Higher Education

Opportunities for Foreign Education Institutes in India

Strategic, Legal and Tax Issues

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According to the India Brand Equity Foundation, India’s higher education system is the largest in the world.¹ In 2017-18, a total of 36.64 million students were enrolled in higher education in India. The higher education sector witnessed an inflow of USD 1.75 billion as Foreign Direct Investments (“FDI”) from April 2000 to June 2018.² Thus, education in India is a growing market and an industry in itself.

To meet the growing demands, the higher education sector in India has witnessed a paradigm shift in recent times. Until a few years back, the sector was primarily focused on certain home grown institutions like the Indian Institutes of Technology (IITs) and the Indian Institutes of Management (IIMs). But in the past few years, there has been an increase in the participation of domestic and global providers in this sector. This is a great sign for the growth of the sector.

India, however still lags behind in the quality of its higher education institutions. Majority of the institutes still offer dated curriculum and do not use a skill training approach, which is the need of the hour. This creates a demand and supply variance where only few institutes are able to offer job ready graduates. This challenge is a big opportunity for global participation. There has been an increase in the demand for education programmes offered by global institutions, which tend to offer a curriculum that reflects latest trends, and imparts new age learning. The use of latest teaching methods and technology in imparting education and skill based learning are aimed at making students employable. Thus, these courses are well received by students.

In order to encourage foreign participation, several initiatives have been and/or are being taken by the Indian government. FDI up to 100% is allowed under the automatic route in the education sector in India. According to the data released by Department of Industrial Policy and Promotion (“DIPP”) from April 2000 to December 2018, the education sector received FDI of a total of USD 2213.49 million.³ Investment in the higher education space is particularly considered to have a great potential. India’s Gross Enrollment Ratio (“GER”) in higher education was 25.2% for the year 2016-17⁴ and the target of the government is to increase it to 30% by 2020.⁵ Given the market size, the Indian education sector offers good opportunities for both domestic foreign providers in this sector.

In addition to this, even amongst the private providers, efforts are being taken to encourage development of strong collaborations between well-established foreign universities and Indian universities in order to facilitate greater academic exchange among students.

As a further impetus to the higher education sector, in 2017, the Government of India approved the regulatory architecture for setting up / upgrading twenty Institutions of Eminence in the country.⁶ Institution of Eminence is an initiative by the Government to set up or recognize existing higher educational institutions in India as world class teaching and research institutes. This step is specifically taken so as to enable Indian institutions/ universities to make its mark amongst the top 100 of world institutions ranking and also to get global recognition. In July 2018, the government declared 6 institutions (3 from public sector and 3 from private sector) as Institutions of Eminence after considering applications from around 100 Indian educational institutes/universities.⁷ The Institutes of Eminence recognized under this initiative are to have greater autonomy with respect to admission of foreign students, recruitment of foreign faculty, and can enter into academic collaboration with top 500 higher educational institutes in global ranking, without any permission from the Government or University Grants Commission (“UGC”).

Further in 2018 itself, the UGC issued the University Grants Commission (Conferment of Autonomous Status upon Colleges and Measures for Maintenance of Standards in Autonomous Colleges) Regulations,

2. ibid.
2018 ("Autonomous Colleges Regulations") for regulation of autonomous colleges. Autonomous colleges have the freedom to design their course, curriculum, fix fees of the courses at their own level, have flexible teaching methods and modules, and have complete administrative autonomy, unlike affiliated colleges and are therefore provide an avenue for investment and innovation. The University Grants Commission (Categorization of Universities (only) for Grant of Graded Autonomy) Regulations, 2018 ("Grant of Graded Autonomy Regulations") encourage autonomous universities to collaborate with foreign educational institutions. These regulations also give an impetus to new age and skill courses.

In this paper, we have discussed some of the structuring options available to foreign educational institutes ("FEI") for doing business in the education sector in India. We have also discussed the key regulatory and tax concerns involved in such structuring.
1. Broad Overview of Regulatory Framework
Governing the Education Sector in India

The higher education segment in India is typically divided in two broad segments:

- **Regulated**
- **Unregulated**

### I. Regulated Sector

This segment includes:
- bachelor’s/undergraduate degree courses
- master’s/post-graduate degree courses
- diploma courses
- pre-doctoral/ doctoral programmes
- online education programmes (non-technical courses)

As per the University Grants Commission Act, 1956 ("UGC Act"), the right of conferring or granting degrees can be exercised only by a university or an institution deemed to be a university. The UGC Act stipulates the criteria for qualifying as universities, deemed universities and has provisions relating to the pre-requisites / eligibility for grant of degrees.

#### A. Technical and Non-Technical courses

The regulated sector can be further sub-categorized broadly into technical and non-technical education courses.

- **Technical courses:** 'Technical Education' has been defined in the All India Council for Technical Education Act, 1987 ("AICTE Act") to mean "programmes 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 AICTE, by notification in the Official Gazette, declare". The All India Council for Technical Education ("AICTE") oversees technical education and the functioning of technical institutions within the country. 'Technical Institution', under the AICTE Act, refers to the institutions, other than universities, conducting the courses or programmes in the field of Technical Education. Courses in technical programmes cannot be offered without prior permission of the AICTE.

- **Non-technical courses:** Non-technical education refers to courses other than technical courses. To the extent they lead to the award of a degree, diploma, etc., they are regulated by the UGC.

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8. Section 22 of the UGC Act.
9. In 2018, the Ministry of Human Resource Development published the Higher Education Commission of India (HECI) Bill, 2018, to repeal the University Grants Commission (UGC) Act, 1956 inviting public comments. However, the Bill is yet to become law.
10. Section 2(g) of the AICTE Act.
11. Section 2(h) of the AICTE Act.
B. Professional councils

Statutory professional councils regulate certain professional courses in the country. They are responsible *inter alia* for recognition of courses, promotion of professional institutions and providing grants for programmes. 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.

C. Distance Education Board

In addition to the in-person education offered through colleges and universities, the distance education sector also forms part of the formal education system in India. It was initially governed by the Distance Education Council ("DEC") which was set up under the Indira Gandhi National Open University Act, 1985. However, in May 2013, the DEC was dissolved.\(^{12}\) Subsequently, in May 2013, the Government, issued a notification transferring DEC's responsibilities to the UGC.\(^{13}\) Vide notification dated June 17, 2013, the UGC adopted the Guidelines of the DEC on Minimum Requirements for recognition of Open and Distance Learning ("ODL") institutions, till such time the UGC frames regulation for ODL institutions.\(^{14}\)

On June 23, 2017, the UGC notified the University Grants Commission (Open and Distance Learning) Regulations, 2017 ("ODL Regulation 2017"),\(^{15}\) setting out minimum standards of instructions required for granting degrees (undergraduate and post-graduate levels) through ODL mode.\(^{16,17}\) These regulations are only 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.\(^{18}\) The key conditions under the regulations include the following:

- higher educational institutions already offering\(^{19}\) or intending\(^{20}\) to offer programmes in ODL mode from the academic session 2018-19 and onwards have to seek approval for recognition from the UGC;
- in order to be recognized the higher educational institutions should have valid accreditation from National Assessment and Accreditation Council ("NAAC") and complete five years of existence;\(^{21}\)
- permission to offer distance education programme in ODL mode will be granted course wise and prior permission is required with respect to each courses to be offered in ODL mode;
- higher education institution can offer up to 20% of the total course being offered in each programme in a semester through online learning courses / massive open online course;\(^{22}\)
- the higher educational institution other than an Open University\(^{23}\) is offering similar programme in the conventional mode of classroom teaching;\(^{24}\)

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\(^{12}\) See https://www.ugc.ac.in/deb/MHRDLetter-16thMay2013.pdf (last visited on January 09, 2019).

\(^{13}\) Ibid

\(^{14}\) See https://www.ugc.ac.in/deb/notices/UGCNotification-17thJune2013.pdf (last visited on January 09, 2019).

\(^{15}\) Available at https://www.ugc.ac.in/oldpdf/regulations/distance%20education%20regulations.pdf (last visited on January 11, 2018).

\(^{16}\) 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.

\(^{17}\) Regulation 2(i) of the ODL Regulation 2017.

\(^{18}\) Regulation 3(i) of the ODL Regulation 2017.

\(^{19}\) Regulation 3(ii) of the ODL Regulation 2017.

\(^{20}\) Regulation 3(ii) of the ODL Regulation 2017.

\(^{21}\) Regulation 3(ix)(vii) of the ODL Regulation 2017.

\(^{22}\) Regulation 3(ix)(xii) of the ODL Regulation 2017.

\(^{23}\) Regulation 2(z) of the ODL Regulation 2017 defines "Open University" as a University which imparts education through distance education or Open and Distance Learning mode using variety of Information and Communication Technology educational aids i.e. online education in the form of Open Educational Resources (OERs) or Massive Open Online Courses (MOOCs) etc.

\(^{24}\) Regulation 3(ix)(iii) of the ODL Regulation 2017.
higher educational institutions have to establish a centre for internal quality assurance exclusively for programmes to be offered in ODL mode within 1 year from these regulations come into force;\textsuperscript{25}

higher educational institutes can fix the fee structure for its courses but the same has to be declared in its prospectus for admission and on the website.\textsuperscript{26}

Further, with respect to deemed universities, the ODL Regulation 2017 specifically states that:\textsuperscript{27}

- 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.

C. Online education programmes

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, and are at times self-paced, it is also preferred by students who are unable to access physical centres. 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.\textsuperscript{28} This is the potential of this sector.

Various Massive Open Online Course (“MOOC”) initiatives have been started by universities and colleges, and by the Indian government as well. Some examples of MOOCs are:

- Birla Institute of Technology and Science (BITS) Pilani, IIT Bombay and IIM Bangalore have partnered with the MIT & Harvard's MOOC platform edX to offer MOOCs to their on-campus and off-campus students.
- As a government initiative, the Union Human Resource Development ("HRD") Ministry had initiated its MOOC platform called SWAYAM, where professors of centrally funded institutions will offer online courses free of cost. SWAYAM was launched in 2016, with the goal to introduce over 350 new online degree, diploma, certification and other course such as MOOCs on this platform. The course offered through SWAYAM are regulated under the UGC (Credit Framework for Online Learning Courses through SWAYAM) Regulations, 2016 (“SWAYAM Regulations”).\textsuperscript{29} The Swayam Regulations provide for credit mobility for credits earned through online learning courses through SWAYAM in the credit programme of educational institutions.\textsuperscript{30} The union cabinet also approved the signing of a declaration of intent with the U.S. Department of State for US universities to offer post-graduate academic programmes with certification on the SWAYAM platform.\textsuperscript{31} Further, technical education can also be provided through SWAYAM platform as per the AICTE Regulation (Credit Framework for online learning course through SWAYAM) Regulation, 2016.\textsuperscript{32}
In 2018, the UGC recognized the validity of degrees, diplomas and certificates offered through online modes of education under its University Grants Commission (Online Courses or Programmes) Regulations, 2018 (“Online Education Regulations”).

The Online Education Regulations apply to a University and an Institution deemed to be a University. As per these regulations, only non-technical courses can be offered online. Further, any course or programme which requires a practical or a laboratory course(s) as a part of its curriculum can also not be offered through the online mode.

For the purpose of obtaining recognition to offer online education, Higher Education Institutes (“HEI”) should meet the criteria laid down under the Online Education Regulations.

The HEIs which are given recognition may operate Online Course or Programme from the next academic session. Some of the key conditions under the Online Education Regulations for offering online education are as follows:

1. The Online Course or Programme should be delivered through the SWAYAM portal or any other learning platform after the same is verified and approved by the expert committee of the UGC.
2. The online learning should have a four quadrant ‘approach’, namely, tutorials, e-content, web resources and self-assessment.
3. Apart from the actual course or programme delivery, other components such as counseling process, online application processing and fee payment should also be provided through online mode.
4. The duration of the Online Course or Programme should be as below:
   a. For a Certification: The Online Course or Programme should be of minimum of six months’ duration and would have a minimum twenty credits.
   b. For a Diploma: Online Course or Programme should be of minimum of one year duration and would have minimum forty credits.
   c. For a degree: The Online Course or Programme should for the same duration and for the same credits as specified by the UGC under Choice Based Credit System (CBCS).

However, the maximum duration for completing the Online Course or Programme should be double the minimum duration of the course or programme as laid down by the UGC from time to time.

5. The HEI can provide one or more academic sessions each year which begin either in July/August or January/February each year.

The Online Education Regulations currently do not extend to programs non-technical courses or degrees, diplomas offered by institutes outside India.

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33. Regulation 2(q) of the Online Education Regulation defines ‘Online Course or Programme’ to mean the Course or Programme of studies which are delivered through online mode leading to award of a Certificate or Diploma or Degree by an approved Higher Educational Institution and recognised under these Regulations. Available at https://www.ugc.ac.in/pdfnews/753683_Online-Courses-or-ProgrammesRegulations_2018.pdf
34. Section 2(f) of the UGC Act, 1956 defines “University” to mean a University 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 recognised by the Commission in accordance with the regulations made in this behalf under the UGC Act
35. Section 3 explains “Institutions Deemed to be Universities” to mean The Central Government may, on the advice of the Commission, declare by notification in the Official Gazette, that any institution for higher education, other than a University, shall be deemed to be a University for the purposes of the UGC Act, and on such a declaration being made, all the provisions of this Act shall apply to such institution as if it were a University within the meaning of clause (f) of section 2.
36. Regulation 2(k) of the Online Education Regulations defines ‘Higher Educational Institution’ to mean a university covered under clause (f) of section 2 and an institution deemed to be a university under section 3 of the Act, which is imparting higher education or research therein by means of conducting regular classes or through Open and Distance Learning systems or through online education system
37. Regulation 4 of the Online Education Regulation. Some of the criterion are existence of at least 5 years; should be accredited to the National Assessment and Accreditation Council and have a score of at least 3.26 on 4: demonstration of capability for developing and producing Online Courses or Programmes; having access to SWAYAM
II. Unregulated Sector

The unregulated sector primarily comprises of:

- certification courses not leading to the award of a degree or diploma
- vocational training
- tutoring services / coaching classes

In the recent past, skill based courses, certification programmes, vocational training and tutoring have garnered interest amongst education service providers. This is because a significant percentage of students graduating from universities and colleges are not readily employable because of lack of skills. This results in students enrolling in coaching classes / vocational training classes and seeking certification courses to increase their scope of employability. Due to the growth of the unregulated education sector and the heavy enrollments, there has been a move to regulate some segments of this sector as well. For instance, tutoring classes are regulated in some states in India now. The regulations however are not compliance heavy, but seek registrations of such institutes so that the government is aware of the number of such institutes that operate in a particular area. Further, there are certain do’s and don’t’s prescribed under the regulations which are aimed to encourage regular schools rather than focus on tuitions classes. Similarly, at times, AICTE regulates extends its jurisdiction to regulation certification courses as well with an aim to protect student interest.

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38. In Goa, private coaching classes and tuitions are regulated under the Goa Coaching Classes (Regulation) Act, 2001. Maharashtra has taken steps towards regulation of coaching classes however, no law has been enacted in this regard till date. See https://timesofindia.indiatimes.com/home/education/news/maharashtra-to-revise-draft-of-private-coaching-classes-regulatory-bill/articleshow/66703536.cms
2. Operation of FEIs in the Regulated Sector

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 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 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. However, currently, the only way FEIs can enter the regulated sector is by way of collaboration with Indian educational institutes.

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

I. AICTE Regulations

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 educational 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:

- the FEI has to be approved and accredited with higher grades in its home country;
- the Indian educational institution has to be an AICTE approved institution and registered as a not-for-profit entity;
- the degree/diploma granted to students has to be recognized in the FEI home country;
- the fee, quantum of student intake, admissions, entry-qualifications and conduct of courses should be as prescribed by AICTE from time to time;
- the FEI 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;
- the FEI is responsible for obtaining accreditation from the National Board of Accreditation after two batches have passed out;
- a performance guarantee fee is required to be paid at the time of seeking registration;
- franchise arrangements are not permitted.

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.\(^{31}\)

**II. UGC Regulations 2016\(^{32}\)**

The UGC (Promotion and Maintenance of Standards of Academic Collaborations between India and Foreign Educational Institutions) Regulations, 2016 ("UGC Regulations 2016") allows FEIs to collaborate with Indian educational institutions (other than technical institutions) upon obtaining approval from the UGC.\(^{53,54}\) Approval is granted for two cycles of the minimum duration of the degree programmes covered under the collaboration.\(^{55}\) These regulations also cover twinning programmes whereby students may complete their course by part study in India and part study in the main campus of the FEI.\(^{56}\) UGC Regulation 2016 have introduced an e-application process for seeking approvals for collaboration/twinning programmes.\(^{57}\) The key conditions under this regulations include the following:

- The FEI 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.\(^{58}\) The FEI also has to abide by other conditions prescribed by the Government statutory bodies.\(^{59}\)

- the Indian educational institute has to be accredited with grade not less than A or its equivalent by any AAA authorized by the UGC;\(^{60}\)

- the written memorandum of understanding to be entered into between the FEI and Indian educational institute after obtaining approval of the UGC;\(^{61}\)

- the FEI 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;\(^{62}\) if any;

- franchise arrangements are not permitted.\(^{63}\)

*Autonomous colleges and institutes:* Autonomous colleges and institutes enjoy autonomy over their day-to-day functioning. In 2018, the government has taken measures to regulate autonomous colleges by introducing the Autonomous Colleges Regulations and the Grant of Graded Autonomy Regulations. The Grant of Graded Autonomy Regulations aim to provide autonomy to the HEIs based on quality benchmarks and categorizes universities into three categories – Category I, II and III based on benchmarks mentioned therein.\(^{64}\) Category I & II Universities can hire foreign faculty, without approval of the Commission, who have taught at an institution appearing in top five hundred of any of the world renowned ranking frameworks. Further, Category I universities may engage in academic collaborations with foreign educational institutions without approval from the UGC.\(^{65}\) The regulations are an example of the government’s attempt to encourage foreign investment in the higher education space in India.


\(^{54}\) In 2017, the UGC issues draft University Grants Commission (Promotion and Maintenance of Standards of Academic Collaboration between Indian and Foreign Educational Institutions) Regulations, 2017. However, no further action has been taken on the these and the 2016 regulations remain in effect.

\(^{55}\) Regulation 3(f) of the UGC Regulation 2016.

\(^{56}\) Regulation 2(m) of the UGC Regulation 2016.

\(^{57}\) Regulation 9(b) of the UGC Regulation 2016.

\(^{58}\) Regulation 9(a) of the UGC Regulations 2016.

\(^{59}\) Regulations 3(f)(c) of the UGC Regulations 2016.

\(^{60}\) Regulation 3(a)(a) of the UGC Regulations 2016.

\(^{61}\) Regulation 4 of the UGC Regulation 2016.

\(^{62}\) Regulation 9(b) of the UGC Regulations 2016.

\(^{63}\) Regulation 6(a) of the UGC Regulations 2016.


\(^{65}\) Regulation 4.0, Grant of Graded Autonomy Regulations.
III. Collaboration with Institutions of Eminence

To establish the Institutions of Eminence,\(^{56}\) in 2017, the UGC notified regulations and guidelines pertaining to the same namely, **UGC (Institutions of Eminence Deemed to be Universities) Regulations, 2017**\(^{66}\) ("Institution of Eminence Regulations, 2017") for private institutions and **UGC (Declaration of Government Educational Institutions as Institutions of Eminence) Guidelines, 2017**\(^{67}\) ("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;\(^{69}\)
- flexibility in admission of foreign student’s subject to maximum of 30% of the strength of domestic students;\(^{70}\)

- freedom to fix fees for both foreign and domestic students;\(^{71}\)
- freedom to offer courses within a programme, as well as to offer degrees in newer areas after approval from its governing council;\(^{73}\)
- flexibility to determine course structure in terms of number of credit hours and years to take a degree and in fixing curriculum and syllabus, with no UGC mandated curriculum structure;\(^{75}\)
- 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;\(^{76}\)
- freedom to hire foreign faculty on tenure or contract basis.\(^{77}\)

Collaboration has therefore become easier for FEIs ranked in the top 500 global rankings.

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\(^{56}\) For a discussion on Institutions of Eminence, see footnote 6 and supporting discussion above.


\(^{71}\) Clause 6.1 (b) of the Institution of Eminence Guidelines, 2017.

\(^{72}\) Clause 6.1 (c) of the Institution of Eminence Guidelines, 2017.

\(^{73}\) Clause 6.1 (d) of the Institution of Eminence Guidelines, 2017.


\(^{76}\) Clause 6.1 (g) of the Institution of Eminence Guidelines, 2017.

\(^{77}\) Clause 6.1 (m) of the Institution of Eminence Guidelines, 2017.
3. Structures Commonly Adopted By FEIs Operating in the Unregulated Sector

In light of the various regulatory restrictions, FEIs seem to be focusing on the unregulated segments of the higher education sector to avoid regulatory hassles. Therefore, FEIs, in India, offer programmes which result in grant of certificate of completion or credits for courses (instead of a degree or diploma). If the programmes are offered from outside India (for instance online mode) then degrees or diplomas are also sometimes issued to the students, depending on the nature of the programme from outside India. The validity and acceptance of such degrees in India remain a grey area under existing Indian regulations. Further, some states, depending on the nature of course and duration, regulate certificate programmes as well. Hence, carefully drafting the agreements, to be in sync with the regulations, is critical from a structuring perspective.

Some of the business models commonly adopted are:

I. License Arrangement

As FEIs are not allowed to open a campus, or conduct regulated educational programmes independently in India, they enter into license arrangement with Indian educational institutions. Under such an arrangement, the FEIs usually license brand name, curriculum, know-how etc. to the Indian educational institute. Such a license can be granted directly by the FEI to the Indian educational institute, from outside India under an agreement. If the FEI is interested in an India presence, it can even set up an Indian centre (through a private limited company or a limited liability partnership), which offers a license to an Indian educational institute. The Indian educational institute then ends up offering the programmes to students in India. Typically, a certificate of completion is awarded to students at the end of the programme which is usually co-branded in the name of the FEI and Indian educational institute. It is important to note that this structure should be in the nature of a pure licensing arrangement and the FEI should not award any degree or diploma to students in India. Otherwise, the programme may fall under the purview of the regulated sector. Such an arrangement is a win–win for all as (i) the FEIs benefit from the license fee and goodwill generated because of its name being recognized in the Indian market; (ii) the Indian educational institute benefits from the license of curriculum and brand name of the FEI, which enable them to attract students to their institute; and (iii) the students get access to the curriculum and teaching methods of FEI in India itself, thus saving on costs.

II. Services Arrangement

In addition to granting a license of the brand, curriculum etc., FEIs may enter into services arrangement with the Indian educational institutes. Under such an arrangement, the FEI may provide services such as advising on standards for evaluation of students, qualification and recruitment of teachers, training teachers, advertising, inputs on infrastructure facilities etc. At times, FEIs also send their teacher and staff to the Indian educational institutes for teacher / student training programmes. The FEIs benefit from such an arrangement as it is able to exercise control over the curriculum, standard of education offered etc. Further, the FEI also earns from the service fee (in addition to license fee). The Indian educational institute benefits from the expertise and experience of the FEIs.

III. Online Programmes

The Online Education Regulation discussed above applies only to Indian institutes. They currently do not extend to programs offered by the foreign education institutions in India. Courses or programmes offered directly through the foreign education institutions from outside India are still
unregulated. While such courses usually award certificate of completion to the successful candidate at the end of the course, some even award a degree from outside India for programmes completed via the online mode. Some of these courses are also self-paced and flexible with programme timing, schedule etc., resulting in higher enrollment ratio. Further, some programmes are highly interactive, and provide for online tutors and access to e-libraries as well. Resultantly, recent trends indicate that such online certification programmes are gaining popularity day by day.

IV. Credit transfer model

An FEI can engage an Indian service provider who is licensed the IP by the FEI and who renders services to the FEI. The student enrolls with the Indian service provider who provides teaching as part of the programme (using its staff or foreign university staff). The course studied in India is recognized by the FEI by giving credit equivalence to students. The student then transitions to the FEI and completes the course and gets a degree/diploma. This helps students save costs, allows the FEI to have a brand name in India and the Indian service provider benefits from this model as well.

In addition to long term courses, short term summer, or skill courses are also gaining popularity in India.
4. Important Considerations for Setting up an Entity in India

FEIs looking to explore the Indian market (for instance by providing training, certificate or corporate executive programmes, or similar programmes etc.) may consider the following options for setting up presence in India:

I. Setting up a Liaison Office (“LO”)

LO is an extension of a foreign company and is not a separate legal entity. A foreign company can set up an LO only after meeting certain eligibility criteria and obtaining an approval from the Reserve Bank of India (“RBI”). Further, there are limitations on the extent of activities that can be undertaken by LOs. It can only undertake activities which are in the nature of business development, liaising, public relations, etc., i.e., activities which do not involve actual income-generating activities, but are merely preparatory and auxiliary in nature.

It is generally tax efficient (so long as the LO’s activities are limited to activities permissible under the exchange control framework, for example, general business promotion and not core business / revenue earning activities).

II. Setting up a Branch Office (“BO”)

Like LO, a BO is also an extension of a foreign company and is not a separate legal entity and needs to meet certain eligibility criteria and obtain approval from RBI for set-up. A BO can undertake a wider range of activities including business / actual income-generating activities as compared to a LO, though there are certain limitations.

A BO is prima facie, considered a permanent establishment (“PE”) of the foreign company in India. Therefore, the net income of the foreign company, to the extent attributable to the PE, could be taxable in India at the rate of 40%.

III. Incorporating a Private Limited Company

A company is a separate legal entity and is not an extension of its parent entity. Therefore, it ring-fences potential liabilities (including business-related liabilities). There are no general limitations on the activities that can be undertaken by a company. Unlike a BO or LO, incorporation of a subsidiary (including a wholly owned subsidiary) is permitted under the automatic route and does not require approval from an exchange control perspective.

A subsidiary usually does not constitute a PE and hence reduces tax risks for the foreign company and is usually preferred if activities in India are to be scaled up. However, it is to be noted that repatriation of income and capital of the subsidiary (especially, dividend payments and buyback of shares) involves significant tax implications. This becomes particularly important as investment in debt instruments (and consequently repatriation of income by way of interest) is restricted under exchange control regulations. Further, services availed by the subsidiary from offshore group entities would be subject to transfer pricing compliances (and consequently, the consideration paid for such services cannot exceed the arms’ length price).

IV. Incorporating a Limited Liability Partnership (“LLP”)

A LLP is a form of business entity which permits individual partners to be shielded from the liabilities created by another partner’s business decision or misconduct. In India, LLPs are governed by the Limited
Liability Partnership Act, 2008. LLPs are hybrid entities with advantages of a company (especially, separate legal entity status and limited liability of stakeholders) and operational flexibilities of a partnership.

FDI in LLP is permitted under the automatic route, for LLPs operating in sectors/activities where 100% FDI is allowed, through the automatic route and there are no FDI linked performance conditions. Eligible foreign investments in LLPs are allowed under the automatic route (i.e., without approval) and downstream investment (without approval) by such LLPs in a company or LLP operating in sectors in which foreign investment can be made in a LLP are also permissible.

The profits of an LLP are taxed at the same corporate tax rate of 30%. However, distribution of profits to partners of the LLP is specifically exempt from tax.
5. Important Considerations from Legal and Commercial Perspective

While doing business in India, FEIs should insist on robust documentation to capture the commercial understanding of the parties. Further, since this sector is heavily regulated, the laws vary from state to state, and keep evolving. It is also important to ensure that the agreements are in line with the law of the land.

Some key contractual clauses are:

I. Intellectual Property (“IP”) Rights

When IP is licensed by FEIs, terms of the license should be properly documented. At times, FEIs share their brand usage guidelines with the Indian educational institutes to specify the manner in which the brand name and trade mark can be used by the Indian entity. Further, it should also be specified that all goodwill emanating from the use of the mark in India will accrue to the benefit of the FEI. Provisions to deter misuse / infringement of IP should also be included. Further, manner of usage of IP / cessation of usage of IP after expiry or termination of agreement should be clearly captured in the document as well. There are also certain local law requirements which should be borne in mind, from an enforcement perspective. For instance, there are certain nuances under the Indian Copyright Act, 1957 from a copyright licensing (curriculum, marketing material etc.), perspective (for example, term of the license / assignment is deemed to be 5 years and territory is deemed to only be India unless parties agree otherwise). These nuances should be borne in mind while structuring a licensing deal.

II. Exclusivity

If FEIs desire that the Indian contracting entity should not engage in a business arrangement for offering similar courses with another FEI, then clauses on exclusivity should be well documented in the agreement.

III. Protection from potential claims from regulatory and tax authorities

Contractual provisions outlining whether consideration payable under contract is gross / net of taxes, tax indemnities and safeguards in case of any claims raised by regulatory or tax authorities, etc., are important and should be negotiated and documented appropriately. Further, FEIs may also want to include clauses placing obligations on Indian educational institute to inform FEIs about the regulatory approvals (if any) required, and to assist the FEI if any obligation under local law needs to be discharged by them.

IV. Dispute resolution

Parties are usually free to decide upon the governing law and dispute resolution mechanism to be adopted in a contract. However, judgments of foreign courts and awards of foreign seated arbitrators are enforceable in India only if such country is notified as a reciprocating country in India. Hence, it becomes important to check for reciprocity between India and the foreign country before deciding on the dispute resolution mechanism.
6. Important Considerations from an Indian Tax Perspective

I. License of Trademark, Curriculum, Software, know-how, etc.

In case of a licensing arrangement (as explained earlier), the consideration payable under the license agreement may be taxable as royalty at 10% on a gross basis. It may be noted that payments which are normally not considered ‘royalty’ may be treated as ‘royalty’ for the purposes of the Indian income tax law, which defines the term in very wide terms. For example, the definition includes consideration paid for limited license of off-the-shelf computer software, even if the licensee is not given any right to commercially exploit the underlying IP. However, it may be possible to avail relief from such taxation under an applicable tax treaty.

II. Providing Services

The consideration paid to FEIs by Indian educational institutions for services rendered by the FEIs may be taxable as fees for technical services (“FTS”) at 10% on a gross basis. However, under several Indian tax treaties (including the treaty with the US), consideration for services qualifies as FTS only where the services enable the service recipient to apply the underlying technology independently. Therefore, if payment for services do not constitute FTS, they would not be taxable in India unless the entity has a PE in India. Further, under treaties with some countries (for e.g., US and Singapore), consideration paid for teaching in or by an educational institution is also excluded from the purview of FTS.

III. ‘Business Connection’ in India

If a FEI is considered to have a ‘business connection’ in India, its net income, to the extent attributable to such ‘business connection’ may be taxable in India at 40%. Through the Finance Act 2018, and as part of India’s commitment to the Base Erosion and Profit Shifting (“BEPS”) initiative on digital economy, the ambit of ‘business connection’ was expanded to include non-resident companies that have significant economic presence (“SEP”) in India. Amongst other things, a non-resident company can form an SEP in India if it carries out certain transactions in respect of digital services including provision of download of data / software in India or carries out systematic and continuous solicitation of its business activities in India through digital means. Non-resident ed-tech companies providing digital services in India may run the risk of constituting a ‘business connection’ in India by virtue of the concept of SEP.

Having said that, treaty relief may be claimed to rely instead on the Permanent Establishment (“PE”) standard to determine taxable nexus with India, the ambit of which is narrower than that of ‘business connection’.

Further, even if a FEI enjoys tax-exempt status under its domestic laws, generally it may not be able to claim any tax exemption/charitable status under Indian domestic tax laws except if it obtains an approval or registration from the prescribed authorities and fulfils prescribed conditions. Therefore, it may be key to avail relief under tax treaties. In the context of Indian educational institutions, FEIs may find it difficult to claim tax treaty relief if they are set up as a fiscally transparent entity (like a partnership, trust, or LLCs), etc.

However, tax-exempt entities (for example, 501(c)
(3) exempt entities in the US) should normally be entitled to relief if they are taxable in the absence of such exemption/upon not satisfying the conditions applicable to such exemption.

Some other important consideration from a tax perspective include applicability of goods and services tax (“GST”) liability at the rate of 18%, on consideration paid by Indian entities for services rendered by FEIs, personal taxation of faculty or other employee visiting India, risk of collaboration arrangements constituting an ‘association of persons’ (“AOP”) between the FEI and Indian educational 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 an Indian educational institution where the FEI provides course content, faculty training, etc. and the Indian educational 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 educational 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”.

However, the Levy does not apply to non-resident companies that constitute a PE in India under the relevant tax treaty.

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7. Conclusion

The Indian education sector offers a great opportunity for FEIs and investors. With foresight and strategic planning, taking into account legal, regulatory and tax considerations, FEIs can successfully contribute to the Higher Education system in India.
Our Expertise

At Nishith Desai Associates ("NDA"), we have developed expertise and carved a niche for ourselves in advising our clients' in the education sector.

NDA is one of the only Indian law firms which has a dedicated team advising clients engaged in this growing industry. The team not only has extensive experience in advising school and university operators, but also investors who are keen in investing in this sector.

The firm’s Education practice group is particularly well known in the industry. Client approach the firm’s education team for their industry expertise, and the ability to marry law with tax which helps in providing pragmatic and innovative solutions to them. This is a key differential for client, vis-à-vis other consultancy or law firms.

Resultantly, the firm has a list of marquee clients to their credit. The firm was also awarded commendation for “Outstanding legal contribution to research, education and thought leadership in education sector” at the Education Investor Asia Awards 2018 in Singapore-the only law firm to have received this commendation.

Our research papers and articles on education sector are listed towards the end of this document and can be accessed from our knowledgesite www.nishithdesai.com.
The following research papers and much more are available on our Knowledge Site: www.nishithdesai.com

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**NDA Insights**

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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 unparallel 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 exclusive Alibaug-Raigadh district. Imaginarium AliGunjan is a platform for creative thinking; an apolitical eco-system 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 futuristics 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
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