

Investment in Education Sector

May 2016

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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.

The President of India, Shri Pranab Mukherjee has said that “Education is the true alchemy that can bring India its next golden age. Our motto is unambiguous: All for knowledge, and knowledge for all”.¹ Further, the 12th Five year Plan prepared by the planning commission also aims to give thrust to education in India.

Several initiatives are being taken by the government to encourage investments in education sector including greater participation by foreign educational institutions 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.

1. Ministry of Human Resource Development, accessible at: <http://mhrd.gov.in/> (last visited on February 6, 2014).

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 was pegged around INR 3.83 trillion (USD 62.34 billion) in financial year 2013-14.² Education industry is thus attracting sizeable investment, most notably in primary, secondary and higher education.

Further, education sector has attracted foreign direct investments (FDI) worth USD 964 million during April 2000 to September 2014, according to the data released by the Department of Industrial Policy and Promotion (DIPP).³

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

It has been observed that 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.

2. Education sector in India, available at: <http://www.ibef.org/industry/education-sector-india.aspx> (last visited on December 26, 2014).

3. Fact Sheet on Foreign Direct Investment (FDI) – From April 2000 to September 2014, available at: http://dipp.nic.in/English/Publications/FDI_Statistics/2014/india_FDI_September2014.pdf (last visited on December 26, 2014).

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

The education sector in India is making rapid strides towards providing quality education. Ten Indian institutes have made it to the top 100 in the Asia University Rankings 2014 published by Times Higher Education as compared to three in 2013.⁴

4. Education sector in India, Indian Brand Equity Foundation (September 2014), available at: <http://www.ibef.org/industry/education-sector-india.aspx> (last visited on December 26, 2014).

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 include⁵:

- 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 Edu-

cation (“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 and Karnataka. The Delhi School Education Act, 1973 (“DSEA”) includes pre-schools and pre-primary schools within its purview and confers power on the Administrator of Delhi to issue guidelines and regulate them. Similarly, the Karnataka Educational Institutions (Classification, Regulation and Prescription of Curricula) Rules, 1995 includes pre-schools within its ambit and lays down the procedure for admission, collection of fee and reservation. Moreover, Section 3 of the Karnataka Education Act, 1983 (“KEA”) gives power to the state government vide sub-section 2(j), to permit and establish institutions or centres for pre-primary education. Moreover, Circular No. 171/PGC/2006 dated 05/10/2006 issued by the Government of Karnataka makes registration of pre-primary schools compulsory if they are attached to primary schools and are located within the same premises. However, for pre-primary schools not attached to schools, registration with the education department is not compulsory. Barring these two states, regula-

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

tion of pre-primary schools is mostly absent. 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.

In 2013, the State of Maharashtra passed the Maharashtra Self-financed Schools (Establishment and Regulation) Act, 2012 (“MSSA”) which defines “pre-primary school” as a nursery, junior kindergarten, senior kindergarten level or any school imparting education up to pre-primary level for children between the age of three (3) to six (6) years, by whatever name called and of any medium attached to a primary school, but does not include a crèche. This definition implies that as long as a pre-primary school (by whatever name called) is not attached to a primary school, the MSSA does not apply. Thus, currently pre-primary schools or crèches or day care centers are not regulated in the state of Maharashtra.

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.

However, there has been a growing demand to include kindergarten and pre-schools within the regulatory framework. As per new reports, the women and child development ministry has finalized a draft ‘Early Childhood Care and Education (ECCE) Policy’ which proposes to not only make registration and accreditation of such centres mandatory, but to also set out the kind of curriculum and learning tools children are provided with at these centres.⁶

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 set up. 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 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.⁷ 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;

6. Govt to soon regulate play schools, day-care centres, First Post (August 13, 2013), available at: http://www.firstpost.com/india/govt-to-soon-regulate-play-schools-day-care-centres-1029205.html?utm_source=ref_article (last visited on February 6, 2014).

7. Central Board of Secondary Education, CBSE Overview, available at: <http://www.cbse.nic.in/welcome.htm> (last visited on June 7, 2013).

- 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.⁸

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.

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 program 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.⁹

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 program across several nations.¹⁰ In India, there are more than hundred

IB World Schools offering one or more of the three IB programs. Fifty-one (51) schools offer the Primary Years Programs, eleven (11) schools offer the Middle Years Program and one-hundred (100) schools offer the Diploma Programs.¹¹

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 programs at Indian universities. However, only about 56 universities currently recognize the IB Diploma.¹² Several colleges and universities do not recognize the IB Diploma, despite the fact that it is recognized by AIU.¹³

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.

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 are

<http://www.amity.edu/ais/aisg2/amitywebsite.pdf> (last visited on June 10, 2013).

8. Id.

9. CISCE Rules for Affiliation, available at: <http://cisce.azurewebsites.net/pdf/AffiliationGuidelines.pdf>.

10. Frequently Asked Questions, Amity University, available at:

11. International Baccalaureate - India, available at: <https://www.ibo.org/country/IN/> (last visited on December 30, 2014).

12. Id.

13. .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).

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 KEA prescribes registration with the appropriate authority (as authorized by the state government) with respect to 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 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, 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, 1956¹⁴ 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 be established purely by a non-profit entity. Thus, under the Haryana Education Act, for-profit companies could set up IB affiliated schools.

14. 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.

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.¹⁵ 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.

For example, the Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act, 1987, allows the state government to regulate tuition fee or any other fee that may be received or collected by any educational institution for admission to, and prosecution of study in any class or any standard or course of study of such institution in respect of any class of students. Collection of any amount, by whatever name called, whether in cash or kind, in excess of the prescribed or, as the case may be approved, rates of fee by unaided institutions is impermissible. Moreover, under the Maharashtra Educational Institutions (Regulation of Collection of Fee) Act, 2011 private unaided schools have been given the autonomy to decide their fee but certain criteria to judge the reasonableness of the fee being charged have been put in place. Similarly, in the State of Tamil Nadu, the Tamil Nadu Schools (Regulation of Collection of Fee) Act, 2009 empowers the state government to prescribe a ceiling on fee that can be charged by private schools and the provision has also been upheld by the High Court of Madras.¹⁶

However, there is a lack of legislative clarity in several states regarding fixation and/or regulation of fee charged by educational institutes. The fee regulation legislations are also the subject matter of litigation in several states. Schools which are CBSE and or ICSE affiliated must adhere to bye- laws of their respective boards which clearly state that fee charged should be commensurate with the facilities provided and no capitation fee or voluntary donations for gaining admission or for any other purpose should be charged.

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 and 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 of the age of six to fourteen years in such manner as the State may, by law, determine*’.¹⁷

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.

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

16. Lakshmi School, Madurai and Ors. Vs. State of Tamil Nadu, (2012) 7 MLJ 301.

17. Article 21A.

- 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*¹⁸ 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.¹⁹ Recently, the Apex Court held that the minority aided or unaided schools are exempt from the provisions of the RTE Act,²⁰ including the requirement to reserve 25% seats for weaker sections and disadvantaged groups.

While the above stipulations appear to promote a noble and vital cause, in light of recent developments, 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.²¹

IV. Higher Education

Education provided after completion of school education (Class XII) is known as higher education.

Higher Education in India comprises of Diploma Courses, Bachelor's/Undergraduate Degrees, Master's/ Post-graduate Degrees and Pre-doctoral/ Doctoral programs. 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". Non-Technical Education would, thus, refer to the courses, other than technical courses.

At present, India's Gross Enrollment Ratio (GER) is 15 per cent in higher education which is much lower than the world average of 23 per cent.²² The aim is to increase the GER to 21 per cent by the end of the 12th Plan and 30 per cent by 2020.²³ 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.²⁴ Private sector educational institutions have improved access to higher education and accommodate more than 50 per cent share in students' enrolment.

18. AIR 2013 Delhi 52.

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

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

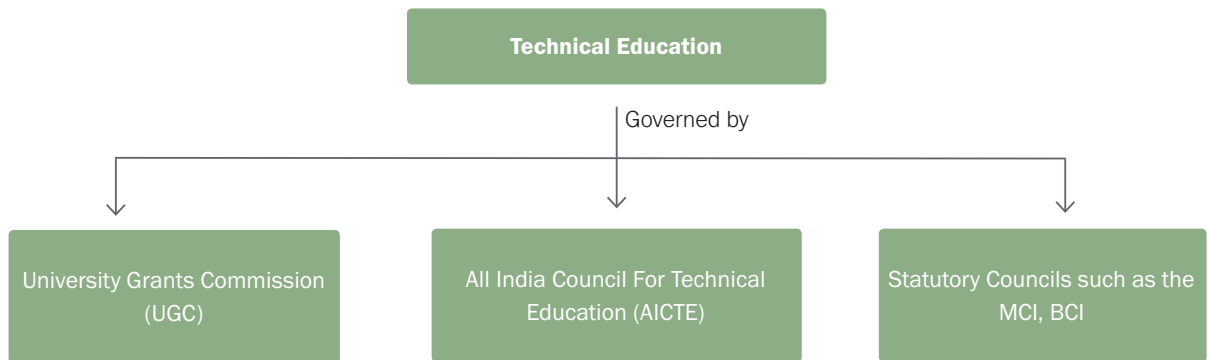
21. Bring back exams, more weight on learning, teachers, *Indian Express* (September 23, 2014), available at: <http://indianexpress.com/article/india/education/bring-back-exams-more-weight-on-learning-teachers/99/#sthash.Nxgb8rOs.dpuf> (last visited on December 30, 2014).

22. M.R. Madhavan & Kaushiki Sanyal, "Regulation in the Education Sector", available at: http://www.idfc.com/pdf/report/2012/Chapter_1.pdf.

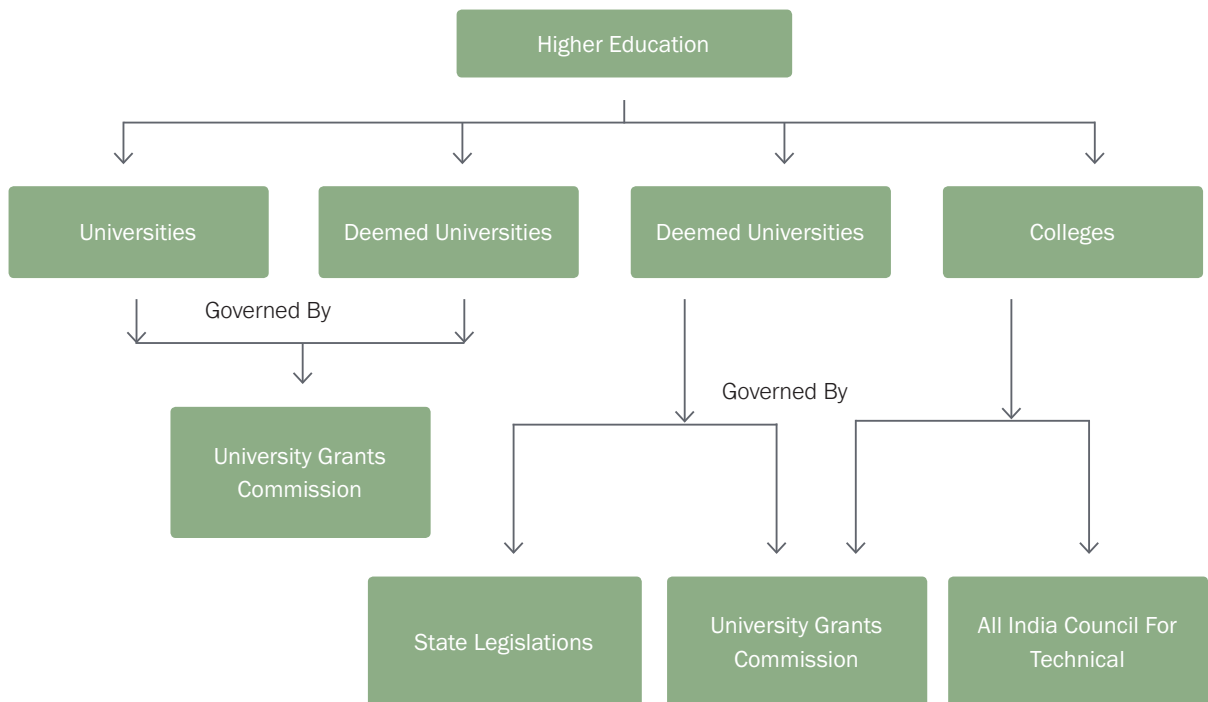
23. *Id.*

24. *Id.*

In India, there are different bodies/authorities governing technical education as indicated here:



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 UGC Act, 1956 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 (“AICTE”)

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.²⁵ 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 programs 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. Ever since the Apex Court’s rejection in 2013 of the

review petition filed by the AICTE in the Association of Management of Private Colleges case²⁶ there has been regulatory ambiguity over the contesting and sometimes overlapping jurisdictions of AICTE and UGC. The Apex Court had earlier restricted the role of AICTE to regulating technical education provided by colleges or institutes affiliated to universities.

However, pursuant to the Apex Court’s order in Orissa Technical Colleges Association v AICTE²⁷, for the academic year 2014-15, prior approval of AICTE is compulsory and mandatory for conduct of a technical

25. The AICTE Act, 1987.

26. Association of Management of Private Colleges v. AICTE and Ors, C.A No. 1145 of 2004.

27. Supreme Court’s order dated April 17, 2014 in SLP (Civil) No. 7277/2014.

course including the Management/MBA course by an existing affiliated technical college and also new technical college which will require affiliation by a University. Moreover, AICTE has also been allowed to act according to its Approval Process Handbook, as it did earlier.

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 45 Central universities, 325 state universities, 128 deemed universities and 195 private universities.²⁸ 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 standard of teaching. To this end, the UGC has introduced standards and regulations that private universities have to maintain under the 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.

28. UGC's list of total number of universities in the country as on November 26, 2014, available at: <http://www.ugc.ac.in/oldpdf/alluniversity.pdf> (last visited on January 3, 2014).

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, 2010' ("**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 in existence at least for a period of 15 years at the time of making an application 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). The status of deemed university granted to such institutions is, however, provisional at the first instance and is subject to confirmation after 5 years, on the basis of the performance report of the review committee set up by UGC.

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. It also does not require the approval of the AICTE for introducing new courses. However, it should adhere to standards set by the AICTE or other statutory councils.

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.

Institutions deemed to be universities have, however, in the recent past attracted the ire of regulatory authorities owing to the revelation of severe malpractices being perpetrated by persons in charge of such institutions. As such, the idea of the removal of this category of institutions is presently being mooted. Several applications for a deemed university status have also been put on hold for the moment and the procedure for cancellation of deemed university status for certain institutions which did not meet the requisite standards have also been initiated.²⁹

iii. College

A college means any institution which provides for a program of study after completion of twelve (12) years of schooling for obtaining the appropriate qualification from a university and which, in accordance with the rules and regulations of the university, is

29. 44 institutions lose deemed varsity status, The Hindu (January 18, 2010), available at: <http://www.thehindu.com/news/national/44-institutions-to-lose-deemed-varsity-status/article82129.ece> (last visited on June 7, 2013); 4 of 7 deemed universities found unfit by UGC face uncertain future; Times of India (September 24, 2014), available at: <http://timesofindia.indiatimes.com/india/4-of-7-deemed-universities-found-unfit-by-UGC-face-uncertain-future/articleshow/43278359.cms> (last visited on December 31, 2014); SC insists on fresh physical verification of 41 deemed universities, Times of India (Sep 26, 2014), available at: <http://timesofindia.indiatimes.com/home/education/news/SC-insists-on-fresh-physical-verification-of-41-deemed-universities/article-show/43476117.cms> (last visited on December 31, 2014).

recognized by the UGC as competent to provide for such program of study and awards such appropriate qualification to students undergoing such program of study.³⁰ Thus 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.³¹

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 487 autonomous colleges³² 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 –

- i. The UGC
- ii. 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 programs 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.

30. Reg 2.2 of the UGC (Affiliation of Colleges by Universities) Regulation, 2009.

31. UGC Guidelines for Autonomous Colleges during the Eleventh Plan Period (2007-12), available at: <http://www.ugc.ac.in/oldpdf/xiplanpdf/revise dau-tonomous240709.pdf>.

32. The figure provided by the UGC is updated till 01.08.2014. See www.ugc.ac.in/oldpdf/colleges/autonomous_colleges-list.pdf. Also, see <http://www.livemint.com/Politics/ZJTceIq4aPmi8QJr-WZmOfP/Govt-to-convert-45-autonomous-colleges-into-universities.html> (last visited on February 12, 2014).

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.³³ 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.³⁴

Further, the UGC on June 27, 2013 issued a public notice³⁵ ("**Notice**") whereby it raised concerns on advertisements (published in national dailies) for offering university degrees through franchise programs 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 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 programs 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.

UGC is in the process of framing detailed regulations in relation to ODL and the same are likely to be issued in due course of time.

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

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

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

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. Recently, Infosys Ltd has entered into a strategic partnership with Stanford University's Institute for Computational and Mathematical Engineering (ICME) to develop curriculum and to undertake research in data science and analytics, with a focus on industry issues. The University of Cambridge through the department of Cambridge English Language Assessment, which works with 200 technical institutions in India (in addition to companies for conducting assessments for employees), has signed more Memorandums of Understandings (MoU) with some Indian institutes. Tech Mahindra has inked a pact for collaborating with Wichita State University's National Institute for Aviation Research on multiple areas of engineering for training students before they enter the workforce. NIIT University (NU) has entered into an understanding with the University of Missouri- Kansas City's School of Computing and Engineering (SCE) to offer a five-year programme, which includes B.Tech degree from NU and Masters of Science in Computer Science from SCE. Aspada Investment Co has invested around US\$ 1.8 million in PI Policy Innovations Pvt Ltd. The company provides assessments, test design and feedback solutions for primary and secondary education schools in India.³⁶

Both the AICTE and the UGC have their own set of regulations to govern foreign universities / foreign educational institutions ("FEIs") entering India. The AICTE Regulation for Entry and Operation of Foreign Universities/Institutions Imparting Technical Education in India, 2005 ("AICTE Foreign University Regulation") regulates the activities of foreign universities/institutions interested in imparting Technical Education in

India, leading to the award of diplomas, degrees, etc. and even facilitate collaborations and partnerships between Indian and foreign universities/institutions. The UGC (Promotion and Maintenance of Standards of Academic Collaboration between Indian and Foreign Educational Institutions) Regulations, 2012 ("UGC Promotion and Maintenance Regulation") as well as the UGC (Mandatory Assessment and Accreditation of Higher Education Institutions) Regulation 2012 ("UGC Assessment and Accreditation Regulation") mandates foreign universities to comply with a number of pre-conditions which includes the requirement of ensuring that the degrees/diplomas awarded to the students in India shall be recognized in the parent country of the foreign university/institution.

The UGC Assessment and Accreditation Regulation require that all higher education institutions (except technical education colleges governed by the AICTE) apply for accreditation within a period of six months to the accreditation agencies recognized by UGC - currently the National Assessment and Accreditation Council, the National Board of Accreditation, and the National Accreditation Board. It may be noted that no franchise agreement is permitted under the UGC Assessment and Accreditation Regulation. Despite these measures to liberalize and regulate the sector, a deterrent to foreign universities or institutions entering India could be the requirement to consider factors other than merit while admitting students- At present, India's constitutional provisions mandate that institutions notified by the Government are required to reserve a specified percentage of its capacity to provide education to the weaker sections of society. FEIs have not been excluded from such affirmative action, despite the fact that they cater to a very different market.

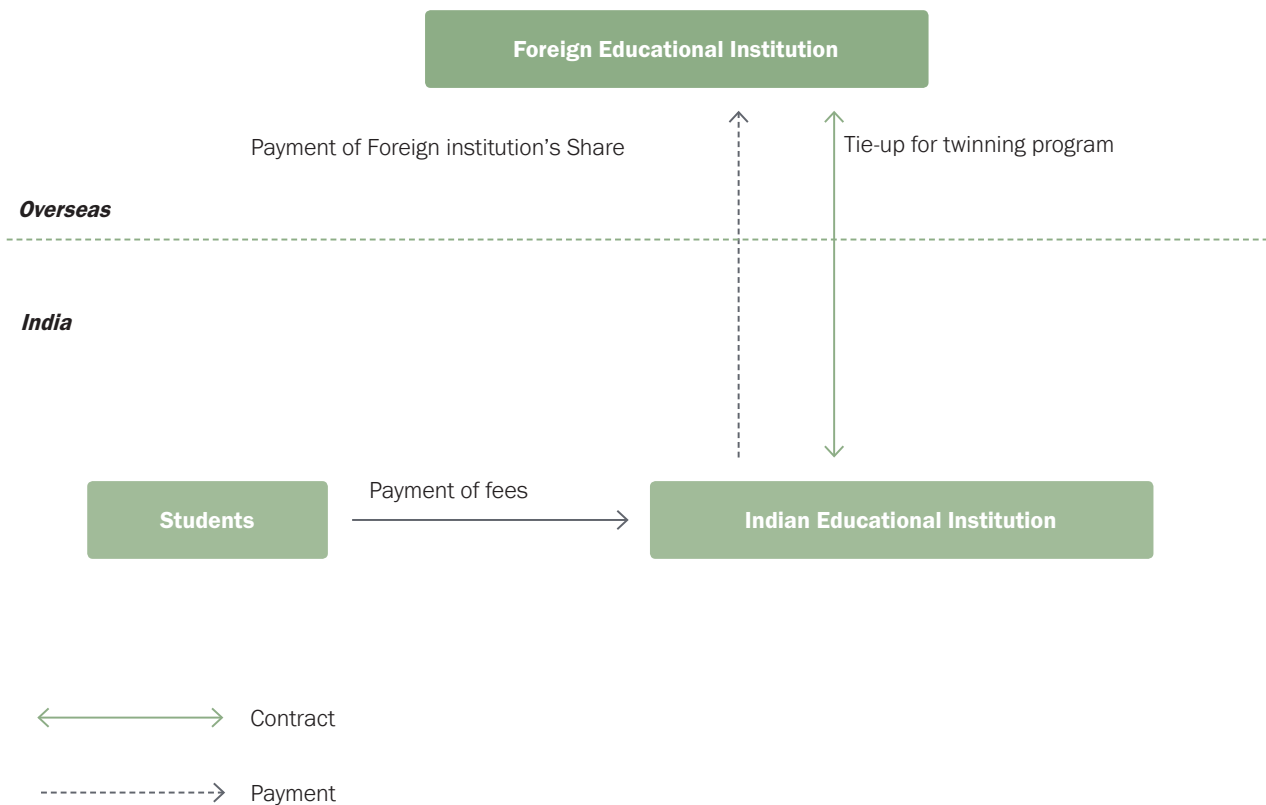
36. Education sector in India, Indian Brand Equity Foundation (September 2014), available at: <http://www.ibef.org/industry/education-sector-india.aspx> (last visited on December 26, 2014); Education sector in India, Indian Brand Equity Foundation (December 2014), available at: <http://www.ibef.org/industry/education-sector-india.aspx> (last visited on January 3, 2014).

I. Tie-ups with Indian Institutions for Twinning Programs

Twinning arrangement refer to those arrangements between universities 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 program. The twinning arrangement could have several variations depending on the specific needs between the contracting parties i.e. overseas and Indian institutes. Twinning program in India is regulated by the UGC (Promotion and Maintenance of Standards of Academic Collaborations between Indian and Foreign Educational Institutes) Regulations, 2012

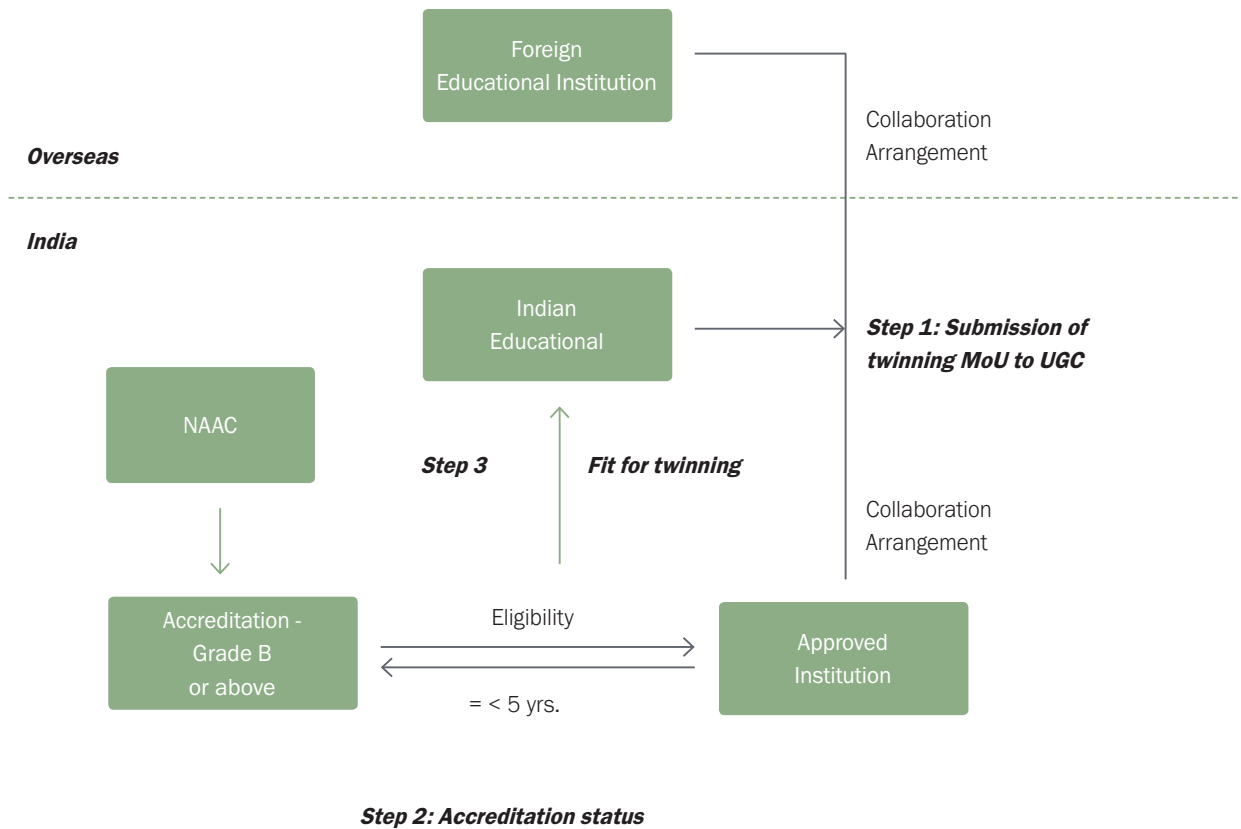
(“UGC Academic Collaboration Regulation”). Besides student exchange, twinning models also facilitate foreign institutes to enter into a service agreement with domestic institutes for providing expertise and services like faculty exchange, curriculum, foreign affiliations etc. Foreign institutes can also provide distant education courses through e-learning to students in India.

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



(Figure 1: A typical twinning arrangement model in India)

II. Tie-Ups with Indian Institutions for Collaboration Programs



(Figure 2: liberalized regulation for collaboration with foreign education providers)

Under this model, an arrangement is made between an Indian educational institution and a foreign educational institution through a written agreement for collaboration with the purpose of offering degree(s) and post-graduate diploma programs to the students.

As per the UGC Academic Collaboration Regulation, Indian institutes with minimum Grade B accreditation can enter into collaboration with foreign educational institutions. The UGC Academic Collaboration Regulation lays down stringent norms to ensure that quality of education is not compromised. Only those institutions recognized and graded in their parent country are allowed to enter into collaboration with Indian educational institutions.

Indian institutions which are accredited by a nationally recognized accrediting agency with a grade not less than 'B' would be allowed to collaborate with foreign educational institutions.

The regulations further provide that Indian institutes collaborating with foreign institutes should have an experience of at least five years offering educational programs at the level of degree and post-graduate diplomas. The UGC Academic Collaboration Regulation is a positive policy initiative to encourage foreign educational institutions to collaborate with Indian institutions and it is expected that collaborations will further strengthen the higher educational space in India.

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 2015), which became effective from May 12, 2015, construction development activities in the education sector have been exempted from conditions generally applicable to construction- development sector in terms of the minimum built area, the minimum capitalization (USD 10 million for wholly owned subsidiaries and USD 5 million for joint ventures with Indian partners) and 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

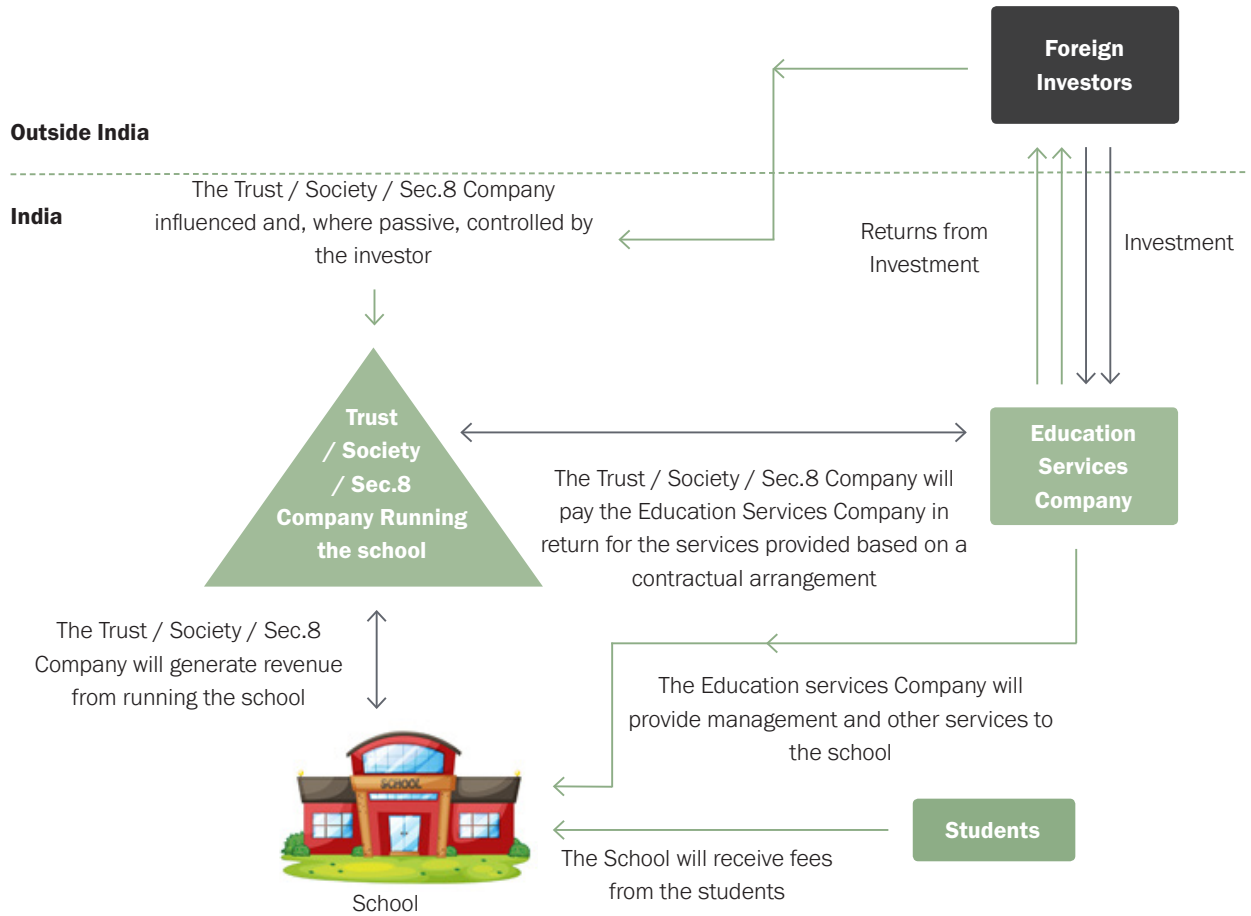
which could be either commerce, art, science, religion, charity or any other useful object.

- 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.

As a step towards liberalization of the heavily regulated higher education sector, MHRD on September 10, 2013 issued a press release³⁷ informing various stake-holders about its proposal to allow foreign universities to set up campuses in India as not-for-profit companies. MHRD is in the process of finalizing the UGC (Established and Operation of Campuses of Foreign Educational Institutions) Rules to permit foreign universities to set up campuses in India and issue foreign degrees without having to collaborate with domestic educational institutions or education service providers, as is the case currently. MHRD has forwarded the above Rules to the Department of Industrial Policy and Promotion (“DIPP”) and the Department of Economic Affairs (“DEA”) for their comments. The above proposal and Rules, if passed, will usher a new era in the higher education sector in India with many reputed foreign universities setting up independent campuses in India.

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

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 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 edu-

cation, 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 Maharashtra³⁸ 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 International Baccalaureate (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 among investors largely due their unregulated environment.

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 participa-

tion 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-pace 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.

³⁸. Case citation: 2005(6) SCC 537.

Investment into educational books, CD ROMs and stationary are also options that may be considered for investment in the education sector.

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 governing education sector.³⁹ For example, National Skill Development Corporation has collaborated with private sector through a PPP program 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 Foundation⁴⁰ 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.

39. Higher Education Sector: Opportunities for Foreign Universities, PWC(October 2012), available at: [http://www.pwc.in/en_IN/in/assets/pdfs/industries/education/publication/India-higher-edu-sector-\(251012\).pdf](http://www.pwc.in/en_IN/in/assets/pdfs/industries/education/publication/India-higher-edu-sector-(251012).pdf) (last visited on February 12, 2014).

40. T. M. A. Pai Foundation v. State of Karnataka (2002) 8 SCC 712.

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.⁴¹

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

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. Separately, service tax at 14.5% (inclusive of Swachh Bharat Cess of 0.5%), which is an indirect tax

as distinguished from income tax, would be applicable in case of educational services that provide services other than the following:

- i. pre-school education and education up to higher secondary school or equivalent;
- ii. education as a part of a curriculum for obtaining a qualification recognised by any law for the time being in force;
- iii. education as a part of an approved vocational education course.

Therefore, training for unregulated courses would be subject to service tax liability.

The Finance Bill, 2016 proposes to increase the service tax to 15% by way of levy of Krishi Kalyan Cess of 0.5% to finance and promote initiatives to improve agriculture.

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).⁴² In addition to corporate tax, the Educa-

42. All tax rates mentioned herein are exclusive of applicable surcharge and education cess, unless mentioned otherwise; In case of resident companies, surcharge at 5 per cent or 10 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 resident partnerships (including LLPs), a surcharge at 10 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.

The Finance Minister, in his budget speech in 2015, had proposed to reduce the corporate tax rate from 30% to 25% (excluding surcharge and cess) over the next four years, coupled with rationalization and removal of various exemptions and rebates. An initiation towards this gradual phasing out is proposed to be made by the

tion Services Company would be liable to service tax on the entire value of the services rendered by it, currently at the rate of 14.5% (which is proposed to be increased to 15% as mentioned above). As service tax is generally passed on to the service recipient, the entity running the school, etc., may be able to claim credit for service tax paid on input services utilized by it for running its operations. However, it would not be able to claim such credit in the event that the education / training provided by it are regulated courses and therefore not subject to service tax (as mentioned above).

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)⁴³, 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 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 3 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%⁴⁴ (with benefit of adjustment of capital gains for foreign exchange fluctuation) in case of private companies. The Finance Minister, in his speech on the Budget 2016, has proposed to reduce the holding period (which results in different tax rates mentioned above) to 2 years. Further, in case of unlisted shares of private companies, the Finance Bill, 2016 proposes to bring the position at par with tax applicable in case of unlisted shares of a public company
- 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

Finance Bill, 2016, which states that manufacturing entities set up on or after March 1, 2016 are entitled to a lower rate of 25% subject to certain conditions. Furthermore, it has been proposed to lower the corporate tax rate to 29% for those domestic companies whose turnover in the financial year 2014-15 does not exceed INR 50 million (approx. USD 800K).

43. 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.

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

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 extend 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 (foreign educational institution / other foreign investor), which are chargeable to tax in 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% 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 to be implemented from April 1, 2017. Once effective, GAAR will provide 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 August 2010. Further, the Finance Minister stated (at the time the Finance Bill, 2015 was laid before Parliament) that investment made up to 31 March 2017 will be protected from the applicability of GAAR through an amendment of the relevant rules in this regard. However, these rules have not yet been issued.

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 the 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 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 are 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.

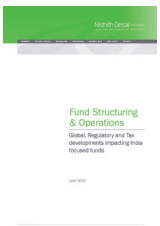

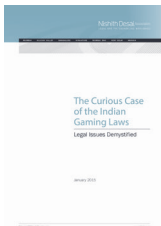






A robust legal due diligence process is also very critical given India's complex corporate, securities, exchange control and taxation laws. Conducting thorough due diligence of the target helps determine whether the target presents a good investment opportunity to the investor, and to determine the other 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 foreign educational institutes 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.

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