08.09.2017. See [https://www.ugc.ac.in/oldpdf/colleges/autonomous\\_colleges-list.pdf](https://www.ugc.ac.in/oldpdf/colleges/autonomous_colleges-list.pdf) (last visited on January 03, 2018).

47. Notification number F.3-2/2012 (Admin.I/A&B), dated May 28, 2013.

48. Notification number F.No. 1-4/2013 (CPP-II), dated June 17, 2013.

49. Notification number F.27-1/2012 (CPP-II).

affiliate any college/institution for the purpose of conducting courses which lead to award of their diplomas, degrees or other qualifications; (ii) universities cannot offer their programmes through franchising arrangements with private coaching institutions, even for the purpose of distance education; (iii) students are advised not to take admission in any unapproved study centers, off-campus centers, franchisee institutions, colleges / institutions claiming to be affiliated with private / deemed universities.

On June 23, 2017, the UGC notified the University Grants Commission (Open and Distance Learning) Regulations, 2017 (“ODL Regulation 2017”), setting out minimum standards of instructions required for granting degrees (undergraduate and post-graduate levels) through ODL mode<sup>50,51</sup>. These regulations are applicable to all degree programmes (other than programmes in technical courses, medical, dental, pharmacy and any programme which is not permitted to be offered in distance mode by regulatory body) offered by universities and institutions deemed to be universities.<sup>52</sup> As per the ODL Regulation 2017, any higher educational institutions already offering<sup>53</sup> or intending<sup>54</sup> to offer programmes in ODL mode from the academic session 2018-19 onwards have to seek fresh approval for recognition from the UGC.

## vi. Institution of Eminence

As an initiative to evolve into institutions of world class and to improve the quality of higher educational institutions in India,

the Government intends to establish 20 ‘Institutions of Eminence’ (10 public and 10 private institutes) to achieve world class status, from amongst the existing government/private institutions and new institutions from the private sector.<sup>55</sup> To give effect to this proposition, the UGC has notified regulations and guidelines pertaining to the same namely, *UGC (Institutions of Eminence Deemed to be Universities) Regulations, 2017*<sup>56</sup> (“**Institution of Eminence Regulations, 2017**”) for private institutions and *UGC (Declaration of Government Educational Institutions as Institutions of Eminence) Guidelines, 2017*<sup>57</sup> (“**Institution of Eminence Guidelines, 2017**”) for public institutions. Some of the key incentives under these regulations and guidelines are:

- exemption from Government approval for academic collaboration with foreign higher educational institutions ranked in top 500 in global ranking;<sup>58</sup>
- flexibility in admission of foreign student’s subject to maximum of 30% of the strength of domestic students;<sup>59</sup>
- freedom to fix fees for both foreign<sup>60</sup> and domestic students;<sup>61</sup>
- freedom to offer courses within a programme, as well as to offer degrees in newer areas after approval from its governing council,<sup>62</sup>

50. Regulation 2(m) of the ODL Regulation 2017, defines “Open and Distance Learning” mode as a mode of providing flexible learning opportunities by overcoming separation of teacher and learner using a variety of media, including print, electronic, online and occasional interactive face-to-face meetings with the presence of an Higher Educational Institution or Learner Support Services to deliver teaching-learning experiences, including practical or work experiences.

51. Regulation 1(1) of the ODL Regulation 2017, available at <https://www.ugc.ac.in/oldpdf/regulations/distance%20education%20regulations.pdf> (last visited on January 03, 2018)

52. Regulation 1(3) of the ODL Regulation 2017

53. Regulation 3(1) of the ODL Regulation 2017

54. Regulation 3(2) of the ODL Regulation 2017

55. See [https://www.ugc.ac.in/pdfnews/4523868\\_Press-release-IoE-final.pdf](https://www.ugc.ac.in/pdfnews/4523868_Press-release-IoE-final.pdf) (last visited on December 28, 2017)

56. See [https://www.ugc.ac.in/pdfnews/5403862\\_Gazette-Institutions-of-Eminence-Deemed-to-be-Universities.pdf](https://www.ugc.ac.in/pdfnews/5403862_Gazette-Institutions-of-Eminence-Deemed-to-be-Universities.pdf) (last visited on December 28, 2017)

57. See [https://www.ugc.ac.in/pdfnews/2170800\\_Guidelines-for-Educational-Institutions-as-Institutions-of-Eminence-2017.pdf](https://www.ugc.ac.in/pdfnews/2170800_Guidelines-for-Educational-Institutions-as-Institutions-of-Eminence-2017.pdf) (last visited on December 28, 2017)

58. Clause 6.1.(j) of the Institution of Eminence Guidelines, 2017

59. Clause 6.1.(a) of the Institution of Eminence Guidelines, 2017

60. Clause 6.1.(b) of the Institution of Eminence Guidelines, 2017

61. Clause 6.1.(c) of the Institution of Eminence Guidelines, 2017

62. Clause 6.1.(d) of the Institution of Eminence Guidelines, 2017

- flexibility to determine course structure in terms of number of credit hours and years to take a degree<sup>63</sup> and in fixing curriculum and syllabus, with no UGC mandated curriculum structure;<sup>64</sup>
- freedom to offer online courses subject to condition that not more than 20% of the programme should be in online mode. However, certificate courses can be provided entirely through online mode;<sup>65</sup>

- freedom to hire foreign faculty on tenure or contract basis;<sup>66</sup>

Thus, once Institutes of Eminence are established, collaboration will become easier for foreign institutions ranked in top 500 in global ranking.

---

63. Clause 6.1.(e) of the Institution of Eminence Guidelines, 2017

64. Clause 6.1.(f) of the Institution of Eminence Guidelines, 2017

65. Clause 6.1.(g) of the Institution of Eminence Guidelines, 2017

---

66. Clause 6.1.(m) of the Institution of Eminence Guidelines, 2017

### 3. Participation of Foreign Educational Institutions in Higher Education

The immense opportunity in the Indian education space has not gone unnoticed. Foreign universities have been inking strategic partnerships with educational institutions in the country.

Currently, FEIs are not permitted to establish an independent campus in India for the purpose of degree programmes. As a step towards liberalization of the heavily regulated higher education sector, the government on September 10, 2013 had issued a press release<sup>67</sup> informing various stake-holders about its proposal to allow foreign universities to set up campuses in India as not-for-profit companies (without having to collaborate with domestic educational institutions). However, no action has been taken on this front as of now. Further, a bill titled ‘The Foreign Educational Institutions (Regulations of Entry and Operations) Bill, 2010<sup>68</sup>’ was introduced in the parliament to regulate entry and operation of FEIs in India to impart higher education. However, the bill lapsed in 2014. In 2016, Niti Aayog have submitted a report to the Prime Minister and the Human Resource Development Minister, calling for the invitation of foreign universities to set up campuses in India and their operations should be controlled by law, since the same will help meet the demand for higher education in the country, increase competition and subsequently improve standards of higher education.<sup>69</sup> However, currently, the only way FEI can enter the regulated sector is by way of collaboration with Indian institutes.

Both the AICTE and the UGC have their own set of regulations to govern the operation of FEIs.

#### I. Tie-ups with Indian Institutions for Twinning Programmes

Twinning arrangement refers to those arrangements wherein students undertake a part of their course study in one institute and spend equivalent duration in the other partnering institute engaged in the twinning programme. Twinning arrangement could have several variations depending on the specific needs between the contracting parties i.e. overseas and Indian institutes. Twinning programme in non-technical sector in India are regulated by the UGC (Promotion and Maintenance of Standards of Academic Collaborations between India and Foreign Educational Institutions) Regulations, 2016 (“**UGC Regulations 2016**”) allows FEI to collaborate with Indian Educational Institutes (other than technical institutions) upon obtaining approval from the UGC.<sup>70</sup> Approval is granted for two cycles of the minimum duration of the degree programmes covered under the collaboration.<sup>71</sup> These regulations also cover twinning programmes whereby students may complete their course by art study in India and part study in the main campus of the foreign institution.<sup>72</sup> UGC Regulation 2016 have introduced an e-application process for seeking approvals for collaboration/twinning programmes.<sup>73</sup> The key conditions under the regulations include the following:

67. See <http://pib.nic.in/newsite/PrintRelease.aspx?relid=99225> (last visited on February 11, 2014).

68. See <http://pib.nic.in/newsite/PrintRelease.aspx?relid=70050> (last visited on December 28, 2017).

69. See <http://indiatoday.intoday.in/education/story/foreign-university-campuses-in-india/1/644180.html> (last visited on December 28, 2017)

70. Regulation 1(2)(a) of the UGC Regulations 2016, available at [https://www.ugc.ac.in/pdfnews/5003871\\_Foreign-Collaboration-Regulations-2016-\(1\).pdf](https://www.ugc.ac.in/pdfnews/5003871_Foreign-Collaboration-Regulations-2016-(1).pdf) (last visited on December 28, 2017)

71. Regulation 5(f) of the UGC Regulation 2016

72. Regulation 2(m) of the UGC Regulation 2016

73. Regulation 5(b) of the UGC Regulation 2016

- the foreign institute has to be accredited in its home country with the highest grade or its equivalent by an Assessment and Accreditation Agency (“AAA”) in its homeland.<sup>74</sup> The foreign institute also has to abide by other conditions prescribed by the Government statutory bodies;<sup>75</sup>
- the Indian institute has to be accredited with grade not less than A or its equivalent by any AAA authorized by the UGC;<sup>76</sup>
- the written memorandum of understanding to be entered into between the foreign and Indian institute after obtaining approval of the UGC;<sup>77</sup>
- the foreign institution has to submit details about the infrastructure facilities, facilities available for instruction, faculty, specified fee, courses, curricula, availability of requisite funds for operation for a minimum period of three years and other terms and conditions of collaboration,<sup>78</sup> if any;
- franchise arrangements are not permitted.<sup>79</sup>
- the foreign institution has to be approved and accredited with higher grades in its home country;<sup>80</sup>
- the Indian institution has to be an AICTE approved institution and registered as a not-for-profit entity;<sup>81</sup>
- the degree / diploma granted to students has to be recognized in the foreign institution’s home country;<sup>82</sup>
- the fee, quantum of student intake, admissions, entry-qualifications and conduct of courses should be as prescribed by AICTE form time to time;<sup>83</sup>
- the foreign institute has to submit a detailed project giving details regarding infrastructure facilities, facilities available for instruction, faculty, admission procedure, prescribed fee, courses, curricula, availability of requisite funds for operation for a minimum period of three years and other terms and conditions of collaboration, if any;<sup>84</sup>
- the foreign institution is responsible for obtaining accreditation from the National Board of Accreditation after two batches have passed out;<sup>85</sup>
- a performance guarantee fee is required to be paid at the time of seeking registration;<sup>86</sup>
- franchise arrangements are not permitted.<sup>87</sup>

The AICTE Regulation for Entry and Operation of Foreign Universities/Institutions Imparting Technical Education in India, 2005 (“AICTE Regulations”) facilitate the entry of FEIs in India by way of collaboration with Indian universities/institutions for imparting technical education leading to the award of diplomas, degrees, etc. This is subject to satisfaction of prescribed conditions and obtaining registration from the AICTE. The registration is granted for a period specified at the time of registration. Key conditions under the regulations include the following:

74. Regulation 3(1)(a) of the UGC Regulations 2016  
 75. Regulations 3(1)(c) of the UGC Regulations 2016  
 76. Regulation 3(2)(a) of the UGC Regulations 2016  
 77. Regulation 4 of the UGC Regulation 2016  
 78. Regulation 5(b) of the UGC Regulations 2016  
 79. Regulation 6(a) of the UGC Regulations 2016

80. Conditions for Registration, Regulation 2 of the AICTE Regulations.  
 81. Conditions for Registration, Regulation 1 of the AICTE Regulations.  
 82. Conditions for Registration, Regulation 3 of the AICTE Regulations.  
 83. Conditions for Registration, Regulation 9 of the AICTE Regulations.  
 84. Procedure for Registration, Regulation 2 of the AICTE Regulations.  
 85. Conditions for Registrations, Regulation 12 of the AICTE Regulations.  
 86. Procedure for Registrations, Regulation 5(b) of the AICTE Regulations.  
 87. Conditions for Registration, Regulation 1 of the AICTE Regulations.

Further, as per the AICTE (Grant of Approvals for Technical Institutions) Regulations, 2016, prior approval of AICTE is required for collaboration and twinning programme between Indian and foreign universities/institutions in the field of technical education, research and training.<sup>88</sup>

With the expansion of India's economy and fluctuations in the value of Indian currency, many students have started preferring twinning programmes to full-time overseas courses. Twinning programmes also costs less in comparison to full-time overseas programmes and students benefit substantially as most of the foreign faculties are also typically covered under such partnership programmes.

---

88. Regulation 4.1 of AICTE (Grant of Approvals for Technical Institutions) Regulations, 2016, available at [http://www.old.aicte-india.org/downloads/reg\\_2016.pdf](http://www.old.aicte-india.org/downloads/reg_2016.pdf) (last visited on December 28, 2017)

## 4. Foreign Investment in the Education Sector

The economic reforms launched by the Government of India from 1991 onwards have resulted in substantial economic growth and integration of India into the global economy. The pace of reforms has gained a new momentum due to political stability and strong industrial growth. The Indian capital markets have been opened up for Foreign Institutional Investors in 1993; the Foreign Direct Investment (FDI) regime too has been progressively liberalized over the years.

As per the regime, FDI up to 100% is allowed under the automatic route in the education sector.

Further, vide the revised Consolidated FDI Policy (of 2017), which became effective from August 28, 2017,<sup>89</sup> construction development activities in the education sector have been exempted from conditions generally applicable to construction- development sector that is the lock-in period of three years from the date of completion of minimum capitalization.

However, despite this liberalized regime, investment in the education sector has been restricted due to the following factors:

- prevailing regulations require the entity setting up a school or college or a deemed university to be of a not-for-profit character. The not-for profit character inevitably requires the entity to be either a registered as a Society or a Trust (in case of schools, colleges and private/deemed universities) or a Section 8 Company (mostly in case of schools). This “not-for-profit-principle” has been a major bottleneck for attracting investments. A Trust or a Society is not eligible to receive foreign investment under

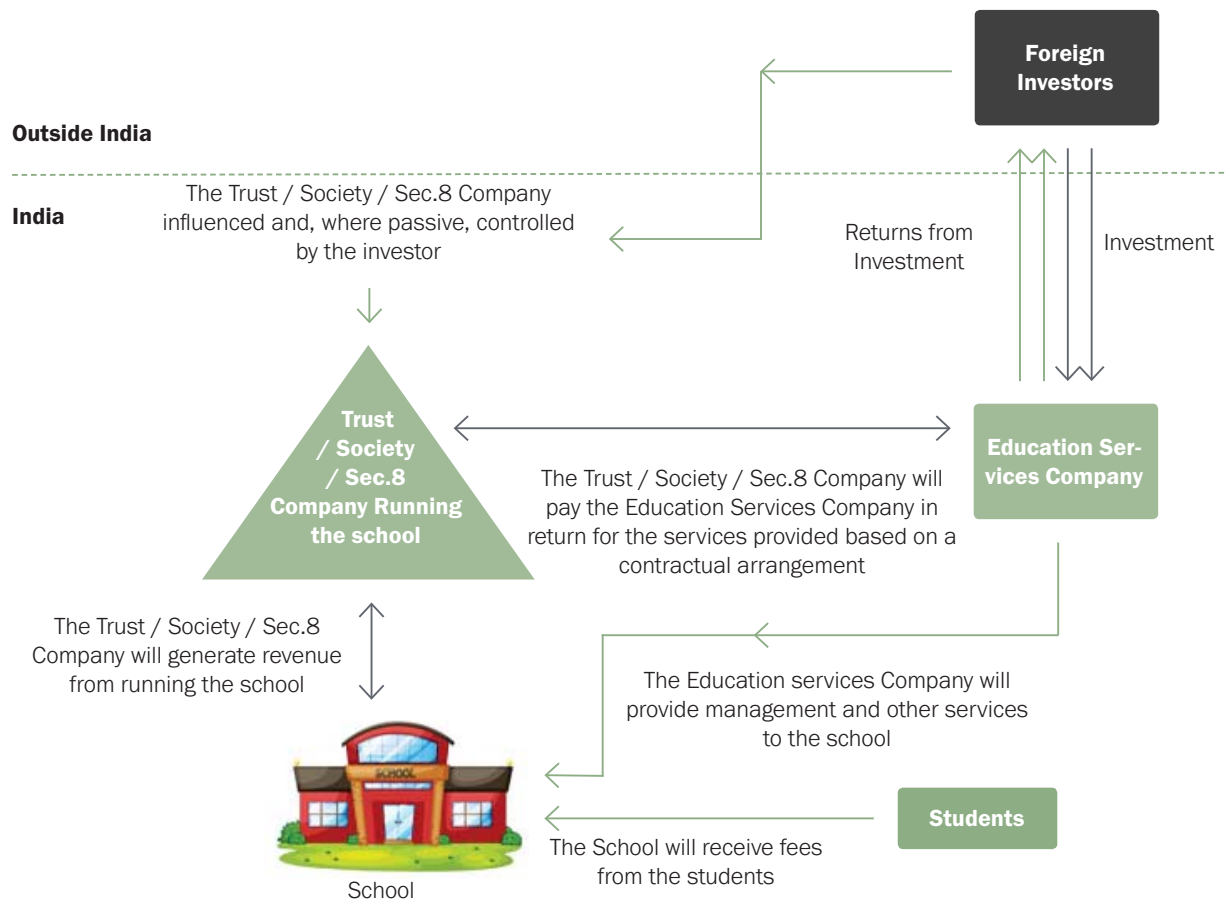
the automatic route. Even if investments were to be permitted, the entities being of a non-profit nature would not be able to distribute returns on the investment. Further, a Section 8 Company being of a charitable nature, would be required to apply its profits or other income towards the promotion of its objects which could be either commerce, art, science, religion, charity or any other useful object.

- The regulations governing this sector vary from one state to another and though a few matters have been uniformly regulated by the RTE, there is need for more coordination between the Central and State Government to avoid overlapping of policies and regulations, etc.
- Transfer of existing infrastructure and human resources is a sensitive issue which may lead to (legal) disputes due to lack of clear and detailed guidelines.
- The presence of multiple regulators along with the requirement of numerous approvals and regulatory compliances has also hampered investment in the higher education segment in India. The regulatory uncertainties surrounding the “for profit” ventures have also hampered investment.

While these factors impact investments in the regulated aspect of education sector to some extent, this, however, does not deter investments in education service provider companies, Ed-tech companies etc, which are currently not regulated. Such entities and businesses are not required to be of a not-for-profit character and are also not required to comply with education sector specific laws.

89. See [http://dipp.nic.in/sites/default/files/CFPC\\_2017\\_FINAL\\_RELEASED\\_28.8.17.pdf](http://dipp.nic.in/sites/default/files/CFPC_2017_FINAL_RELEASED_28.8.17.pdf) (last visited on January 13, 2018)

## I. Possible Structure in Case of Schools & Higher Education



[**Note:** Not-for profit companies which were earlier governed by Section 25 of the Companies Act, 1956 are now governed by Section 8 of the new Companies Act, 2013].

(Figure 3: Investment Structure)

Foreign investments can primarily be made into companies providing educational and construction services to schools run by Trusts, Societies or Section 8 Companies. Consequently, funds and other investors have invested in education services companies which provide services to such Trusts, Societies or Section 8 Companies and in turn receive compensation for it. A wide array of legitimate services, including management services, teacher training, curriculum designing, etc., can be provided to the entity running the school.

The aforesaid structure could be made applicable even with respect to colleges and deemed to be universities as they are also managed either by a Trust or a Society. However, its implementation in the case of professional colleges could be arduous because

of multiplicity of regulators. Further, the aforesaid model is based on the assumption that the school would be in a position to derive high income by way of fees commensurate with the services provided by it. This would be possible in the case of schools affiliated with the CBSE and the CISCE, as there is no ceiling on the amount of fees charged by such schools (except in states where fee regulation legislations are in force). However, in case of professional

colleges offering degrees in technical and medical education, the collection of fees may be regulated by State Bodies which are required to approve the fees structure of colleges during an academic year. For instance, in the State of Maharashtra, a state body called the Shikshan Shulk Samithi (SSS) decides the fees to be charged by a particular college. Such state



bodies regulating the fee structure and the admission process of colleges providing higher education are found in other States as well. The Supreme Court of India in the case of P. A. Inamdar and others vs. State of Maharashtra<sup>90</sup> held that the establishment of such committees is a permissible regulatory measure as it is aimed at protecting the interest of the student community as a whole.

Another option, fast emerging as a popular one in the K-12 space, is that of investing in schools following the IB and the International General Certificate of Secondary Education (IGCSE) syllabi. These schools are not subject to regulatory controls which are as restrictive as those applicable to schools affiliated to boards in India.

## II. Other Segments of Investment in the Education Space

Investment in the education space is not limited to only the K-12 and the higher education segments. There are other segments such as vocational training and tutoring services which have been attracting a great amount of interest amongst investors largely due their unregulated environment in which they operate.

### A. Vocational Training

A number of studies have indicated that a significant portion of students graduating from colleges are not readily employable in industries such as IT/ITES. Furthermore, a substantial portion of students graduating from schools lack the means to access professional colleges and tend to pursue employment in low level posts/profession. Vocational courses providing employable skills are, thus, in great demand. Private participation occurs mostly in niche training centers relating to IT and hospitality. The IT training market is one of the biggest sections in the vocational

course segment and is estimated to run into multi-million USD. This market, being outside the purview of Government regulation, is attractive for entrepreneurial participation.

### B. Tutoring & Test Preparation Services

Due to the increasing level of competition and the need to succeed at a state/national level to get into colleges of choice, the face of tutoring has undergone a tremendous change from what was once a teacher led, highly local and fragmented delivery model to IP/content led delivery model built around the promise of performance. The promise to provide individual attention and improve the level of performance of the student is what differentiates it from ordinary schooling. However, it is here that the challenge of creating a scalable model lies. The ability to deliver consistent quality of teaching and the ability to cater to the varying needs of each student are key challenges to scalability of the business. Scalability may, however, be achieved by the use of technology to deliver content, for assessment and benchmarking and to enable students undertake self-paced learning. Apart from the challenge of scalability, the industry also faces the problem of being highly fragmented. Scalability and profitability will, thus, require a significant commitment from the investors who understand that to build such a business, significant investments from time to time, and a long investment horizon would be required.

### C. Delivering Educational Services to Students on a for-Profit Basis

This model can provide opportunities to formal educational institutions as well as educational entrepreneurs to provide variety of services such as training, skill development, courses on employability enhancements etc. - areas that are presently outside the purview of regulations

90. Case citation: 2005(6) SCC 537.

governing education sector. For example, National Skill Development Corporation has collaborated with private sector through a PPP programme to provide educational modules on employability.

## D. PPP Model in Education

Under this model, education is treated as a public good with private sector participation. PPP in education is a marriage between non-profit activities and for-profit administration of such occupations (educational institutions). The Supreme Court of India has, in the case of T.M.A Pai Foundation<sup>91</sup> stated that education is a non-profit activity and institutions are under an obligation to not profiteer from such occupation; making reasonable surplus from such occupation is however allowed. In light of the same, PPP in higher education can be used for the following:

- Providing infrastructure and facilities
- Providing investments
- Providing capacities for future expansion

Moreover, several business models have also been developed by private players to increase participation in higher education sector. Few of the models are mentioned herein-below:

### Sub-Model I – Basic Infrastructure Model

States in India have disproportionate GDP spending on education. A large part of spending is dedicated to take care of operational expenses, salaries, allowances etc. thus leaving very little for the government to spend on infrastructure. Private sector can step in and provide infrastructure to government aided schools. Thus, the private sector invests in infrastructure while the government retains the responsibility for operations and management of the institutions and makes annualized payments to the private investors in lieu of the cost incurred in creating the infrastructure.

### Sub-Model II – Outsourcing Model

The private sector invests in the infrastructure and also has the responsibility of operations and management of the institutions, while the government pays the private investors for the specified services.

### Sub-Model III – Equity or Hybrid Model

Investments in infrastructure are shared between the government and the private sector, while operations and management are with the private sector.

### Sub-Model IV – Reverse Outsourcing Model

Government invests in infrastructure and the private sector takes the responsibility of operations and management.

While there has been considerable amount of experimentation with some success stories in school education and in the vocational-education and skill- development sectors, very few PPP models have been tried out in the field of education. Thus, in order to facilitate models for industry-institute interface and to ensure local and regional development of the areas, large education hubs could be created in different parts of the country anchored by large public/private sector enterprises funded through their allocations for corporate social responsibility with free provision of land and other essentials by the State governments concerned.<sup>92</sup>

## E. Online Education

Another new space of growth is the online education sector, which is witnessing investments, and entry of new providers through new initiatives and acquisitions. Since the programmes are offered online, they are

91. T.M.A. Pai Forundation v. State of Karnataka (2002) 8SCC 712

92. Inclusive and Qualitative Expansion of Higher Education, UGC 12th Fifth Year Plan (2012-17), available at: [http://www.ugc.ac.in/ugcpdf/740315\\_12FYP.pdf](http://www.ugc.ac.in/ugcpdf/740315_12FYP.pdf) (last visited on May 23, 2013).

not only low cost but are at times self-paced. It is also preferred by students who are unable to access physical centers. As per a report published by KPMG, India's online education industry is expected to grow almost eight times to hit \$1.96b by 2021. The paid user is expected to increase from ~1.6m users in 2016 to ~9.6m in 2021.<sup>93</sup>

Primarily, there are five business models which are growing at a rapid pace in the ed-tech sector in India,:

- primary and secondary supplement education;
- test preparation;
- reskilling and online certifications;
- higher education and language; and
- casual learning

As per the report published by KPMG, reskilling and online certification has the maximum paid users i.e. approximately 499,000.<sup>94</sup>

---

93. Online Education In India : 2021, A study by KPMG in India and Google, published on May 2017, available at <https://assets.kpmg.com/content/dam/kpmg/in/pdf/2017/05/Online-Education-in-India-2021.pdf> (last visited on December 28, 2017)

---

94. *Ibid.*

## 5. Taxation

In light of the restrictions on investment into the education sector due to the prevailing regulations which require the entity setting up the school or college or a deemed university to be of a non-profit character, the investments are usually made, as described previously, into an Education Services Company, which could provide services to the entity setting up and running the school / college / university. In such cases, taxation at multi-levels would have to be considered. The tax implications on the entity setting up the school, the Education Services Company and on the foreign investor are discussed below:

### I. On the Entity Setting up the Institution

Educational institutions set up as not-for-profit organizations are thus eligible for certain tax exemptions, as provided under the Income Tax Act, 1961 (ITA), subject to satisfaction of certain conditions, such as:

- the educational institution will have to qualify as a trust set up for a charitable purpose; education is covered within the definition of 'charitable purpose' as defined under Section 2(15) of the ITA;
- the educational institute will also have to fulfil certain other conditions in respect of utilization of income (i.e., income derived from property held under charitable trust must be used predominantly for charitable purposes), etc., as prescribed under Sections 11 and 12 of the ITA;
- the educational institution should be registered under section 12AA for availing such exemption.

Alternatively, if any university or other educational institution existing solely for educational purposes obtains registration as prescribed under Section 10(23F), it could claim income tax exemption from income earned by it.

### II. On the Education Services Company

An Education Services Company, as discussed above, would generally be rendering managerial, administrative and other services to the school. Being a corporate entity, the Education Services Company would be subject to tax on its total income at the applicable rate of corporate tax in India (currently 30% for resident companies).<sup>95</sup> In addition to corporate tax, the Education Services Company would be liable to goods and service tax on the entire value of the services rendered by it, currently at the rate of 18%<sup>96</sup> on consideration paid by Indian entities for services rendered by FEIs.<sup>97</sup> Personal taxation of faculty or other employee visiting India, risk of collaboration arrangements constituting an 'association of persons' ("AOP") between the foreign and Indian institutes. An AOP is a separate taxable entity and is considered to be resident in India even if a part of its control and management is situated in India. For example, in case of collaborations between an FEI and

95. All tax rates mentioned herein are exclusive of applicable surcharge and education cess, unless mentioned otherwise; In case of resident companies, surcharge at 7 per cent or 12 per cent is applicable on their income tax liability if their total taxable income in a financial year is in excess of INR 10 million and up to INR 100 million or in excess of INR 100 million, respectively. In case of non-resident companies, a surcharge of 2 per cent or 5 per cent is applicable in similar circumstances. In case of partnerships (including LLPs), a surcharge at 12 per cent is applicable on their income tax liability if their total taxable income in a financial year is in excess of INR 10 million. Cess (education cess and higher education cess) at 3 per cent (cumulatively) is payable by all entities on the total of their income tax liability and surcharge.

96. Subject to exemptions available depending upon the satisfaction of conditions laid.

97. Notification 8/2017 - Integrated Tax (Rate), available at <https://cbec-gst.gov.in/pdf/integrated-tax-rate/Notification8-IGST.pdf> (last visited on December 28, 2017)

an Indian institution where the FEI provides course content, faculty training, etc. and the Indian institution is responsible with respect to infrastructure and other on-ground activities, there is a risk that both entities may jointly be treated as an AOP (depending on the nature of relationship between the entities). As the Indian institution is resident in India, such an AOP would also be treated as a resident of India. AOP classification could give to significant exposure for FEI as AOPs resident in India are taxable on its worldwide income in India.

Further, the Government of India introduced the Equalisation Levy (Levy) in the year 2016. The Levy has been introduced to achieve the following two objectives:

- equalizing the playing field between resident service providers who pay income taxes in India and non-resident service providers who do not pay taxes in India;
- taxing the untaxed income of non-resident service providers who do not have a physical presence in India

The Levy currently imposes a 6% tax “on consideration received or receivable for any consideration received or receivable for any specified services” which currently includes “online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement”. As of now, the Levy is only applicable on online advertising industry. However, in 2016 the Government released the Report of E-commerce Committee on Taxation of E-commerce (“**Report**”). The Report suggested including several other services under the Levy. One such service being use of digital platforms for sale of goods and services; and online software applications accessed or downloaded through internet. If the same is introduced, it can affect the ed-tech sector and tax at the rate of 6-8% may be applicable on non-residents providing services through digital platforms.

### III. On the Foreign Investor

Under the ITA, non-residents are taxable only on income that is (a) received or is deemed to be received in India; or (b) accrues or arises or is deemed to accrue or arise in India.

In case of a foreign investor being located in a jurisdiction with which India has a double tax avoidance agreement (“**DTAA**”), the provisions of the ITA will be subject to relief under such agreement. Therefore, before investing in India, it would be useful to explore various structuring options from the perspective of tax efficiency along with other important considerations such as stability from political perspective, diplomatic ties with India, robustness of the financial sector, corporate law flexibilities from the perspective of re-structuring in future, rights under bilateral investment treaties, ease of raising funds from financial institutions, potential listing in the future, perception as a transparent jurisdiction, etc.

Subject to tax treaty relief, if applicable, the taxation of relevant sources of income of a foreign investor under the ITA would be as follows:

- Declaration / distribution of dividends on shares of an Indian company is subject to dividend distribution tax (“**DDT**”) at 15% (computed on a grossed up basis),<sup>98</sup> which is an additional tax on the profits of the Indian company. Such dividends are exempt from tax in the hands of the shareholders. DDT being a tax liability on the company and not the shareholder, foreign shareholders may not be able to claim foreign tax credit for such DDT in their country of residence.
- Interest payable on loans taken and debt securities issued in foreign convertible currency are taxable at the rate of 20% and 10% respectively; debt securities issued in Indian Rupees to Foreign Portfolio Investors are taxable at 5%. Interest payable in a majority of other circumstances is taxable

98. The Finance Act, 2014 changed the manner of computation of DDT under the ITA. With effect from October 1, 2014, DDT is computed on a grossed up basis.

at 40%. However, it is important to note that the ability of an Indian entity to borrow from / issue debt securities to non-residents is restricted under Indian exchange control regulations.

- Capital gains arising from the sale of unlisted securities held for 2 years or less are taxable at the rate of 40% and those held for more than 3 years at the rate of 10% in case of public companies & at 20%.<sup>99</sup>
- The consideration received/income generated by foreign institutions collaborating with Indian institutions (as discussed earlier) from granting the Indian partner either a right to use or associate with the brand name of the foreign university/ college or access to various course material, curriculum, etc. of the foreign university, may be characterized as royalty income in the hands of the foreign university. Presently, royalty income in the hands of non-residents is taxed at the rate 10% (on a gross basis) under the provisions of ITA, which may be reduced under an applicable tax treaty.
- If collaborations extends to provision of services, depending on the nature of services rendered, the consideration paid thereof may be categorized as fees for technical services. In such a case also, there applies a withholding tax of 10% (on a gross basis) under the ITA, subject to tax treaty relief.

When any of the above-mentioned sources of income is paid to a non-resident (FEI / other foreign investor), which are chargeable to tax India, the payer is under an obligation to withhold prescribed taxes. Further, if a non-resident is considered to have a permanent establishment in India (by having a fixed base, by having an agent in India with the power to contractually bind the non-resident, on account of employees visiting India in excess of prescribed durations, etc.), the non-

resident would be taxable in India at 40%<sup>100</sup> to the extent of net income attributable to its permanent establishment in India.

It is also important to note that India has introduced general anti-avoidance rules (“GAAR”), which are implemented from April 1, 2017. GAAR provides Indian tax authorities wide discretion with respect to taxation of ‘impermissible avoidance arrangements’. An arrangement would be considered an ‘impermissible avoidance arrangement’ if its main object is to obtain a tax benefit and if it satisfies one or more of the following: (a) non-arm’s length dealings; (b) misuse or abuse of the provisions of the domestic income tax provisions; (c) lack of commercial substance; and (d) arrangement similar to that employed for non-bona fide purposes. The tax authorities have been given broad powers to subject such arrangement to such tax treatment as they deem appropriate, including the power to disregard transactions, entities and structures that lack business purpose and commercial substance. Power has also been granted to re-characterize and re-allocate income between parties to the arrangement and to deny treaty benefits. However, GAAR will not be applicable if the tax benefit pertains to income generated from structures put in place up to 31st March, 2017.

Further, invocation of GAAR by the tax authorities, if objected by the taxpayer, is required to be approved by an Approving Panel, which is an independent body chaired by a retired High Court Judge, a senior member of the tax office and a reputed academician or scholar with expertise in taxation or international trade and business.

One of the important risk-mitigation strategies adopted by non-residents, particularly where there is uncertainty as to taxability of a transaction proposed to be entered into by them, is to approach the Authority for Advance Rulings (“AAR”) for a ruling, subject to restrictions as to pendency of regular litigation on the matter and rulings that would require

99. The 20% tax rate is applicable on capital gains as adjusted for currency fluctuations (as per prescribed mechanism).

100. Exclusive of applicable surcharge and cess.

examination of valuation. Recently, availability of AAR rulings has also been extended to questions pertaining to applicability of GAAR and domestic transactions between certain classes of persons. The AAR is an independent quasi-judicial body outside the tax department and its rulings is binding on the tax authorities

with respect to the particular transaction on which the ruling has been rendered. However, the ruling of the AAR could be challenged by invoking constitutional remedies before the High Court or the Supreme Court, which have the discretion to admit or reject such applications.

## 6. Identifying the Right Opportunities

The first thing required to be borne in mind while looking at investments in the Indian education sector is the fact that except for a few organizations, most of the educational groups are relatively small and have a low capital base. Therefore, while there are tremendous investments opportunities for strategic investors, one must bear in mind that the deal sizes can often be smaller than in other developed markets.

Irrespective of the size of the deal or the segment in which the investment is made, identifying the right target for investment is very critical. Investors should look at opportunities that make sense from a strategic business perspective. One should focus on the markets needs and the strengths and weaknesses of the target.

A robust legal due diligence process is also very critical given India's complex corporate, securities, exchange control and taxation laws. Conducting thorough due diligence of the target helps determine

whether the target presents a good investment opportunity to the investor, and to determine the other important aspects of the deal like valuation of the target, the nature of representations and indemnities to be taken from the target and its founders, etc. Issues such as absence / expiry / revocation of approvals obtained from the AICTE (especially relevant in case of management institutions), etc., are typically identified during such process. If such issues crop up, it would become necessary from the investors' perspective to incorporate certain conditions precedent and covenants on the target in the definitive documents. Such conditions precedent and covenants mandating that the target will acquire and maintain the requisite approvals for the running of institutions and comply with the conditions set forth by affiliating universities would be significant for guaranteeing hassle-free, effective returns on the investment.



## 7. Conclusion

Although investment in the Indian education sector is plagued with challenges, it offers great opportunity to investors. A number of studies and reports indicate that strong returns could be expected from the sector. With the demographic dividend in India at its peak, India's working age population almost two-third of the total population and the presence of a severe shortage of institutions delivering high quality education and training across segments, what is present before the investors is a timely opportunity. The regulatory issues associated with investing, extracting returns and exiting are indeed of

significant importance. However, with foresight, strategic planning taking into account legal, regulatory and tax considerations in dealing with these issues, investors interested in investing in education can overcome these challenges and generate favorable returns. The push by the MHRD to allow FEIs to set up base independently in India (without the need to partner with Indian institutes), certainly seems like a step towards facilitating foreign participation in India's education sector.

## About NDA

At Nishith Desai Associates, we have earned the reputation of being Asia's most Innovative Law Firm – and the go-to specialists for companies around the world, looking to conduct businesses in India and for Indian companies considering business expansion abroad. In fact, we have conceptualized and created a state-of-the-art Blue Sky Thinking and Research Campus, Imaginarium *Aligunjan*, an international institution dedicated to designing a premeditated future with an embedded strategic foresight capability.

We are a research and strategy driven international firm with offices in Mumbai, Palo Alto (Silicon Valley), Bangalore, Singapore, New Delhi, Munich, and New York. Our team comprises of specialists who provide strategic advice on legal, regulatory, and tax related matters in an integrated manner basis key insights carefully culled from the allied industries.

As an active participant in shaping India's regulatory environment, we at NDA, have the expertise and more importantly – the VISION – to navigate its complexities. Our ongoing endeavors in conducting and facilitating original research in emerging areas of law has helped us develop unparalleled proficiency to anticipate legal obstacles, mitigate potential risks and identify new opportunities for our clients on a global scale. Simply put, for conglomerates looking to conduct business in the subcontinent, NDA takes the uncertainty out of new frontiers.

As a firm of doyens, we pride ourselves in working with select clients within select verticals on complex matters. Our forte lies in providing innovative and strategic advice in futuristic areas of law such as those relating to Blockchain and virtual currencies, Internet of Things (IOT), Aviation, Artificial Intelligence, Privatization of Outer Space, Drones, Robotics, Virtual Reality, Ed-Tech, Med-Tech & Medical Devices and Nanotechnology with our key clientele comprising of marquee Fortune 500 corporations.

The firm has been consistently ranked as one of the Most Innovative Law Firms, across the globe. In fact, NDA has been the proud recipient of the Financial Times – RSG award 4 times in a row, (2014-2017) as the **Most Innovative Indian Law Firm**.

We are a trust based, non-hierarchical, democratic organization that leverages research and knowledge to deliver extraordinary value to our clients. Datum, our unique employer proposition has been developed into a global case study, aptly titled 'Management by Trust in a Democratic Enterprise,' published by John Wiley & Sons, USA.

A brief chronicle our firm's global acclaim for its achievements and prowess through the years -

- **AsiaLaw 2019:** Ranked 'Outstanding' for Technology, Labour & Employment, Private Equity, Regulatory and Tax
- **RSG-Financial Times:** India's Most Innovative Law Firm (2014-2017)
- **Merger Market 2018:** Fastest growing M&A Law Firm
- **IFLR 1000 (International Financial Review - a Euromoney Publication):** Tier 1 for TMT, Private Equity
- **IFLR:** Indian Firm of the Year (2010-2013)
- **Legal 500 2018:** Tier 1 for Disputes, International Taxation, Investment Funds, Labour & Employment, TMT
- **Legal 500 (2011, 2012, 2013, 2014):** No. 1 for International Tax, Investment Funds and TMT

- **Chambers and Partners Asia Pacific (2017 – 2018):** Tier 1 for Labour & Employment, Tax, TMT
- **IDEX Legal Awards 2015:** Nishith Desai Associates won the “M&A Deal of the year”, “Best Dispute Management lawyer”, “Best Use of Innovation and Technology in a law firm” and “Best Dispute Management Firm”

Please see the last page of this paper for the most recent research papers by our experts.

---










## Disclaimer

This report is a copy right of Nishith Desai Associates. No reader should act on the basis of any statement contained herein without seeking professional advice. The authors and the firm expressly disclaim all and any liability to any person who has read this report, or otherwise, in respect of anything, and of consequences of anything done, or omitted to be done by any such person in reliance upon the contents of this report.

## Contact

For any help or assistance please email us on [ndaconnect@nishithdesai.com](mailto:ndaconnect@nishithdesai.com) or visit us at [www.nishithdesai.com](http://www.nishithdesai.com)

The following research papers and much more are available on our Knowledge Site: [www.nishithdesai.com](http://www.nishithdesai.com)

|  |  |  |  |  |   |
|--|--|--|--|--|---|
|   | <b>Fund Formation:<br/>Attracting Global<br/>Investors</b>                               |   | <b>Social Impact<br/>Investing in India</b>          |   | <b>The Curious Case<br/>of the Indian<br/>Gambling Laws</b>             |
|  | March 2018   |  | July 2018  |  | February 2018   |
|   | <b>Corporate Social<br/>Responsibility &amp;<br/>Social Business<br/>Models in India</b> |   | <b>Incorporation of<br/>Company LLP in<br/>India</b> |   | <b>Outbound<br/>Acquisitions by<br/>India-Inc</b>                       |
|  | March 2018   |  | April 2017   |  | September 2014  |
|  | <b>Internet of Things</b>  |  | <b>Doing Business in<br/>India</b>                   |  | <b>Private Equity<br/>and Private Debt<br/>Investments in<br/>India</b> |
|  | January 2017   |  | September 2018                                       |  | March 2018  |

## NDA Insights

| TITLE  | TYPE         | DATE           |
|--|--------------|----------------|
| Blackstone's Boldest Bet in India                                      | M&A Lab      | January 2017   |
| Foreign Investment Into Indian Special Situation Assets                | M&A Lab      | November 2016  |
| Recent Learnings from Deal Making in India                             | M&A Lab      | June 2016      |
| ING Vysya - Kotak Bank : Rising M&As in Banking Sector                 | M&A Lab      | January 2016   |
| Cairn – Vedanta : 'Fair' or Socializing Vedanta's Debt?                | M&A Lab      | January 2016   |
| Reliance – Pipavav : Anil Ambani scoops Pipavav Defence                | M&A Lab      | January 2016   |
| Sun Pharma – Ranbaxy: A Panacea for Ranbaxy's ills?                    | M&A Lab      | January 2015   |
| Reliance – Network18: Reliance tunes into Network18!                   | M&A Lab      | January 2015   |
| Thomas Cook – Sterling Holiday: Let's Holiday Together!                | M&A Lab      | January 2015   |
| Jet Etihad Jet Gets a Co-Pilot   | M&A Lab      | May 2014       |
| Apollo's Bumpy Ride in Pursuit of Cooper                               | M&A Lab      | May 2014       |
| Diageo-USL- 'King of Good Times; Hands over Crown Jewel to Diageo      | M&A Lab      | May 2014       |
| Copyright Amendment Bill 2012 receives Indian Parliament's assent      | IP Lab       | September 2013 |
| Public M&A's in India: Takeover Code Dissected                         | M&A Lab      | August 2013    |
| File Foreign Application Prosecution History With Indian Patent Office | IP Lab       | April 2013     |
| Warburg - Future Capital - Deal Dissected                              | M&A Lab      | January 2013   |
| Real Financing - Onshore and Offshore Debt Funding Realty in India     | Realty Check | May 2012       |

## Research @ NDA

**Research is the DNA of NDA.** In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

Our dedication to research has been instrumental in creating thought leadership in various areas of law and public policy. Through research, we develop intellectual capital and leverage it actively for both our clients and the development of our associates. We use research to discover new thinking, approaches, skills and reflections on jurisprudence, and ultimately deliver superior value to our clients. Over time, we have embedded a culture and built processes of learning through research that give us a robust edge in providing best quality advices and services to our clients, to our fraternity and to the community at large.

Every member of the firm is required to participate in research activities. The seeds of research are typically sown in hour-long continuing education sessions conducted every day as the first thing in the morning. Free interactions in these sessions help associates identify new legal, regulatory, technological and business trends that require intellectual investigation from the legal and tax perspectives. Then, one or few associates take up an emerging trend or issue under the guidance of seniors and put it through our "Anticipate-Prepare-Deliver" research model.

As the first step, they would conduct a capsule research, which involves a quick analysis of readily available secondary data. Often such basic research provides valuable insights and creates broader understanding of the issue for the involved associates, who in turn would disseminate it to other associates through tacit and explicit knowledge exchange processes. For us, knowledge sharing is as important an attribute as knowledge acquisition.

When the issue requires further investigation, we develop an extensive research paper. Often we collect our own primary data when we feel the issue demands going deep to the root or when we find gaps in secondary data. In some cases, we have even taken up multi-year research projects to investigate every aspect of the topic and build unparalleled mastery. Our TMT practice, IP practice, Pharma & Healthcare/Med-Tech and Medical Device, practice and energy sector practice have emerged from such projects. Research in essence graduates to Knowledge, and finally to *Intellectual Property*.

Over the years, we have produced some outstanding research papers, articles, webinars and talks. Almost on daily basis, we analyze and offer our perspective on latest legal developments through our regular "Hotlines", which go out to our clients and fraternity. These Hotlines provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our Lab Reports dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction. We regularly write extensive research articles and disseminate them through our website. Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with much needed comparative research for rule making. Our discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged. Although we invest heavily in terms of time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

As we continue to grow through our research-based approach, we now have established an exclusive four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. **Imaginarium AliGunjan** is a platform for creative thinking; an apolitical ecosystem that connects multi-disciplinary threads of ideas, innovation and imagination. Designed to inspire 'blue sky' thinking, research, exploration and synthesis, reflections and communication, it aims to bring in wholeness – that leads to answers to the biggest challenges of our time and beyond. It seeks to be a bridge that connects the futuristic advancements of diverse disciplines. It offers a space, both virtually and literally, for integration and synthesis of knowhow and innovation from various streams and serves as a dais to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear your suggestions on our research reports. Please feel free to contact us at [research@nishithdesai.com](mailto:research@nishithdesai.com)



**Nishith Desai** Associates  
LEGAL AND TAX COUNSELING WORLDWIDE

**MUMBAI**

93 B, Mittal Court, Nariman Point  
Mumbai 400 021, India

tel +91 22 6669 5000  
fax +91 22 6669 5001

**SILICON VALLEY**

220 California Avenue, Suite 201  
Palo Alto, CA 94306-1636, USA

tel +1 650 325 7100  
fax +1 650 325 7300

**BANGALORE**

Prestige Loka, G01, 7/1 Brunton Rd  
Bangalore 560 025, India

tel +91 80 6693 5000  
fax +91 80 6693 5001

**SINGAPORE**

Level 30, Six Battery Road  
Singapore 049 909

tel + 65 65509855

**MUMBAI BKC**

3, North Avenue, Maker Maxity  
Bandra-Kurla Complex  
Mumbai 400 051, India

tel +91 22 6159 5000  
fax +91 22 6159 5001

**NEW DELHI**

C-5, Defence Colony  
New Delhi 110 024, India

tel +91 11 4906 5000  
fax +91 11 4906 5001

**MUNICH**

Maximilianstraße 13  
80539 Munich, Germany

tel +49 89 203 006 268  
fax +49 89 203 006 450

**NEW YORK**

375 Park Ave Suite 2607  
New York, NY 10152

tel +1 212 763 0080