Education Sector Hotline

May 01, 2020

OFFERING ONLINE COURSES IN INDIA? TAX ISSUES A FOREIGN UNIVERSITY SHOULD KNOW ABOUT

Online education is here to stay. If the pandemic wasn't enough to impress this point, suspension of international travel, visa delays and immigration bans are only increasing adaptability to e-learning amongst the students.

As prospect of campus life looks bleak, educational institutions around the globe have started providing online courses to students around the world, including in India.

In a pure online model, foreign university provides courses wholly online. i.e. course material is electronically provided to students, teachers conducts classes through recorded videos or conferencing live, there are chat groups for student interactions, and exams are conducted in closed rooms online. There are also some variations to this model, such as foreign university licensing its content to educations institutes in India to teach students, faculty visits, exchanges, credits transfer programs, twinning and collaborations *et al*.

Online education has its own set of risks and challenges. This article focuses on the tax nuances[1] of online education, with some discussion on the hybrid models as well.

ROYALTY & FEES FOR TECHNICAL SERVICES

Foreign university will receive fee a.k.a. income from India by way of student fee. Therefore, the first question to ask is whether foreign university is required to pay tax on its India income, in India?

Taxation of income in India is governed by the provisions of the Income-tax Act, 1961 ("**ITA**"), as amended annually.

Under the ITA, tuition fees and license fees earned by a foreign university could be taxable as fees technical services ("**FTS**") at 2% on a gross basis. ITA defines FTS to mean consideration for managerial, technical, or consultancy services, irrespective of whether such services are rendered in India or from outside India[2].

The ITA imposes withholding tax obligation on the receiver of services, i.e. students in this case. This means that students must withhold tax at the time of payment of fee.

License fee payable by an Indian institute to a foreign university could be categorized as royalty, and be subject to a 10% withholding tax.

For the purposes of withholding, the foreign university will need to provide a Permanent Account Number (PAN) to the withholder. Further, this will also trigger the requirement for the foreign university to file its return of income in India. This process can be tedious and cumbersome.

But there could be a way out.

Since the definitions of FTS and royalty under Indian law are quite wide, foreign university should evaluate if it is entitled to benefit under the relevant tax treaty. If the treaty favors, a foreign university may not be required to pay any tax in India. Consequently, withholding tax obligations may also not arise. For instance, the US-India tax treaty provides that teaching in or by educational institutions does not constitute fees for included services. Therefore, US educational institutions should not be subject to tax in India by virtue of the relief under the treaty.

Thus, it is advisable for foreign universities to analyze if it is entitled to treaty benefit or is liable to pay tax in India. This analysis should be done in the planning phase itself, as it can prove to be very helpful in the long run.

PERMANENT ESTABLISHMENT

Variations to a pure online model could result in other tax considerations. For instance, if the foreign university has (i) a business presence in India which could be in the nature of a fixed place of business, (b) a branch office, (c) staff or teachers visiting India to the India institute's campus pursuant to a collaboration or a license, services or credit transfer arrangement between them for a certain period of time[3], the foreign university runs the risk of having a permanent establishment (**PE**) in India.

There are, ofcourse, exemptions to PE creation if the university's local center is purely for the purpose of advertising or is of preparatory or auxiliary nature. The analysis is however a tricky one, but equally important one. Why? Because once a PE is formed, foreign university would be taxed at 40% (exclusive of surcharge and cess) in India on the profits attributable to such a PE. Given the high tax rate, it is advisable to structure the arrangement in a manner to avoid or minimize the risk of a PE in India.

EQUALIZATION LEVY

Equalization Levy ("**EL**") imposes a 6% tax on consideration in excess of INR 100,000 (approx. USD 1,500), received by a non-resident for provision of specified online advertising services in India. Scope of EL has been expanded in April 2020. Consequently, there is now a tax of 2% (as EL) on the consideration received by a non-resident e-commerce operator from 'e-commerce supply or services' made or provided or facilitated by or through it:

Research Papers

Unmasking Deepfakes
October 25, 2024

Are we ready for Designer Babies
October 24, 2024

Opportunities in GIFT City
October 18, 2024

Research Articles

Acquirers Beware: Indian Merger Control Regime Revamped!
September 15, 2024

Navigating the Boom: Rise of M&A in Healthcare
August 23, 2024

Navigating The Change in Shareholding and Management Rule for Non-Banking Financial Companies in India: A Practical Perspective
August 22, 2024

Audio

Renewable Roadmap: Budget 2024 and Beyond - Part I
August 26, 2024

Renewable Roadmap: Budget 2024 and Beyond - Part II
August 26, 2024

Renewable Roadmap: Budget 2024 and Beyond - Part III
August 26, 2024

NDA Connect

Connect with us at events, conferences and seminars.

NDA Hotline

Click here to view Hotline archives.

Video

"Investment return is not enough" Nishith Desai with Nikunj Dalmia (ET Now) at FII8 event in Riyadh
October 31, 2024

Analysing SEBI's Consultation Paper

- to a person resident in India; or
- to a non-resident in certain circumstances[4].

The term 'e-commerce operator' is defined to mean "*a non-resident who owns, operates or manages digital or electronic facility for online sale of goods or online provision of services or both*".

An online sale of goods owned by the e-commerce operator or online provision of services provided by the e-commerce operator, or a combination of both would fall within the definition of 'e-commerce supply or services'.

Education services should ideally not be consideration as an "ecommerce" activity especially when it is offered by a not-for-profit entity, which most foreign universities are. Further, Indian not-for-profits are not subjected to tax under Indian law. This parity should be applied to foreign not-for-profits as well. However, the law is very new, and in the absence of specific exemption from applicability of EL for foreign not-for-profit institutes, expansive language used to define 'e-commerce operator' and 'e-commerce supply or services' could potentially apply to online education programs which are conducted by foreign universities in India.

Universities should therefore factor EL when planning their India launch if they believe their turnover from India could in in excess of de-minimus threshold, i.e turnover of INR 2 crore (USD 0.2 million approx.)[5]

The good news is that EL is not payable until July 2020, so there is still time for the payout of EL to trigger. We hope to get clarity from the government regarding its applicability to foreign not-for-profit institutes in the meanwhile.

ASSOCIATION OF PERSONS

Another important consideration that foreign universities needs to stay clear of is forming an Association of Persons ("**AOP**") when partnering with an Indian institute.

The term AOP is not defined under the ITA and has evolved only through judicial precedents. Simply put, an AOP may be formed when two or more persons voluntarily combine in joint enterprise to carry on a business with a common purpose.

Thus, in case of collaborations between a foreign university and an Indian institution where the foreign university provides course content, faculty training, etc. and the Indian institution is responsible for 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. AOP classification could give to significant exposure for foreign university as AOPs resident in India are taxable on its worldwide income in India. The rate of tax varies based on whether the share of the two collaborating parties in the income is determinable or not[6].

WAY FORWARD

Tax is a very important consideration in expansion and growth planning for universities. It cannot be ignored specially at a time when several foreign universities across the globe are looking at offering online courses in India. Through this article, we have discussed some of the basic tax concepts a foreign university should keep in mind while looking at India. We hope this helps universities in navigating Indian tax nuances and encourages them to offer courses in India.

– Ashish Sodhani, Aarushi Jain & Vivek Kathpalia
You can direct your queries or comments to the authors

---

[1] Please access our write up on regulatory regime for foreign universities in India at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Higher-Education-Web.pdf

[2] Explanation 2 to Section 9(1)(vii) of the Income Tax Act, 1961.

[3] For service PE to be formed, the time period under the India-USA Tax Treaty is 90 days within any twelve month period.

[4] This applies, *inter alia*, to provision of e-commerce supply or services to a person who buys goods or services or both supplied by the 'e-commerce operator' using an IP address located in India.

[5] This means that if the sales, turnover or gross receipts from the e-commerce supply of services provided or facilitated is less than USD 0.2 million (approx.), EL should not be applicable. Therefore, if the revenue from e-commerce supply of service is more than the threshold amount, EL should be applicable.

[6] For example, AOP could be taxed on its profits at the maximum marginal rate, i.e., 30% plus surcharge and cess (maximum approx. 42.74%). However, if the total income of a member of AOP is taxable at a rate higher than the maximum marginal rate (e.g., a non-resident that may be taxed at around 40% plus surcharge and cess), the total income AOP would be taxed at such higher rate

---

on Simplification of registration for FPIs
September 26, 2024

Scope of judicial interference and inquiry in an application for appointment of arbitrator under the (Indian) Arbitration and Conciliation Act, 1996
September 22, 2024