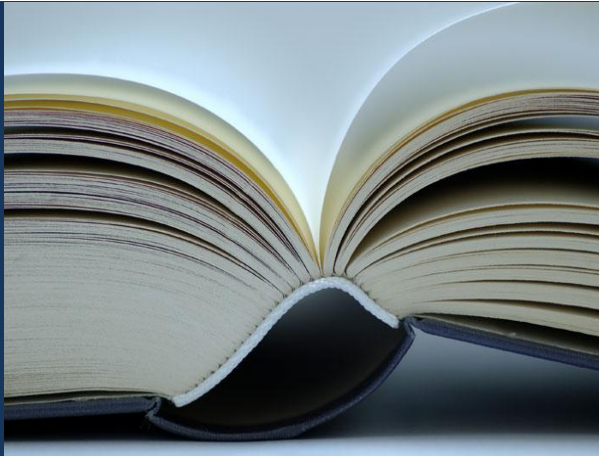


**Nishith Desai Associates**

*Legal & Tax Counseling Worldwide*

Mumbai • Silicon Valley • Bangalore • Singapore • Mumbai-BKC • New Delhi

## **INVESTMENT IN EDUCATION**



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2010 Edition

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Core practice areas include Cross-border transactions, Fund Structuring and Investments, Mergers & Acquisitions, International Tax, Dispute Resolution, Corporate & Securities Law, Competition Law, Employment Law and Intellectual Property Law. Our specialized industry niches include financial services, IT and telecom, education, pharma and life sciences, media and entertainment, real estate and infrastructure.

Among the several firsts to our credit are the pioneering work done in the area of international taxation, advice for setting up the first India focused private equity fund, the first ever American Depository Receipt issuance by an Indian company, and the world’s largest private equity investment in microfinance. Our key clients include marquee repeat Fortune 500 clientele, of which over 60% are US corporations.

Nishith Desai Associates has been named by the Pacific Business Press as Asian – Counsel Firm of the Year 2009 for the practice areas of Private Equity and Taxation in India. In the Financial Times – RSG Consulting ranking of Indian law firms in early 2009, we were ranked the highest for ‘Quality’. We are also part of the Asian Legal Business Watchlist as one of the ‘Top 10 firms to watch in 2009’ in Asia – Pacific. The Tax Directors Handbook, 2009 lauded us for our constant and innovative out-of-the-box ideas. Other past recognitions include being named the Indian Law Firm of the Year 2000 and Asian Law Firm of the Year (Pro Bono) 2001 by the International Financial Law Review, a Euromoney publication. In an Asia survey by International Tax Review (September 2003), we were voted as a top-ranking law firm and recognized for our cross-border structuring work.

Our research oriented approach has also led to the team members being recognized and felicitated for thought leadership. Consecutively for the fourth year in 2009, NDAs have won the global competition for dissertations at the International Bar Association. Nishith Desai, Founder of Nishith Desai Associates, has been named one of the ‘Most In Demand Practitioners’ by Chambers Asia 2009. He has also been ranked No. 28 in a global Top 50 “Gold List” by Tax Business, a UK-based journal for the international tax community.

We believe strongly in constant knowledge expansion and have developed dynamic Knowledge Management (‘KM’) and Continuing Education (‘CE’) programs, conducted both in-house and for select invitees. KM and CE programs cover key events, global and national trends as they unfold and examine case studies, debate and analyze emerging legal, regulatory and tax issues, serving as an effective forum for cross pollination of ideas.

Our trust-based, non-hierarchical, democratically managed organization that leverages research and knowledge to deliver premium services, high value, and a unique employer proposition has now been developed into a global case study and published by John Wiley & Sons, USA in a feature titled ‘Management by Trust in a Democratic Enterprise: A Law Firm Shapes Organizational Behavior to Create Competitive Advantage’ in the September 2009 issue of Global Business and Organizational Excellence (GBOE).

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## 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. Thus 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. Rapidly globalizing competitive marketplace coupled with the increasing need to expand quality education at the grassroots level and spur innovative thought, policy makers in India have slowly but surely set the Indian education sector on the reforms track. The Government of India, for instance, recently announced a plan to establish 14 innovation universities in collaboration with leading universities of the world to draw on their talent and expertise<sup>1</sup>. Honorable Human Resource Development Minister Kapil Sibal has been visiting and discoursing with top universities in the US and Europe to develop strong collaborations between them and Indian universities to "build India into a hub of top-class higher education to which the world comes"<sup>2</sup>. The private sector is not left behind either. Several well known private equity and venture capital funds have also shown interest in this unique, emerging, business opportunity, which balances investor returns with social responsibilities and aims to uplift communities. Needless to say, all these measures go a long way in tooling and enhancing India's globally competitive skilled workforce.

Various factors contribute to the growing interest in the education sector<sup>3</sup>:

- ***Expected Growth in the Market Size:*** Analysts at CLSA Asia Pacific Markets estimate the current private education market in India to be worth approximately US\$ 40 billion and expect it to grow 70% to US\$68 billion in three years<sup>4</sup>. Moreover, according to the estimates of Technopak, this market size could roughly triple to US\$ 110 - 120 billion in ten years' time<sup>5</sup>. A combination of a large growing population of youth<sup>6</sup> and inadequacy of existing educational facilities to cater to such a population makes India among the world's largest potential markets for education and training. The CLSA Asia-Pacific Markets Report indicates the current and the future expected market size to be as follows:

**TABLE 1: MARKET SIZE - CURRENT AND AFTER FIVE YEARS**

SEGMENT	CURRENT MARKET (US\$ MILLION)	2012 MARKET (US\$ MILLION)
K-12	19,655	28,885
Tutoring (Grades 5-10)	5,351	8,747
Educational Books	1,949	2,554
Educational Stationery	1,326	1,960
Preschools	985	3,426
Educational CD ROMs	117	351
Multimedia in Schools	30	405
Private Professional Colleges	7,054	11,888

<sup>1</sup><http://economictimes.indiatimes.com/news/politics/nation/Sibal-visits-US-to-woo-leading-universities/articleshow/5161899.cms>. Last accessed on: October 26, 2009

<sup>2</sup> <http://timesofindia.indiatimes.com/news/india/Foreign-university-education-in-India-to-be-cheaper/articleshow/5001381.cms>. Last accessed: September 12, 2009

<sup>3</sup> Private Equity Pulse on Education, April 2009 – Venture Intelligence

<sup>4</sup> Private Equity Pulse on Education, April 2009 – Venture Intelligence

<sup>5</sup> <http://ridingtheelephant.blogs.fortune.cnn.com/2008/07/07/indian-education-a-120-billion-opportunity/> Last accessed on July 7, 2008 or <http://www.educomp.in/News/NewsText.aspx?id=104&status=Y> Last accessed on October 27, 2009

<sup>6</sup> [http://www.censusindia.gov.in/Census\\_Data\\_2001/India\\_at\\_glance/broad.aspx](http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/broad.aspx): Last accessed on October 27, 2009

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Engineering	5,850	9,750
Medical	473	675
MBA	731	1,463
Test Prep (Total)	1,664	3,328
Engineering (Test Prep)	1,000	2,000
UPSC (Civil Service) (Test Prep)	120	240
MBA (Test Prep)	104	207
Medical (Test Prep)	420	840
GRE/GMAT/SAT	20	41
Vocational Training (Airlines, Retail, Financial services, English)	1,365	2,904
Child Skill Enhancement	777	2,331
IT-Training - Retail	187	376
IT-Training - Corporate	38	140
E-learning - Retail	14	147
E-learning - Corporate	13	132
Teacher Training	15	153
IT/BPO Finishing School	27	283
<b>TOTAL MARKET</b>	<b>40,565</b>	<b>68,011</b>

*Source: CLSA Asia-Pacific Markets*

The report further states that India's education and training sector provides private institutions with a potential compounded annual growth rate of 16% over a five year period. Another analysis by IDFC-SSKI implies that private spends on education is expected to increase to US\$ 80 billion by 2012<sup>7</sup>.

- ***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.
- ***Negative Working Capital:*** The costs of running an educational institution are incurred over a period of time. The fees, on the other hand, for providing educational services are collected prior to such costs.
- ***Counter-Cyclical in Times of Recession:*** Enrollments in education, especially higher education, improve during economic recessions wherein availability of employment becomes difficult.
- ***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. The migration to quality is also observed in the growth of international schools.

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<sup>7</sup> Private Equity Pulse on Education, April 2009 – Venture Intelligence

### **THE INDIAN EDUCATION SYSTEM**

The education system in India comprises of three key groups: Pre-School/Kindergarten Education, Primary & Secondary Education and Higher Education. With different regulatory bodies governing each stage of the education sector, it is fraught with its unique challenges.

#### **PRE-SCHOOL/KINDERGARTEN AND PRIMARY & SECONDARY EDUCATION**

A school that provides Pre-School/Kindergarten and Primary & Secondary Education (also known as K-12 Education) may be governed by different boards/authorities depending on the regulations and the curriculum of the particular school. A school may be governed by the Central Board of Secondary Education (CBSE), the Council for the Indian School Certificate Examinations (CISCE) or the respective State Boards (under State Acts/Regulations/Authorities), as the case may be. The affiliation to one of these boards/authorities is necessary in order to ensure the recognition of the education and qualification provided by the school.

Central Board of Secondary Education: The CBSE functions under the overall supervision of the Controlling Authority which is vested with the Secretary of Education, Ministry of Human Resource Development, Government of India<sup>8</sup>. It was set up with the view of

- prescribing conditions of examinations and conducting public examination at the end of Class X and XII;
- granting qualifying certificates to successful candidates of the affiliated schools;
- prescribing and updating the course of instructions of examinations;
- affiliating institutions for the purpose of examinations and to raise the academic standards of the country.<sup>9</sup>

Schools intending to partake in the pattern of examinations prescribed by the CBSE are required to be associated or affiliated with the CBSE. Affiliation to the CBSE is governed by its Affiliation Bye-Laws which prescribe certain pre-conditions and requirements.

Council for the Indian School Certificate Examinations: The CISCE was constituted to secure suitable representation of governments responsible for schools (which are affiliated to it) in their States/Territories; the Inter-State Board for Anglo-Indian Education; the Association of Indian Universities; the Association of Head of Anglo-Indian Schools, the Indian Public School Conference; the Association of Schools for the ISC Examination and eminent educationists.<sup>10</sup>

The objects of the CISCE include the promotion of science, literature, the fine arts and the diffusion of useful knowledge by conducting school examination through the medium of English. It exists solely for educational purposes and not for purposes of profit.<sup>11</sup>

The CISCE conducts the Indian Certificate of Secondary Education (ICSE) Examination and the Indian School Certificate (ISC) Examination. The ICSE Examination presupposes a school course of ten years duration

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<sup>8</sup> <http://www.cbse.nic.in/welcome.htm>

<sup>9</sup> <http://www.cbse.nic.in/welcome.htm>

<sup>10</sup> <http://www.cisce.org/council.jsp>

<sup>11</sup> <http://www.cisce.org/council.jsp>

(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.

Similar to the CBSE, schools intending to partake in the examinations of the CISCE are required to be affiliated with the CISCE. Affiliation to the CISCE is also governed by its very own Affiliation Bye-Laws which, not unlike the CBSE Affiliation Bye-Laws, prescribe certain pre conditions and requirements.

State Boards (under State Acts/Regulations/Authorities) – Education is governed by both the Central and the State Governments. While Boards such as the CBSE prescribe standards for education under the aegis of the Central Government, the State Governments regulate the education sector within their respective States through State-specific legislations. Each of these legislations may prescribe certain requisites for the setting up of and the administration of schools, which may, again, differ from State to State.

In the State of Karnataka, for instance, the organization, development, discipline and control of the educational institutions are governed by the Karnataka Education Act, 1983 and the regulations thereunder. The said Act prescribes the requirement of a registration 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 of an institution is, however, subject to certain requirements prescribed under the regulations including minimum infrastructure requirements and minimum financial requirements.

In the State of Maharashtra there are, unlike in the State of Karnataka, two different acts governing the matters pertaining to education in the State – the Bombay Primary Education Act, 1947 and the Maharashtra Secondary Boards Act, 1965. While, the Bombay Primary Education Act, 1947 provides for the management and control of primary education, the Maharashtra Secondary Boards Act, 1965 regulates matters pertaining to secondary education in the State.

### **Setting Up Schools:**

The proposed curriculum and the respective regulatory authority determine the basic requirements that need to be met while setting up a school. This aspect is akin to requirements under the Affiliation Bye-laws of both the CBSE and the CISCE and the provisions under State-specific legislations. The school, however, under these bye-laws, acts or regulations, would have to be set up either by a Trust or a Society or a Section 25 Company (a charitable company under the Companies Act, 1956), which are of a not-for-profit character. As a result, the very process of commercialization is hampered.

Moreover, the setting up of a school can in itself be an arduous process involving onerous requirements, including the obtainment of a number of approvals from different authorities. In the State of Delhi, for instance, according to a study conducted by the Centre for Civil Society<sup>12</sup>, approximately 14 different approvals would be required from various authorities in order to set up a school. 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. For CBSE and CISCE schools, there is also the requirement of a 'No Objection Certificate' from the concerned State Government.

The aforesaid process is even more particular with respect to Primary and Secondary Schools. In the case of Pre-schools, the basic requirement of a non-profit entity may not be entirely necessary as the regulations with respect to them are a lot less stringent when compared to the Primary, Secondary and Higher Education. Their

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<sup>12</sup> As contained in research paper of the Centre of Civil Society, an independent, non-profit, research and educational organization. Available on <http://www.ccsindia.org/ccsindia/policy/ed/studies/wp0001.pdf>, Last accessed on October 27, 2009

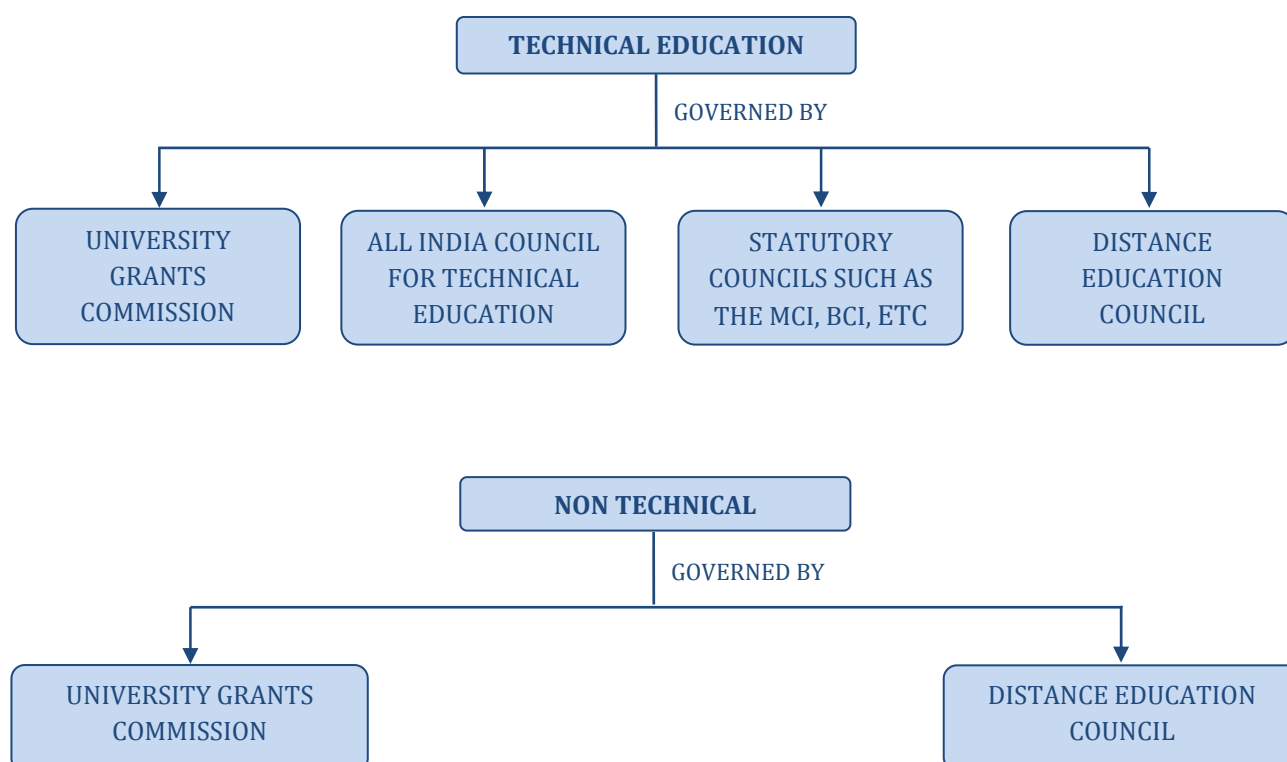
## INVESTMENT IN EDUCATION

governance, as previously mentioned, may depend on their affiliation either with the CBSE, the CISCE or the State Boards. While the CBSE does not prescribe any particular provisions with respect to Pre-Schools, the CISCE does stipulate certain requisites such as minimum land area requirements. Certain State Acts/Regulations may also stipulate certain conditions with respect to Pre-Schools. For instance, under the Karnataka Educational Institutions (Classification and Registration) Rules, 1997, Pre-Schools are required to obtain a registration with the concerned authority within a specified timeline. There are also certain provisions with respect to collection of fees and admission of students under the Karnataka Educational Institutions (Classification, Regulation and Prescription of Curricula, etc.) Rules, 1995, which may be applicable to Pre-Schools as well. However, in the State of Maharashtra the Bombay Primary Education Act, 1947 does not prescribe any regulation which may be applicable to the running of Pre-schools.

### HIGHER EDUCATION IN INDIA

Higher Education 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 derived from the All India Council for Technical Education Act, 1987, may mean programs of education, research and training in Engineering & Technology, Architecture, Town Planning, Management, Hotel Management & Catering Technology, Pharmacy and Applied Arts and Crafts. Non-Technical Education would, thus, refer to the courses, other than technical courses, such as Law, subjects related to Science, Commerce and Arts, etc.

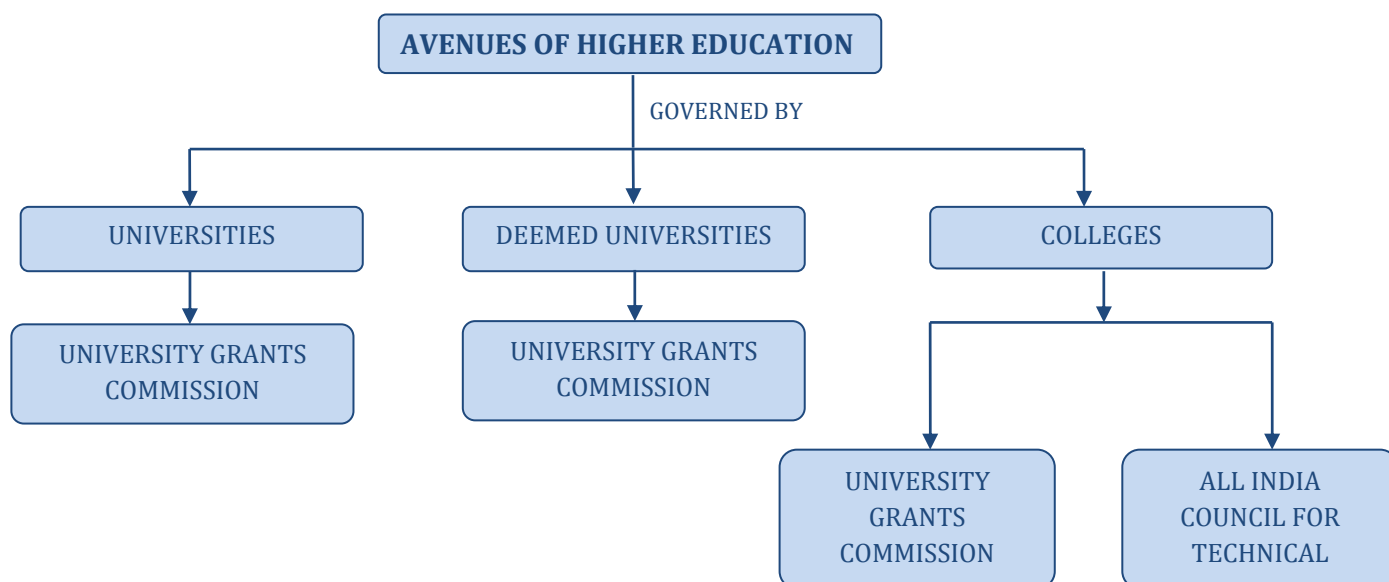
In India, there are different bodies/authorities governing technical and non-technical education as indicated hereunder:





## INVESTMENT IN EDUCATION

**Avenues of Higher Education:** The basic avenues of higher education include Universities, Colleges and Deemed Universities. Each of these entities is governed by different bodies as indicated hereunder:



### **Understanding the Facets of Higher Education**

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

- Promoting and coordinating university education;
- Determining and maintaining standards of teaching, examination and research in universities;
- Framing regulations on minimum standards of education;
- Monitoring developments in the field of collegiate and university education;
- Disbursing grants to the 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 the measures necessary to improve university education.

The UGC, therefore, prescribes the minimum standards that are to be adhered to by universities and the colleges affiliated to such universities. It also has the unique distinction of being the only grant-giving 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 the provision for the definition of universities, deemed universities and also the conferment of certain important rights upon universities.

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Universities: 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.

A university is, thus, not established under the UGC Act but is only required to adhere to the provisions of the same. Universities are set up mostly under State Acts. For instance, in the State of Karnataka we have the Karnataka State Universities Act, 2000 under which the following universities have been established:

- The Bangalore University with headquarters at Bangalore and territorial jurisdiction extending over the districts of Bangalore, Bangalore Rural and Kolar.
- The Karnataka University with headquarters at Dharwad and territorial jurisdiction extending over the districts of Bagalkot, Belgaum, Bijapur, Dharwad, Gadag, Haveri and Uttara Kannada.
- The Kuvempu University with headquarters at Shankaraghatta and territorial jurisdiction extending over the districts of Chikmagalur, Chitradurga, Davangere and Shimoga.
- The Mangalore University with headquarters at Konaje, Mangalore Taluk and territorial jurisdiction extending over the districts of Dakshina Kannada, Kodagu and Udupi.
- The Mysore University with headquarters at Mysore and territorial jurisdiction extending over the districts of Chamarajanagar, Hassan, Mandya and Mysore.

The Banaras Hindu University and Aligarh Muslim University are examples of Central Universities and are under the control of the Central Government.

The UGC has, however, in light of the phenomenon of setting up of private universities through State Acts, introduced regulations with regard to the establishment of the same under the UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003. Accordingly, a private university has to be established by a separate State Act and has to conform to the relevant provisions of the UGC Act. 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 25 of the Companies Act, 1956. The universities set up under the aforesaid regulations, however, differ to the extent that these private universities are unitary institutions. Further, they cannot establish off campus centre(s) beyond the territorial jurisdiction of the concerned State. However, they can establish off-campus centre(s) within the concerned State after their existence for a minimum duration of 5 years and with the prior approval of the UGC. So far, the UGC has not approved any off campus centre(s) of any private university.

The importance of the designation of a university is realized only in light of Section 22 of the UGC Act. According to Section 22 of the UGC Act, the right of conferring or granting degrees specified by the UGC by notification in the Official Gazette 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.

According to the information published by the UGC regarding particulars of the organization, functions and duties of the UGC under sub-clause (i) of Section 4(1)(b) of the Right to Information Act, 2005 there were about 376 Universities/University level Institutions [Central – 20, State – 218, State legislation – 5, Deemed to be –

109, Institute of National Importance (central legislation) - 13, Private - 11] as on March 31, 2007. Recent circulars issued by the UGC suggest that there has been an increase in these numbers. The number of private universities, for instance, now stands at 42 according to a circular issued by the UGC in June 2009.

Colleges: Colleges are institutions which provide for a course of study for obtaining any qualification from a university and which, in accordance with the rules and regulations of such university, are recognized as competent to provide such course of study, and present students undergoing such course of study for the examination for the award of such qualification. Thus the difference between a college and university is that they facilitate the obtainment of a degree but do not grant it, while a university awards a degree either through its own departments or through colleges affiliated to it.

A college is recognized as competent and is admitted to the privileges of university by virtue of its "affiliation" with such university. It will, during its affiliation to the university, be governed by the terms and conditions of the affiliation. A university is, under the UGC (Minimum Standards of Instruction for the Grant of the First Degree through Formal Education) Regulations, 2003, required to adhere to, and ensure the institutions affiliated to it adhere to, certain requirements with respect to admissions, syllabi, physical facilities, etc.

Setting up of a college would have to be carried out either by a Trust or a Society. The UGC would require that the college be managed by a registered Society or Trust for purpose of inclusion and recognition of colleges under Section 2 (f) of the UGC Act, 1956.

Autonomous Colleges: The affiliating system of colleges was originally designed when their number in a university was small. The university could then effectively oversee the working of the colleges, act as an examining body and award degrees. With the increase in the number of colleges and the universities finding it difficult to attend to the varied needs of individual colleges, the Education Commission (1964-66) recommended college autonomy recognizing that colleges have the potential for offering programs of higher standard.

Autonomous colleges, unlike other colleges, have the freedom to:

- determine and prescribe its own courses of study and syllabi, and restructure and redesign the courses to suit local needs;
- evolve methods of assessment of students' performance, the conduct of examinations and notification of results;
- prescribe rules for admission in consonance with the reservation policy of the State Government;

Autonomous colleges are free to make use of the expertise of university departments and other institutions to frame their curricula, devise methods of teaching, examination and evaluation. The parent university is required to accept the methodologies of teaching, examination, evaluation and the course curriculum of its autonomous colleges. It is also required to help the colleges to develop their academic programs, improve the faculty and to provide necessary guidance by participating in the deliberations of the different bodies of the colleges. The autonomous status covers certificate, diploma, undergraduate, postgraduate and M.Phil. programs offered in autonomous colleges. All courses introduced after the conferment of autonomous status are also automatically covered under the purview of autonomy. The degree certificates will be in a common format devised by the university. The name of the college will be mentioned in the degree certificate, if so desired. Autonomous colleges that have completed three terms can confer the degree under their title with the seal of the university. The parent university awards degrees to the students evaluated and recommended by autonomous colleges.

Presently, the grant of autonomy of colleges is governed by the UGC XI Plan Guidelines which provide for a Scheme of Autonomous College. The said Scheme provides for certain criteria for the identification of institutions for the grant of autonomy, which among other requirements include academic reputation, academic achievements, adequacy of infrastructure, quality of institutional management, etc. In case of self financing colleges, they are required to have completed a minimum of 10 years of existence in order to apply for autonomy. The parent university confers the status of autonomy upon a college that is permanently affiliated, with the concurrence of the State Government and the UGC. The UGC invites proposals once in an academic year from eligible colleges seeking autonomous status. The individual universities may also send circulars asking colleges to apply.

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 Section 2(f).

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 were not universities and yet were carrying out work of high standard in a specialized academic field comparable to a university and that granting of the status of a university would enable them to further contribute to the cause of higher education which would mutually enrich the institution and the university system.

Proposals for deemed universities are presently covered under the 'Guidelines for Considering Proposals for Declaring an Institution as Deemed to be University under Section 3 of the UGC Act' (Guidelines). The said Guidelines prescribe certain requirements to qualify for the grant of status as a university such as minimum land area and infrastructure requirements, financial requirements, equipments, books and journal requirements, etc. The institution should have among its primary objectives, post graduate instruction and training in such branches of learning which are innovative, and research for advancement and dissemination of knowledge. The institution should have been in existence at least for a period of 10 years at the time of making an application for being recognized as a deemed university, unless made under the De-novo category (institutions in emerging areas with promise of excellence). An application made under the De-novo category need not adhere to most of the requirements prescribed under the said Guidelines. The status of deemed university granted to such institutions shall, however, be provisional 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 more freedom when compared to an ordinary institution in terms of academic, administrative, finance, research, evaluation and extension aspects, etc. It would not require the approval of the AICTE for introducing new courses. However, it would be required to adhere to the standards set by the AICTE.

Further, despite being entitled to privileges similar to that of universities, deemed universities are, however, unitary institutions similar to the private universities set up under the aegis of the UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003. 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 the regulatory authorities owing to the revelation of severe mal practices 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.

## INVESTMENT IN EDUCATION

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 AICTE, thus, governs technical education and the functioning of technical institutions within the country. 'Technical Education', as previously described, has been defined under Section 2(g) of the AICTE Act. '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. However, the importance of the AICTE is evident through Sections 10 and 23 of the AICTE Act, by virtue of which:

- No new 'Technical Institution' of Government, Government Aided or Private (self financing) institution, whether affiliated or not affiliated to any university, can be started and no new courses or programs can be introduced and nor can there be any increase and/or variation of intake in the existing courses or programs effected at all levels in the field of 'Technical Education' without obtaining prior approval of the AICTE.
- No new or existing 'Technical Institution' of Government, Government Aided or Private (self financing) institution, whether affiliated or not affiliated to any university, can conduct any technical course or program without obtaining the prior approval of the AICTE.
- No admission authority/body/institution shall permit admission of students to a course or program of a 'Technical Institution' not approved by the AICTE.

The attainment of AICTE approval is, however, subject to the fulfillment of a number of criteria which may include minimum land area and infrastructure requirements, maximum number of student intake, faculty requirements, library requirements, computer requirements, etc., depending on the course. The entity setting up the institution would have to be a registered Society or Trust of a not-for-profit character, similar to the other regulations governing different areas within the education space. The AICTE may take appropriate action including legal action against any defaulting Institution/Society/Trust/Company, including Associated Individuals, in case of failure to obtain prior approval of the AICTE.

Position of Institutes such as ISB, IIPM, etc.: Despite the stipulated requirement of an AICTE approval for conducting programs in technical education, there are several institutes including reputed ones such as the Indian School of Business and the Indian Institute of Planning Management which offer programs in Management without the approval of the AICTE. Per the AICTE regulations, the defaulting Institutions/Society/Trust/Company including Associated individuals, as the case may be, are liable for stringent legal action including action under the provisions of Indian Penal Code, 1860 and other relevant Indian laws for conducting courses or programs comprising Technical Education without the prior approval of AICTE. In settlement of a lawsuit filed by IIPM, the UGC agreed to remove IIPM from the list of 'fake universities' published on its website after IIPM clarified that its courses were aimed only at imparting training and making the students eligible for degree courses like BBA and MBA offered by the International Management Institute, Belgium'.<sup>13</sup>

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<sup>13</sup> <http://www.expressindia.com/latest-news/iipm-will-be-deleted-from-fake-varsity-list-ugc-tells-hc/328522/>

Foreign Universities: The immense opportunity in the Indian education space has not gone unnoticed by foreign universities and institutes. Foreign universities have been inking strategic partnerships with educational institutions in the country. For instance, various media reports have suggested that Lovely Professional University, based in Jalandhar, and San Francisco State University have come together to make international education accessible to Indian students, while United Kingdom based Leeds Metropolitan University and Jagaran Social Welfare Society, based in Bhopal, have entered into an arrangement to offer courses and degree through their newly formed campus in India.<sup>14</sup> Lancaster University, United Kingdom, has reached an understanding with Jawaharlal Nehru University for conducting joint research in social sciences. Jindal Global Law School near New Delhi has set up a research center in collaboration with the University of Michigan Law School. Apart from this, Lancaster University has also entered into partnerships to offer joint-degree programs with the Indian Institute of Management, Bangalore and collaborative degrees and joint research agreement in life sciences with Manipal Academy of Higher Education. Similarly, University of Virginia's Darden School of Business has entered into a collaborative relationship with Jamshedpur based Xavier Labour Relations Institute's School of Business and Human Resources.

At present, the entry and operation of foreign universities/institutions imparting Technical Education in India is regulated by the All India Council for Technical Education Regulations for Entry and Operations of Foreign Universities in India Imparting Technical Education, 2005 (Foreign Universities Regulations). These regulations apply to 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. However, a foreign university seeking to establish an educational institution in India has to do so by way of a registered Trust or a Society and franchises from foreign universities are not permitted. Also, the foreign university would be required to comply with a number of pre-conditions which includes the submission of an undertaking declaring therein that the degrees/diplomas awarded to the students in India shall be recognized in the parent country of the foreign university/institution. It is pertinent to note that the fee to be charged and the intake in each course to be offered by a foreign university/institution shall, after giving the said institution an opportunity to be heard, be prescribed by the All India Council of Technical Education.

The Foreign Educational Institutions Regulation of Entry and Operations, (Maintenance of Quality and Prevention of Commercialization) Bill 2007 (Bill) which is yet to come into force has been pending passage in the parliament for a couple of years already. The objective of the Bill, at present, and as can be observed from its title, is to provide for the regulation of entry and operation, maintenance of quality and prevention of commercialization of education by Foreign Educational Institutions (FEIs) imparting higher education in India and for matters connected therewith. The provisions of the Bill are however not applicable to any partnership, collaboration or twinning arrangement. Some of the important features proposed to be introduced by the Bill are follows:

- FEIs may not be able to operate unless they have been granted a deemed university status by UGC;
- All FEIs operating before commencement of the Act (once the Bill is passed) will have to get themselves registered and accredited within 6 months;
- The programs offered in India have to be comparable to that offered in the country of origin of the FEI;
- FEIs shall have to maintain a minimum corpus fund of INR 100 million; and
- FEIs may not utilize more than 75% of the income derived for the development of their

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<sup>14</sup> <http://www.thehindubusinessline.com/2009/05/21/stories/2009052151230500.htm> Last accessed on October 27, 2009

institutions in India and the remaining 25% would have to be deposited in their corpus fund.

Despite these measures to liberalize 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 minimum percentage of its capacity to provide education to the weaker sections of society. FEIs should be spared from such affirmative action as the market they cater to is very different.

Distance Education Council (DEC): For running programmes in 'distance mode', the approval of the Joint Committee of the UGC, the AICTE and the DEC is required. The DEC is the Co-ordinator of the Joint Committee. The DEC was established in 1991 under Sections 16(7) and 5(2) of the Indira Gandhi National Open University Act, 1985. It is responsible for the promotion, coordination and maintenance of standards in the open and distance learning system in the country.

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 granting 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 we have other statutory councils, some of which are as follows:

- Indian Council for Agricultural Research (ICAR)
- National Council for Teacher Education (NCTE)
- Dental Council of India (DCI)
- Pharmacy Council of India (PCI)
- Indian Nursing Council (INC)
- Bar Council of India (BCI)
- Central Council of Homeopathy (CCH)
- Central Council for Indian Medicine (CCIM)
- Council of Architecture
- Rehabilitation Council
- National Council for Rural Institutes
- State Councils of Higher Education

Each of these statutory councils has been empowered to prescribe standards and formulate regulations with respect to their field of jurisdiction.



### **FOREIGN INVESTMENT IN THE EDUCATION SECTOR**

#### **REGULATIONS**

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

The FDI Policy in India is formulated by the Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce and Industry. In formulating the sector-specific FDI policy for various sectors, the guidelines issued by the other Ministries of the Central Government are also taken into account<sup>15</sup>. While the FDI Policy formulated lays down the broad policy framework relating to foreign investments in India, the administration of the policy and its implementation are done through the exchange control laws governed by the Foreign Exchange Management Act, 1999 (FEMA). The FEMA confers powers on the Reserve Bank of India (RBI), the central bank of the country, to frame detailed regulations in respect of various aspects of exchange control in a liberalized framework<sup>16</sup>. Similarly, the Government has been empowered to frame rules<sup>17</sup>. The RBI and the Government have accordingly announced a series of regulations and rules respectively relating to various aspects of exchange control, including foreign investments into India. These regulations and rules give legislative effect and force to the policy formulated by the DIPP.

The FEMA and the regulations relating to FDI framed there under by the RBI<sup>18</sup> (FDI Regulations) have from time to time, on a progressive basis, been liberalizing the exchange control regime of India. Foreign investments in most sectors are now under what is known as the “automatic route”, which essentially means that an investor can bring in investment in those sectors without any prior approval from any regulatory authority. Some of the sectors even under “automatic route” continue to be regulated through stipulated maximum investment caps. Where the foreign investment does not come under purview of the automatic route, they will be subject to a prior approval of the Foreign Investment Promotion Board (FIPB) (the “approval route”). Foreign investment in the telecom services, for example, could be made up to the extent of 49% of a company’s equity under the automatic route. Foreign investment beyond 49% of the company’s equity would require the prior approval of the FIPB and would be subject to the guidelines issued by the Government, which in this instance would be the Press Note 3 (2007 Series).

Subsequent to Press Note 2 (2000 Series), FDI up to 100% has been allowed under the automatic route in the Education Sector. Despite this liberalized scheme, investment into the education sector has been restricted due to the prevailing regulations which require the entity setting up the school or college or a deemed university to be of a not-for-profit character. The bearing of a not-for-profit character inevitably requires the entity to be either a registered Society or a Trust (in case of schools, colleges and private/deemed universities) or a Section 25 Company (mostly in case of schools). 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 non-profit nature would not be able to distribute returns on the investment. Further, a Section 25 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.

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<sup>15</sup> <http://dipp.nic.in/dippsub.htm>

<sup>16</sup> Section 47 of the FEMA

<sup>17</sup> Section 46 of the FEMA

<sup>18</sup> The Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000

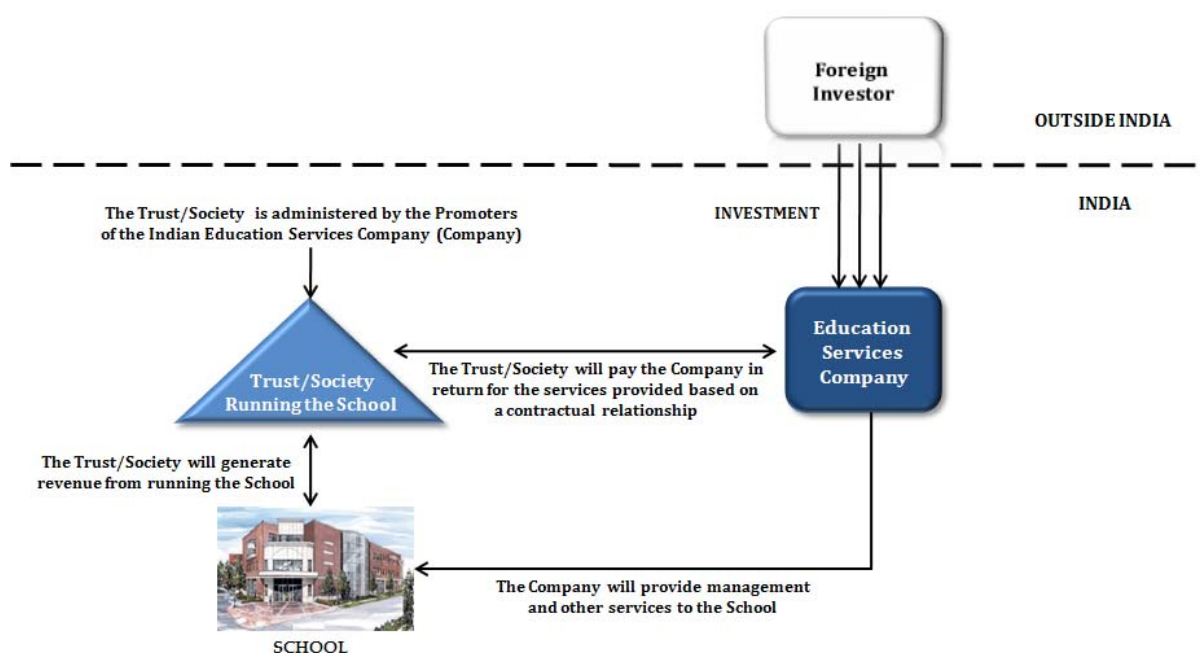


## INVESTMENT IN EDUCATION

### FOREIGN INVESTMENTS IN SCHOOLS & COLLEGES - STRUCTURING & OPTIONS

Foreign investments can, thus, be made only into companies providing educational services (Education Services Company) to these Trusts, Societies or Section 25 Companies. Funds and other investors that have invested in the education sector have setup such Education Services Companies which provide services to related Trusts, Societies or Section 25 Companies and are in turn compensated 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 from which income can be derived.

#### Possible Structure in the case of Schools:



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. 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, the Affiliation Bye-laws of which make provisions for the same. However, in case of professional colleges offering degrees in technical and medical education, the collection of fees may be regulated by State Bodies which are required to approve the fees structure of colleges during an academic year. For instance, in the State of Maharashtra a State Body called the Shikshan Shulk Samithi (SSS) decides the fees to be charged by a particular college, such as medical colleges<sup>19</sup>, on basis of the details submitted to it. Bodies such as the SSS make it highly difficult for institutions to charge fees often even commensurate with the services provided. Such State Bodies regulating the fee structure and the admission process of colleges providing higher education are found in other States as well. They have been set up under the authority of the judgment of the Supreme Court of India in the case of *P. A. Inamdar and others*

<sup>19</sup> [http://www.sspnsamiti.gov.in/pdf/CheckList\\_2009.pdf](http://www.sspnsamiti.gov.in/pdf/CheckList_2009.pdf). Last accessed on October 27, 2009

vs. *State of Maharashtra*<sup>20</sup> which held that the establishment of such committees is a permissible regulatory measure aimed at protecting the interest of the student community as a whole.

The presence of onerous regulators along with the requirements of numerous approvals and regulatory compliances has, not surprisingly, hampered investment in the higher education segment in spite of it being a significant segment of the education sector. The regulatory uncertainties surrounding the “for profit” ventures have hampered investment as well.

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. Schools of these varieties are not subject to the aforesaid regulatory controls as they are affiliated to international bodies. According to media reports, a fund backed by Kaizen<sup>21</sup> is currently evaluating such a model.

### 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.

Vocational Training: A number of studies such as that of NASSCOM-McKinsey<sup>22</sup> have indicated that a significant portion of students graduating from colleges are not readily employable in industries such as IT/ITES. Furthermore, a substantial portion of students graduating from schools lack the means to access professional colleges and tend to pursue employment in low level posts/profession. Vocational courses providing employable skills are, thus, in great demand. Private participation occurs mostly in niche training centers relating to IT training and hospitality. The IT training market is one of the biggest sections in the vocational course segment and is estimated by industry participants and experts to be about US\$ 500 million. This market, being outside the purview of Government regulation, is attractive for entrepreneurial participation.

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 permanent 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 the 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.

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

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<sup>20</sup> Case citation: 2005(6) SCC 537

<sup>21</sup> [http://www.kaizenpe.com/news/kaizen\\_targets%20\\$150m\\_for\\_indian\\_education.pdf](http://www.kaizenpe.com/news/kaizen_targets%20$150m_for_indian_education.pdf): Last accessed on October 27, 2009

<sup>22</sup> <http://www.nasscom.in/Nasscom/templates/NormalPage.aspx?id=2599>: Last accessed on October 27, 2009

### RECENT DEVELOPMENTS

A number of measures are being considered in order to streamline the education sector including discontinuing the deemed university status granted to institutions. The Yash Pal Committee, which was set up by the Government with a view to suggest measures for "renovation and rejuvenation" of higher education in India, has submitted its final report to the Government. The report may be of great significance as the Committee has made some strong suggestions. For example, it has viewed UGC and the AICTE as burdensome regulators that must be done away with. The Committee has further suggested that the UGC and AICTE be replaced by a single body called the National Commission for Higher Education and Research. The suggestion comes on the same lines as that of the National Knowledge Commission which had also in its report on higher education suggested that one regulatory body - Independent Regulatory Authority for Higher Education (IRAHE) be appointed for approval/coordination for all higher level educational institutions<sup>23</sup>. The National Knowledge Commission is a high-level advisory body to the Prime Minister of India, established with the objective of transforming India into a knowledge society.

The Right of Children to Free and Compulsory Education Act, 2009 (Free Education Act) is another important piece of legislation, having recently received the President of India's assent<sup>24</sup>. Free Education Act seeks to provide free and compulsory elementary education to all children and thereby, give effect to Article 21 A<sup>25</sup> of the Constitution of India. The salient features of the Free Education Act are as under:

- It provides for the duties and responsibilities of the Government, the local authorities, the schools and the parents towards ensuring free and compulsory elementary education to all children.
- The Central/State Governments, as well as the local authorities, are obligated to provide free and compulsory elementary education to every child.
- The Central Government and the State Governments shall have concurrent responsibility for providing funds for carrying out the provisions and objects of the Free Education Act.
- Schools are required to provide free and compulsory education to a particular strength of students depending on whether they are aided, unaided or Government controlled. While a school established, owned or controlled by either the Government or the local authority would have to provide free and compulsory elementary education to all the students admitted therein, an unaided school not receiving any kind of aid or grants from the Government would be 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.
- The expenditure incurred by an unaided school may however be reimbursed by the Government to the extent of per-child-expenditure incurred or the actual amount charged from the child, whichever is less.
- Schools are prohibited from subjecting any child or its parents to any method of selection for admission of a child, in preference over another, other than a random method.
- The collection of any capitation fee is prohibited and a contravention of this stipulation shall be subject to the penalties prescribed there under.
- Most importantly, a certificate of recognition is to be obtained from the concerned authority for the establishment or functioning of a school. This requirement shall, however, not be applicable to a school established, owned or controlled by either the Government or the local authority. A school in

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<sup>23</sup> [http://www.knowledgecommission.gov.in/downloads/documents/NKC\\_Education.pdf](http://www.knowledgecommission.gov.in/downloads/documents/NKC_Education.pdf): Last accessed on October 27, 2009

<sup>24</sup> <http://pib.nic.in/release/release.asp?relid=52370&kwd=> Last accessed on October 27, 2009

<sup>25</sup> Article 21 A of the Constitution of India: "**Right to education.** 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."

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order to obtain the certificate of recognition would have to fulfill the criteria of norms and standards as set out under the Schedule to the Free Education Act. Failure to obtain a certificate of recognition would attract penalties.

While these developments appear to promote a noble and vital cause, it remains to be seen how effective their eventual outcome will turn out to be when implemented.

### **TAXATION ASPECTS**

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 routed, as described previously, into an Education Services Company which could provide services to the entity which sets up the school. In such cases, taxation at multi-levels may be applicable. The tax implications on the entity setting up the school, the Education Services Company and on the foreign investment into the Education Services Company are discussed below:

#### **ON THE ENTITY SETTING UP THE INSTITUTION:**

An educational institution in India may be set up as a not-for-profit organization in the form of a Trust, Society or a Section 25 Company. Educational institutions set up as not-for-profit organizations may avail of certain tax exemptions as provided under the Income Tax Act, 1961 (ITA), subject to satisfaction of certain conditions as prescribed therein.

In order to take advantage of tax exemptions under the ITA, an educational institution will have to qualify as a Trust or an institution set up for a charitable purpose and will also have to fulfil certain other conditions in respect of utilization of income, etc., as prescribed under Sections 11 and 12 of the ITA. Education is covered within the definition of 'charitable purpose', as defined under Section 2(15) of the ITA.

Educational activities would also have to be undertaken in a not-for-profit manner, and not as a trade or commerce activity, in order to avail of the tax exemptions. *In Re. MCD v. Children Book Trust*<sup>26</sup>, the Supreme Court of India held that the mere imparting of education for the primary purpose of earning profits cannot be said to be a charitable activity.

Further, an educational institution, seeking to avail of the aforementioned tax exemption, will have to make an application under Section 12AA of the ITA to the Commissioner of Income Tax accompanied with the prescribed documents.

Hence, if an educational institution fails to register itself under the provisions of Section 12AA or does not satisfy the conditions as listed under Sections 11 to 13 of the ITA, it will be subject to tax as per the regular provisions of the ITA.

Recently, the Government has circulated a new draft tax code for public comments – the Direct Taxes Code, 2009<sup>27</sup> which aims to replace the ITA for all forms of direct taxation in India. The draft code has not been presented in either houses of the Parliament. Further, it is not expected to be passed in its current form and significant changes may be expected in the draft legislation. However, when the new tax code is debated and passed as law, it is likely to have a significant impact on the taxation of not-for-profit institutes, including educational institutions.

#### **ON THE EDUCATION SERVICES COMPANY:**

The 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 33.99% including surcharge

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<sup>26</sup> Case citation: (1992) 3 SCC 390

<sup>27</sup> <http://finmin.nic.in/dtcode/Direct%20Taxes%20Code%20Bill%202009.pdf>

and education cess). In addition to corporate tax, the Education Services Company would be liable to service tax on the entire value of the services rendered by it, currently at the rate of 10.3%.

### ON THE FOREIGN INVESTOR:

The ITA lays down elaborate provisions in respect of chargeability to tax, determination of residency, computation of income, et al. At the outset, it is pertinent to note that non-residents are taxed 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. Therefore, non-residents are only taxed on income which is received in India or is deemed to accrue or arise in India.

In case of the foreign investor being located in a jurisdiction with which India has a double tax avoidance agreement, the provisions of the ITA will apply only to the extent they are more beneficial than the provisions of such agreement. Use of a jurisdiction with which India has a double tax avoidance agreement may allow the foreign investor to effectively achieve global tax management while investing into India.

#### **Subject to tax treaty relief, if applicable, the taxation of the foreign investor under the ITA would be as follows:**

- Capital gains, being gains on sale of equity shares held for a period of more than twelve months on the floor of the stock exchange would not be taxable in India provided Securities Transaction Tax (STT) has been paid on the same;
- Capital gains, being gains on sale of equity shares held for a period of twelve months or less on the floor of the stock exchange will be taxed at the rate of 15.836% provided STT has been paid on the same;
- Capital gains arising from the sale of listed securities, sold off the floor of the stock exchange, held for twelve months or less will be taxed at the rate of 42.23% and those held for more than twelve months will be taxed at the rate of 10.558%;
- Capital gains arising from the sale of unlisted securities held for twelve months or less will be taxed at the rate of 42.23% and those held for more than twelve months shall be taxed at the rate of 21.115%;
- Dividends on shares received from an Indian company on which dividend distribution tax has been paid by the Indian company are exempt from tax in the hands of the shareholders. However, the Indian company distributing dividends is subject to a distribution tax at the rate of 16.995% (including the currently applicable surcharge at the rate of 10% on tax and education cess of 3% on the surcharge and tax);
- Interest income from loans made or debt securities held in India in foreign convertible currency will be taxed at the rate of 21.115% and at the rate of 42.23% on loans made or debt securities held in India in Indian Rupees. However, if such interest arises out of the holding of Foreign Currency Convertible Bonds, then such interest shall be taxed at the rate of 10.558%. Indian tax on interest income will be collected by the payer of such interest income as withholding tax.

With respect to collaborations between Indian institutions and foreign universities, as previously discussed, the consideration received/income generated by the foreign collaborator by virtue of granting to 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 usually be characterized as royalty income in the hands of the foreign university. Such a characterization would impose an obligation on the Indian universities making payment to deduct tax at source. Presently, royalty income in the hands of non-residents is

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taxed at the rate 10.558% under the provisions of ITA, which may further be subject to tax treaty relief, if applicable. Additionally, if the collaboration extends to provision of technical services, depending on the nature of services rendered, they may be categorized as fees for technical services. In such a case, also, there would be a withholding tax of 10.558% in respect of the payments made under the provisions of the ITA, subject to any relief available under the tax treaties.

### **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 small having 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 settle on opportunities either for long-term capital appreciation or for investments that make sense from a strategic business perspective and accordingly focus on the aspects related to the potential target, such as business focus and strategy for growth, its efficacy owing to constant threat of obsolescence, sustainability of the products or services being offered by the target, etc.

The 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 cessation of approvals obtained from the AICTE, running of institutions, especially management institutions, without the requisite approvals, etc., are typically identified during such process. If such issues crop up, it would become necessary from the investors' perspective to incorporate certain covenants on the target in the definitive documents. Covenants ensuring 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.



### 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 the strong returns that could be expected from the sector. With about 50% of India's population being younger than 25 years of age 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 significant. However, with foresight, strategic planning and by retaining legal counsel with prior experience in dealing with these issues, investors interested in investing in education can overcome these challenges and generate favourable returns even in an unfavourable economy. Further, we understand that the Ministry of Human Resource Development is, at present, in strong favour of facilitating foreign participation in India's education sector. Thus, a slew of measures assisting the same is also expected to be introduced in the months to come.

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