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EdTech: From IT to AI

A legal perspective

June 2021

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A legal perspective

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1. Introduction

Robots, artificial intelligence (AI) and Deep Learning are fast becoming a reality. In some cases, they are at a base stage and in some others far more advanced. Across the entire spectrum of its scale and complexity, technology has profound implications on educational technology (“EdTech”) and the future of education.

At one point in time, the invention of computers and the use of internet was considered a big breakthrough for dissemination of knowledge and information. This was followed by a phase where the rapid increase in the users of iPad, smartphones and electronic smart devices coupled with popularity of digital books, smart classes, digital educational tools, education-based applications and games resulted in education being just a click away!

Thanks to the internet, today, education is not limited to the younger generation alone. Even adults are realizing the benefit of education on the go, at their fingertips, and enrolling for courses to constantly update their skills. The digitization of education is helping social causes as well, as, in addition to traditional education, it is enabling the government and social organizations in reaching out to the masses and imparting education on topics such as IT, health, mental well-being, social matters, current affairs and other subjects, thus contributing to public good. In the near future, technologies and businesses have the potential of changing the way of learning and teaching in ways unthought-of earlier.

It is a known fact that the learning curve of every individual is different. Some learn faster than others, while some take more time and attention to absorb details. Further, techniques of teaching may also need to vary depending on the subject. Although teachers are trained to provide effective education to students, there are some inherent constraints, of time and capability, for teaching different students differently. AI can help bridge this gap as it has the ability of monitoring and adapting to the learning patterns and providing effective solutions to students. Further, it can also make learning more fun using interactive methods of teaching. The benefits of AI can thus be used for improving the standard and quality of education as a whole.

However, with technology replacing human-power in various facets, several questions arise from an education sector perspective as well. For instance, how will classrooms of the future look like? Will AI replace teachers completely in the future and if yes, for good or bad? Will interfacing a computerized device suffice, vis-à-vis the in-person classroom experience? With the conventional pen and paper being supplemented by smart devices, does blended learning seem to be the logical way forward? These are issues requiring much deliberation and discussion.

Since education is a fundamental requirement of life, while a machine can analyze patterns and provide effective solutions, society still trusts human interaction over technology for imparting learning. The role of technology, such as AI, can therefore be of an assistive learning tool in teaching, which complements the experience of teachers with processes and new age solutions. For instance, AI is already being used to some extent to lessen the burden of the teachers by helping with administrative jobs such as question paper generation, evaluation etc. It can be used in providing focused tutoring customized to the need of students so they are up to speed with the others in the class, and can specifically be used to help students who may have visual, hearing or other learning challenges. Technology and AI-based applications can also be an effective tool for parents to keep a track on the progress made by their child. It can be (and to some extent is) used for making teaching more fun, interactive and practical. Use of digital content such as videos, games, and other learning-based applications are already helping in creating an adaptive learning environment. Thus, while human involvement in teaching seems irreplaceable, “EdTech” is the much-needed disruption revolutionizing the manner of teaching and learning.

The Government of India has recognised the massive potential that modern methodologies of education have, and it has encouraged technology-enabled learning in the National Education Policy of 2020.¹ The University Grants Commission (“UGC”) and the All India Council for Technical Education (“AICTE”), which are two of the primary regulators for higher education in India, have also published regulations and guidelines to give a boost to online learning and the use of educational platforms. Moreover, the UGC recently released a draft concept note on blended mode of learning and teaching, which has made references to some of the popular EdTech platforms globally.² These steps are towards the right direction in realising the potential of EdTech in India and the numerous benefits that it has for the learning all individuals, children and adults alike.

In light of the above, in this paper, we have explored some of the EdTech businesses and the relevant legal issues which may be considered by such businesses.

1. Available at: https://www.education.gov.in/sites/upload_files/mhrd/files/NEP_Final_English_o.pdf (Last accessed on June 7, 2021).

2. Draft concept note on “Blended Mode of Teaching and Learning” available at: https://www.ugc.ac.in/pdfnews/6100340_Concept-Note-Blended-Mode-of-Teaching-and-Learning.pdf (Last accessed on June 7, 2021).

2. The Business of EdTech

The unmet demand for good quality education, coupled with the lack of quality infrastructure and teachers has adversely affected the education system in many countries, including India. Lack of skill-based education affects the employability of individuals and the country's overall development of the nation. Since it is both expensive and rather challenging to set up good quality educational institutes to meet the growing demand in a short span, use of technology is an effective solution for providing quality education to a large population, via the medium of internet.

EdTech models of various kinds are gaining popularity amongst students worldwide for they not only provide access to good quality education, but are more affordable for the students by saving on costs of relocation / travel, and accommodation, to name a few.

Given that technology, which is at the crux of EdTech, is evolving every minute, it is difficult to crystallize all the business models of EdTech. Some current businesses relying on EdTech are discussed below:

I. Online Tutorials

The trend of students enrolling for coaching classes for admission in premier institutes is not a recent one. Since the coaching centers are based in select cities, students usually have to shift base to avail tutorial services. However, technology has now managed to bring the coaching classes right inside the home of the student. Students are able to download the applications and become part of the virtual classrooms, through live streaming possibilities. Further, they are even able to interact with teachers and fellow students via discussion forums. This has helped spread the reach of education to students even in the remotest locations, without the need for travel. Tutorials and coaching classes have always been a thriving segment of the Indian educational set-up, and the benefits of expansion and reach through e-learning has been realized by providers and investors alike. The growth of several e-tutorial based start-ups and the investment and acquisition activity in this space is clearly suggestive of the potential this segment holds. The situation is such that even traditional coaching and tutorial houses are moving to e-platforms, in addition to physical setups, to expand their market reach, and increase enrollments.

II. Certification and Degree courses

Admission in a good institute is merit-based and highly competitive. The fee charged by such institutes for a degree / diploma programme is usually very high and not affordable for many students. This invariably means that every student may not be able to pursue a degree / diploma programme from a good institute. Further, the curriculum taught in a lot of these institutes is either dated or not as progressive as modern jobs may require. Thus, while a student may graduate from such institutes, he or she may not necessarily be appropriately skilled for a job or have the practical knowledge required to hit the road running. This results in students enrolling in coaching classes/ vocational training classes and seeking certification courses to improve their skill set and increase their scope of employability.

In the recent past, certification courses have attracted a great amount of interest amongst education service providers. Certification courses are generally unregulated short-term courses and are aimed at improving a skill set or enhancing knowledge about a particular subject. These courses help students develop practical knowledge in a subject, which helps in employment as well as in career progression. Further, students can take up multiple courses to broad base their knowledge in several subjects. Numerous platforms now offer massive open online courses ("MOOCs"), which may be offered independently or in collaboration with universities. They are

increasing the popularity of certification programs, as they give cross border access to students to courses provided by universities, including world class universities.

On the downside, given that MOOCs are usually free of cost, and are open to public at large, the completion rate of MOOCs is fairly low. This has paved the way for small private online courses (“SPOCs”). SPOCs, unlike MOOCs, are customized learning targeted at a smaller group for a more focused learning experience. In addition to MOOCs and SPOCs, educational institutes are progressing towards online classroom models where a formal degree or diploma is provided to students on the completion of the course.

A blended model of learning where part of the study is through digital means and part in a physical class room has also been proposed by the UGC and is perhaps more tuned to cater to today’s needs.

III. Credit Transfer

Another upcoming model is the credit transfer model adopted by foreign educational institutes (“FEI”) looking to do business in the education sector in India. In this model, an FEI can engage an Indian service provider who licenses the intellectual property from the FEI and 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.

Under the National Education Policy, 2020 the Government of India has also proposed that credits acquired in FEIs will be permitted, where appropriate as per the requirements of each HEI, to be counted towards the award of a degree. When implemented, this will make collaboration models between FEIs and HEIs a big success.

IV. Gamification

While games are traditionally considered a means of entertainment, EdTech industry is creatively using gaming as a means for imparting education. Gaming-based education platforms present problems as challenge to students packaged with an entertainment quotient for productive learning. Students are engaged by the competitiveness of the game, its user interface and the reward at the completion of each stage, making learning fun.

Designing an educational game is usually inexpensive, when compared to the wide reach it offers. Also, the availability of low-cost devices, increase in internet penetration and the popularity of games among children and adults alike, is an indicator that gamification is playing a crucial role in transforming learning.

V. Television Channels and Platforms

Television, because of its vast reach, is turning out to be a very effective medium of providing education to the masses. Television channels (which could either be uplinked and downlinked from India or uplinked from outside and downlinked in India) as well as platform service providers (such as cable operators, DTH or IPTV players) are collaborating with content providers for education-focused content (such as tutorials for specific subjects or learning and problem solving-based programmes) in India. Educational content by a television channel is usually provided as part of its programme schedule and is available to customers as part of the subscription charge paid for the channel. In case of a platform, for instance a cable or DTH operator, the customer may need to subscribe to such content separately, unless it is provided as free content by the platform. The offering of educational content

through the medium of television, which has a presence in most households, can have a far-reaching impact on the education industry as a whole.

VI. Knowledge sharing platforms and teaching assistance tools

Platforms such as knowledge sharing applications, e-books, e-discussion forums, web portals for idea exchange, smart classes, audio-visual tools and applications enabling interactive teaching, portals helping teachers generate question papers, evaluate and track student progress, and platforms helping parents to track their child's development are some of the other variants which are becoming increasingly popular in the EdTech ecosystem. With the education system progressing towards a blended learning model, teachers are also using technology, including AI, to assist with their teaching. The large consumer base of this market comprising of educators and learners, is opening up opportunities for providers and investors.

VII. Big Data

Big Data, i.e. analysis of large volume of data using techniques to ascertain patterns, trends, preferences etc., is extremely helpful for EdTech. With the help of big data, it is possible to analyze student behavior, needs, learning abilities and weaknesses. This analysis can be used for customizing education for students. Use of Big Data has been well received in the education sector and several companies currently offer such solutions.

VIII. Cloud Computing³

Cloud Computing provides several benefits for the education sector in terms of storage, sharing and accessibility. With the help of cloud storage, students can have access to education resources via any tablet/ mobile device, without the need to invest in high storage capable devices. Due to the benefits of ease of access and low investment costs, educators and students prefer cloud-based solutions. This results in increased opportunities for cloud computing providers.

IX. E-Commerce and Payment Systems

The payment towards tutorials classes, certification, educational content, games, interactive boards, applications, e-books, web-based education tools and services etc. is essentially a purchase of a service or product through the electronic medium, resulting in a commercial transaction.

The benefits of e-commerce for EdTech has created a thriving market for all types of education platforms resulting in an increase in e-commerce transactions in the education space.

Given the flexibility of online learning-based models to provide education anytime, from anywhere, the traditional models of physical payment are also no longer feasible, and giving way to evolving payment methods. Efficient and effective e-payment mechanisms are necessary in order to facilitate the businesses functioning in a web-based environment. The new models of payment systems i.e. Unified Payment Interface (“UPI”), e-wallets etc.

3. Please refer to our research paper titled “Cloud Computing Risks/ Challenges Legal & Tax Issues” accessible at the link: http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Cloud_Computing.pdf for further information on this subject (Last accessed on June 8, 2021).

have become immensely popular and are a necessity for the growth and success of EdTech businesses. With the growth in the demand for EdTech services, the number of electronic transactions, both domestic and cross border are only going to increase, creating scope for more such payment gateways and solutions to emerge in future. The blockchain technology could also play an important role in the fast-evolving payment systems space.⁴

4. Please refer to our research paper titled “The Blockchain: Industry Applications and Legal Perspectives” accessible at the link: http://www.nishith-desai.com/fileadmin/user_upload/pdfs/Research%20Papers/The_Blockchain.pdf for further information on this subject (Last accessed on June 7, 2021).

3. EdTech and the Law

EdTech, like any other business, has its own peculiar challenges from a legal, regulatory and tax perspective. Some key nuances are discussed below:

I. Entity Form, Jurisdiction and Contractual Documents

The first and foremost step for any business is to decide the form of the legal entity they will organize themselves as. Choice of jurisdiction, India or overseas is also an important decision to make right in the beginning. Intellectual Property (“IP”) is a key asset of an EdTech business, and its optimum protection and exploitation is an important driver for this choice.

A company aiming to service local customers, should ideally be set up in the jurisdiction where its customer and revenue source is. Conversely, where an entity intends to do business across the globe (e.g. launching an application or service which they expect to be used globally), structuring is critical to inter alia decide on the most efficient legal, tax and regulatory jurisdiction to set up the business, so that the revenues can be maximized. For such companies, jurisdictions, which provide good intellectual property right protection, tax treaty networks and are investor friendly may be preferred locations. However, each structure is dependent on a number of factors and will vary from business to business.

A. Setting up a Business in India⁵

If the business is set up in India, following forms of entities may be considered:

i. Private Limited Company

A private company can be set up under the provisions of the Companies Act, 2013. As per this act, a private limited company needs to have a minimum of two persons as shareholders and a minimum of two directors, at least one of whom is a resident director and has stayed in India for not less than 182 days in the previous calendar year. A private company has the following features:

- The right to transfer shares is restricted in accordance with its articles of association.
- The maximum number of its shareholders is limited to 200 (excluding past and present employees who are shareholders of the company).
- No offer can be made to the public to subscribe to its shares, debentures and deposits.

In a private limited company, the liability of the shareholders is limited to the extent of the shares contributed to the capital of the company. Further, a company is a separate legal entity and can sue and be sued in its own name. Therefore, it ring-fences potential personal liabilities (including business-related liabilities) of the shareholders and is thus a common structure for receiving investments.

5. Please refer to our research paper titled “Doing Business in India” accessible at the link: http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Doing_Business_in_India.pdf for further information on this subject (Last accessed on June 8, 2021).

ii. Limited Liability Partnership

A Limited Liability Partnership (“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. LLP is a body corporate and exists as a legal person separate from its partners. Since an LLP has lesser compliances than a company and is tax efficient, it is being increasingly used in businesses.⁶

B. Offshore Business⁷

A number of international players provide education services in India, from outside India. In such cases, the servers or clouds are usually located outside India and the intellectual property is also housed outside India. Further, at times, even providers from within India, with an intention of expanding globally, set up offshore entities, as described above. Some of these offshore services models are:

i. Rendering services directly to customers

In this model, the online courses, web-based or application-based portals, forums or games, or products are directly provided by the entity from outside India. The EdTech entity does not have any presence in India. The payments, if any, required to be made by the customer are processed by an international payment gateway directly to the EdTech entity. This model is used by those EdTech players who have services or are expanding their services in various markets, but do not wish to have a local presence in each market. India has exchange control regulations and therefore an understanding of the regulations relating to payment systems and permitted cross-border transactions in India is important to ensure a smooth transaction flow.

ii. Entity located outside India having a service provider in India

This is a hybrid of the first model. In this model, while the EdTech entity provides the services from outside India, and collects payments, if any, directly outside India, it may have a presence through a local entity, which may assist in services such as marketing, customer acquisition and customer support. Depending on the commercial arrangement between the parties, the local service provider could be paid by the EdTech entity on a commission basis or be paid a fixed amount on a periodic basis. This model helps the EdTech players in expansions in the market without having a formal presence in the market.

iii. License arrangement

In this model, the EdTech entity (for instance a foreign institute), which owns the IP such as the proprietary courses material, enters into license arrangement with an Indian entity. The brand name, curriculum, know-how etc. is licensed to the Indian party. The course curriculum is then imparted to students by the Indian institute in India. Such an arrangement is a win-win situation for all parties as (i) the foreign institute benefits from the license fee and goodwill generated because of its name being recognized in the Indian market; (ii) the Indian institute benefits from the license of curriculum and brand name from the foreign institutes, which enables them to attract students to their institute; and (iii) the students get access to the curriculum and teaching methods of foreign institutes in India itself, thus saving on costs. It is important to note that such an arrangement should be a pure license arrangement and the foreign institute should not be awarding any degree or diploma to students in India, or else the programme may fall under the purview of the regulated sector.

6. Please refer to section on “Tax Considerations” below for further information on this subject.

7. Please refer to section on “Tax Considerations” below for further information on the taxation of these models.

iv. Services arrangement

This is a hybrid of the above model, in which the Indian entity also engages the services of the foreign entity, such as advising on standards for evaluation of students, qualification and recruitment of teachers, training teachers, advertising, inputs on infrastructure facilities etc. At times, the foreign educational institute may also send their teacher and staff to the Indian institutes for teacher/ student training programmes or provide certain services (for instance certain modules through online medium) directly to students in India. The foreign institute benefits from such an arrangement as it is able to establish its presence in the Indian market and earn from the services fee and the Indian institute benefits from the expertise and experience of the foreign institute. However, from a regulatory perspective, it is important to structure the arrangement in a manner which reflects the intent of the parties. Since foreign educational institutes are currently not allowed to operate an independent campus in India, the arrangement should not result in the Indian institute being construed as a campus of the foreign educational institute in India nor should the foreign educational institute be construed as awarding degree or diplomas to students in India.

v. Back Office Functions

Because of the thriving IT industry in India, offshore entities often engage Indian service providers for IT-based services, such as software development, graphics, data processing etc. These Indian services companies could be captive units of the offshore entity or a neutral third-party rendering services.

C. Contractual Arrangements

Depending on the business model, jurisdiction and structure, an EdTech entity may need to enter into several agreements. These agreements would however need to be in compliance with applicable local laws. Some such agreements relevant to an EdTech business are:

i. IP Assignment Agreements

Having a clear chain of title to the asset is the backbone of any business. Since IP forms the crux of an EdTech model, it is imperative that the rights in the IP vest with the correct entity. In case the IP is created by the employees or consultants, it is important to have clear documentation to ascertain how the IP rights vest in favor of the owner entity. Hence, clear assignment clauses in employee, consultant and third-party contractor agreements are important.

Many entities acquire IP in the course of obtaining services e.g., website development, software development, development of marketing and promotional material, etc. In case of acquired IP, the entire chain of title documents needs to be examined to ascertain whether the entity from which IP is to be acquired actually has a valid title to transfer the IP.

In order to seek assignment of rights, there are some specific provisions under Indian IP laws which need to be complied with / borne in mind while transferring IP. For instance, in case of copyright, it needs to be ensured that the term and territory of the assignment is specified in the assignment and license documents, in the absence of which the term is deemed to be 5 years and the territory to be India. While these provisions of copyright law may not have an effect in an employer-employee relationship (since copyright vests in the employer automatically), in all other cases, assignment clauses need to be carefully examined to ascertain absolute ownership of copyrighted work. Further, in case of any other form of IP (such as trademarks, patents etc.) the IP rights need to be specifically assigned.

ii. Confidentiality and Non-Disclosure Agreement

Every business owns certain information which it treats as confidential. In order to carry out business with third parties, a confidentiality and non-disclosure agreement must be prepared. This can be used to enter into preliminary discussions with third party vendors, consultants, contractors, etc. whilst ensuring that appropriate protection is provided to the business and its ideas.

Further, employees of an organization are privy to confidential information and trade secrets on a daily basis. In the absence of any specific Indian statute conferring protection on such information in the hands of employees, it is imperative to have contractual documentation placing confidentiality and non-disclosure obligations on employees.

iii. IP license agreement

For EdTech businesses which license their IP to another entity, the presence of an IP license agreement is a must. In case a brand is licensed, the agreement should clearly set out the terms and conditions for the grant of license, and that the goodwill generated by the use of the brand will accrue to the benefit of the EdTech entity. As far as licensing of copyrighted work is concerned, there are certain nuances under the Indian Copyright Act, 1957 (for example, term of the license 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 specifically if any license is taken in relation to any copyrighted work in India or from an Indian entity.

iv. Other agreements

In addition to the above, an EdTech entity may require certain other agreements as well, such as agreements for availing services (for instance website or development services) from a service provider, marketing and distribution agreements (for instance, for sale or promotion of the products or services in local regions), website or application terms and conditions for entering in contracts with the users, privacy policy etc.

II. Protection of IP⁸

IP is the principal asset in an EdTech business and hence, it is essential to protect it. IP could either be developed in-house, acquired or licensed from a third party. The various forms of IP that an EdTech model can have are as follows:

A. Copyright

The saying “Content is King” couldn’t be truer for an EdTech business, which is an entirely educational content driven model. Under the Indian Copyright Act, 1957, copyright subsists in original literary (e.g., course material), musical (e.g., background scores or notations), artistic (e.g., graphics) and dramatic works (e.g., the performances in a video recording), cinematograph films (e.g., videos recordings) and sound recordings (e.g., audio notes). A computer programme is also treated as a “literary work” and is protected as such. In India, copyright registration is not mandatory, and copyright comes into existence the moment the work is created, provided it is original. A registered copyright is, however, prima facie evidence of ownership. The term of copyright is, in most cases is, the lifetime of the author plus 60 years thereafter.

8. Please refer to our research paper titled “Intellectual Property Law in India” accessible at the link: http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Intellectual_Property-Law_in_India-Web.pdf for further information on this subject (Last accessed on June 6, 2021).

B. Trademarks

The brand name or product name of an entity or its tagline, logo and trade dress are its trademarks. In India, trademarks are protected both under statutory law and common law.

A trademark can be registered under the Trade Marks Act, 1999 (“**TM Act**”) along with the Trade Mark Rules, 2017 (“**TM Rules**”). A “mark” under the TM Act is defined to include “*a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or, combination of colors, or any combination thereof.*”⁹ Thus, the list of instances of marks is inclusive and not exhaustive. Any mark capable of being “graphically represented” and indicative of a trade connection with the proprietor is entitled to get registered as a trademark under the TM Act, provided it does not fall under any of the absolute or relative grounds for registration. A registration acts as a prima facie proof of a trademark and hence, is recommended. However, if the mark is not registered, it is still protected under common law. Under common law, the owner of the trademark may claim a passing off right, against the entity who may be passing off goods and services as that of the goods or services of the owner of the trademark.

Since trademarks are territorial in nature, it is important to register them in each jurisdiction where the mark is used or proposed to be used.

C. Domain Names

In an e-business environment, websites and internet domains play an important role in the conduct of business. While there is no specific law or regulation pertaining to domain names, the Indian Courts have extended the protection availed to trademarks under the TM Act and TM Rules to domain names as well. Since websites are accessible worldwide, while purchasing a principal domain (generic top level domain names) name such as a “.com” it is recommended to have sub-domain (country code top level domain names) names such as “.in” as well.

D. Patents

In India, the law governing patents is the Patents Act, 1970 (“**Patents Act**”) which grants protections to inventions. Not all innovations are “inventions” within the definition of the Patents Act. The term “invention” is defined as “*a new product or process involving an inventive step and capable of industrial application.*”¹⁰

Unlike in other countries, software (except in certain circumstances), algorithms and business methods are not patentable in India. Thus, learning based products and processes, being softwares, are not patentable in India, unless they are combined with a hardware and the invention fulfills the requirements of novelty, non-obviousness (inventive step), and industrial application. Further, it should also not be previously available in public domain.

The challenge that businesses prima facie face as regards patents is to determine whether a product or process is patentable or not. For instance, if an entity develops a novel process, but discloses it to public, it may lose the opportunity to patent the process solely because it was not aware about what qualifies as a patent and what to do to patent a product. This may become a deal breaker from a commercial perspective if the value of the company was based on the novel process itself. This is especially true in case of an EdTech venture which develops its own unique learning processes and products.

9. Section 2 (zb) of the TM Act.

10. Section 2(1) (j) of the Patents Act.

E. Trade Secret and Know-How

Whilst there are no specific laws and regulations governing trade secrets and know-how, these are protected under the common law in India. In order to protect trade secrets and confidential information, watertight agreements should be agreed upon, and they should be supported by sound policies and procedures.

III. Data Protection Compliances in India

The increasing use of technology in education has raised several data security and privacy concerns. Games, learning applications or any other interface generally collect personal information about its users which can be further put to commercial use and marketing. The sale of personalized data to third parties for different reasons ranging from development of related products or to advertisers or crossover vendors may lead to several data protection implications.

In India, the provisions relating to data protection are covered under the Information Technology Act, 2000 (as amended) (“**IT Act**”) and more specifically, the rules issued under the IT Act, titled “*Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011*” read along with the clarification dated August 24, 2011 that was issued by the Government in relation thereto (together referred to as the “**Data Protection Rules**”).

There are basically two categories of information covered under the IT Act, which need to be considered with respect to data protection:

- a. Personal information (“**PI**”) which is defined as any information that relates to a natural person, which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is capable of identifying such person.
- b. Sensitive personal data or information (“**SPDI**”) which is defined to mean such personal information which consists of information relating to -
 - i. password;
 - ii. financial information such as bank account or credit card or debit card or other payment instrument details;
 - iii. physical, physiological and mental health condition;
 - iv. sexual orientation;
 - v. medical records and history;
 - vi. Biometric information.

Additionally, SPDI also includes any details relating to (i) to (vi) above as provided to the body corporate for providing services and any of the information above received by the body corporate for processing, whether stored or processed under lawful contract or otherwise.

The Data Protection Rules prescribed certain compliance requirements for SPDI only. The compliances include the requirement for a body corporate to take the consent of the person whose SPDI is collected, to inform them about the purpose for which the SPDI is collected and give them an option of withdrawing the consent given for collection of SPDI/ modifying the SPDI that has been provided by them to the body corporate. As far as PI is concerned, the

unauthorized disclosure of PI which is obtained under contract, is punishable under the IT Act¹¹ if such disclosure is done with the intent to cause or knowing that such disclosure is likely to cause wrongful loss or wrongful gain.

The Data Protection Rules are applicable to a **body corporate** located with India that is engaged in the collection, receiving, possessing, storing, dealing or handling of SPDI using **electronic medium** and sets out compliances for protection of SPDI by such body corporate. Thus, if SPDI of any individual is collected, received, processed, stored, dealt with and handled outside India, the Data Protection Rules will not be applicable. However, the local data protection laws of the relevant countries may apply in relation to such data.

Notably, India is planning to overhaul its data protection law. The latest publicly available draft of the proposed law is similar to EU's General Data Protection Regulation and aims towards protection of wider categories of data, regulation of cross-border data flows, data localization, and enhanced obligations on data controllers. Further details about the proposed law and our accompanying analysis can be accessed in the footnote below.¹² Thus, the data protection and data privacy requirements for EdTech may need to be revisited once the new law is enforced in India.

IV. Intermediary law and liability

Depending on the specifics of the business model, an EdTech platform may be considered as an intermediary (an EdTech marketplace for example) within the meaning of the IT Act, which defines an intermediary to mean “*any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web hosting service providers, search engines, online payment sites, online-auction sites, online market places and cyber cafes.*”¹³

Under Section 79 of the IT Act, intermediaries are accorded ‘safe harbor’ from liability for content published by third parties and hosted on their platform, subject to the intermediary observing due diligence while discharging their duties. These due diligence requirements have been prescribed under the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021¹⁴ (“**IT Rules**”) which have been framed under the IT Act and were notified on February 25, 2021. The IT Rules supersede the erstwhile Information Technology (Intermediaries Guidelines) Rules, 2011. Therefore, under Indian law, an intermediary is required to comply with both the IT Act and IT Rules (including complying with takedown requests, appointing a grievance officer, etc.), and may face penal consequences in case of certain violations.

V. Payment Systems

As discussed earlier in this paper, the growth of technology has enabled growth of instruments which allow for easy access to e-commerce transactions. Payment systems in India (both traditional and electronic) are regulated by the Payment and Settlement Systems Act, 2007 (hereby the “**PSS Act**”). The PSS Act defines a “payment system”

11. Section 72A of the IT Act – Punishment for disclosure of information in breach of lawful contract – “*Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person, shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both.*”

12. See https://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/new-data-protection-law-proposed-in-india-flavors-of-gdpr.html?no_cache=1&cHash=820346306b0aae8065a8ed29f7161dbc, http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/wheels-in-motion-for-an-epic-2020-for-privacy-in-india.html?no_cache=1&cHash=67db52ffabaf4655045d9446f8371923, and http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Privacy-and-Data-India_s-Turn-to-Bat-on-the-World-Stage.pdf

13. Section 2(w) of the Information Technology Amendment Act, 2008.

14. Available at <https://mib.gov.in/sites/default/files/IT%20Intermediary%20Guidelines%20and%20Digital%20Media%20Ethics%20Code%20Rules%202021%20English.pdf> (Last accessed on June 8, 2021).

as “a system that enables payment to be effected between a payer and a beneficiary, involving clearing, payment or settlement¹⁵ services or all of them but does not include a stock exchange”.¹⁶

The PSS Act explains that for the purpose of the definition, “payment system” includes the systems enabling credit card operations, debit card operations, smart card operations, money transfer operations or similar operations. As per the PSS Act, Reserve Bank of India (“RBI”) governs the payment systems operational in India. In addition to the PSS Act, there may be several other rules and regulations, including those established by the RBI that govern a system that involves the “clearing, payment or settlement” of a payment, depending upon the nature of service or undertaking involved.

Some common payment instruments which are used for e-commerce transactions are:

- Credit / Debit cards;
- UPI; and
- Pre-paid Instruments, which can include smart cards, magnetic stripe cards, internet accounts, internet wallets, mobile accounts, mobile wallets, paper vouchers and any such instrument which can be used to access the pre-paid amount.

Some of the specific legal issues in relation to payments and payment systems are discussed below.

A. Card Not Present transactions

With EdTech growing rapidly in India, an increasing number of businesses, whether service or product based, require payment online or via phone leading to “Card Not Present” (“CNP”) transactions. A CNP transaction is one where the customer and the merchant / service provider are not physically in the same location, and the merchant does not have access to the card being used, thereby making it difficult for the merchant / service provider to verify the identity of the customer. This could lead to situations in which payments and transactions are completed without the knowledge or authorization of the actual holder of a credit card.

Taking heed of the growing number of incidents of credit card fraud, especially via online payment portals, the RBI issued a notification in February 2009¹⁷, mandating the use of an additional factor authentication / validation system (“AFA”) (also referred to as 2nd level authentication / 3D verification) for online CNP transactions. Further, banks are also required to put in place an online alert system which would notify the card holder of any CNP transaction. The additional authentication / validation is to be obtained using information that was not visible on the credit card itself, i.e. information known or available to the holder of the card but not printed on the card. One-time passwords, internet banking passwords are examples of 2nd level authentication.

The requirement for 2nd level authentication is applicable to all transactions where:

- The card was issued in India; and
- There was no outflow of foreign exchange contemplated.

15. Section 2 (1) (n) of the PSS Act defines “Settlement” as “settlement of payment instructions and includes the settlement of securities, foreign exchange or derivatives or other transactions which involve payment obligations.”

16. Section 2 (1) (i) of the PSS Act.

17. RBI circular ref no. DPSS No. 1501 / 02.14.003 / 2008-2009 available at <https://rbi.org.in/Scripts/NotificationUser.aspx?Id=4844&Mode=0> (Last accessed on June 8, 2021).

The introduction of a second level authentication prevents merchants from implementing mechanisms where continuous / repeat payments can be made by customers, for example, in the case of subscription-based services. Obtaining a second level authentication requires more time and effort for a customer as opposed to a simple click through transaction.

As a result, it appears that some players in the industry may have structured their businesses by receiving payments in an offshore entity. However, the RBI vide a directive¹⁸ clarified that “*merchant transactions (for underlying sale of goods / services within India) being acquired by banks located overseas resulting in an outflow of foreign exchange in the settlement of these transactions is not acceptable*”, and that where cards issued by banks in India are used for making CNP payments towards purchase of goods and services provided within the country, such transactions should be settled in Indian currency and the acquisition of such transactions should also be through a bank in India.

In 2019, a revised framework¹⁹ (“**Framework**”) was issued to permit processing of e-mandates for recurring transactions for user-merchant payments using debit, credit, prepaid instruments (including e-wallets), and UPI.²⁰ The limits thereunder were subsequently revised and an e-mandate of up to a maximum of INR 5,000 (approx. USD 70) (pre-specified value or a variable value, and in case of the latter INR 5,000 is the maximum cap) can now be registered through a one-time registration process with successful AFA validation by the issuer. The cardholder is not required to provide any AFA for recurring payments unless the cardholder seeks to modify the e-mandate. Issuers are required to send a pre-transaction notification at least 24 hours prior to making the actual charge with prescribed information and must also give an opt-out option (with AFA validation) upon receipt of the pre-notification. Thereafter, a post-transaction notification must be sent too. The payer must be provided with an online facility to withdraw any e-mandate and AFA validation must be performed for such withdrawal of an e-mandate too. The issuer must establish a grievance redressal system, a dispute resolution mechanism and a system to separately identify chargebacks/dispute requests. The RBI notified a deadline of September 30, 2021 for issuers to comply with the Framework.

From an Indian market perspective, it is important for EdTech entities located outside India, looking at subscription based models to structure their business and payment systems taking into account the above mentioned regulations and directives.

B. Payment aggregators

The RBI had issued detailed guidelines (“**PA Guidelines**”)²¹ applicable to payment aggregators (“**PA**”)²² in March, 2020. PAs are those entities that facilitate payments to merchants, and that receive, pool and transfer user payments to the merchants as part of the facilitation process. The PA Guidelines also define ‘payment gateways’ (“**PG**”) as “*entities that provide technology infrastructure to route and facilitate processing of an online payment transaction without any involvement in handling of funds.*” Thus, PGs under the PA Guidelines may be limited to entities providing authentication services, back-end infrastructure or technology integrations services which assist in the payment ecosystem.

18. RBI circular ref no. DPSS.CO.CO.No.371/02.14.003/2014-2015 available at <https://www.rbi.org.in/commonman/Upload/English/Notification/PDFs/CNINR220814.pdf> (Last accessed on June 8, 2021).

19. RBI circular ref no. DPSS.CO.CO.No.447/02.14.003/2019-20 available at: <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11668&Mode=0> (Last accessed on June 8, 2021).

20. Our analysis on the Framework updated as of August 26, 2019 is available at https://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/recurring-online-payments-via-cards-and-e-wallets-now-a-reality.html?no_cache=1&cHash=a8d11bce549de4dbe73fe1e8863b54ad (Last accessed on June 8, 2021).

21. RBI circular ref. no. DPSS.CO.CO.No.1810/02.14.008/2019-20, available at <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11822&Mode=0> (Last accessed on June 8, 2021).

22. The PA Guidelines define PAs as “*entities that facilitate e-commerce sites and merchants to accept various payment instruments from the customers for completion of their payment obligations without the need for merchants to create a separate payment integration system of their own. PAs facilitate merchants to connect with acquirers. In the process, they receive payments from customers, pool and transfer them on to the merchants after a time period.*”

By virtue of the PA Guidelines, PAs must obtain an authorization / license to operate from the RBI. No authorization /license is prescribed for PGs. While the PA Guidelines set out certain baseline technology recommendations required to be adopted by PAs, the same are not mandatory for PGs. Among other things, PAs are required to perform background and antecedent checks on merchants before the on-boarding process and may also perform “know your customer” checks on the merchant as per existing RBI norms. Specifically, PAs are not permitted to store customer card credentials on their systems that may be accessed by the merchant. The merchant sites are also prohibited from saving customer card and such related data.

PAs would also be subject to the data storage requirements applicable to payment system operators, which appear to also include data localization requirements in terms of end-to-end transaction data. The PA Guidelines require that the contractual agreement entered into between the merchant and the PA must include provisions for security and privacy of customer data, along with mechanisms for periodic security assessment of the merchant’s systems.²³ As a result, any EdTech platform engaging entities which are PAs should be aware of, and would be required to cooperate with such PA’s compliance procedures, including contractual arrangements and data storage restrictions, which may have an impact on the EdTech platform.

C. Data localization for payments data

The RBI prescribes for data localization requirements for payments data. RBI issued a circular on ‘Storage of Payment System Data’ dated April 6, 2018 (“DL Circular”), read with the RBI *Frequently Asked Questions on Storage of Payment System Data* issued in July 2019 (“DL FAQ”) (together referred to as the “DL Regulations”).²⁴

The DL Regulations require RBI-regulated payment system providers to “ensure that the entire data relating to payment systems operated by them are stored in a system only in India.”²⁵ However, the DL Circular provides an exemption for data pertaining to the foreign leg of the transaction, where the RBI had clarified that for cross-border transaction data, that consists of a foreign component and a domestic component, a copy of the domestic component may also be stored abroad, if required. The DL Circular further clarifies as below:

- While payment transactions may be processed outside India, the data relating thereto is required to be stored only in India after the processing. The data should be deleted from the systems abroad and brought back to India within one business day or 24 hours from payment processing, whichever is earlier. The complete end-to-end transaction details should be part of the data.
- Any subsequent activity such as settlement processing after payment processing, if done outside India, is also required to be undertaken / performed on a near real-time basis. The data should be stored only in India.
- In case of any other related processing activity, such as chargeback, etc., the data can be accessed, at any time, from India where it is stored.

As a result, alternative options such as tokenization and storage of payment data by PAs are being explored. EdTech platforms which are based outside India should keep the above in mind while structuring their payment data storage and processing arrangements.

23. Further details on the regime on PAs, as updated on March 24, 2020 are available at https://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/licensing-regime-introduced-for-payment-aggregators-e-commerce-industry-to-undergo-significant-change.html?no_cache=1&cHash=3f8d6296f0d2cc7e2018ecea19c2f77e (Last accessed on June 7, 2021).

24. Our further analysis on the data localization regime as updated on July 10, 2018 is available at: https://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/india-steps-towards-localisation-of-payment-systems-data.html?no_cache=1&cHash=5a25fcad0456ff54b54de033bd8a2325 (Last accessed on June 8, 2021).

25. “Payment Systems Data” is defined in the DL Circular to include “the full end-to-end transaction details / information collected / carried / processed as part of the message / payment instruction.” The DL FAQ further specifies that the data should include “Customer data (Name, Mobile Number, email, Aadhaar Number, PAN number, etc. as applicable); Payment sensitive data (customer and beneficiary account details); Payment Credentials (OTP, PIN, Passwords, etc.); and, Transaction data (originating & destination system information, transaction reference, timestamp, amount, etc.).”

VI. E-commerce and consumer protection laws

India has revamped its consumer protection and e-commerce laws through the Consumer Protection Act, 2019²⁶ (“CPA”), and the Consumer Protection (E-Commerce) Rules, 2020²⁷ (“E-Commerce Rules”) thereunder. The CPA defines “e-commerce” as buying or selling of goods or services including digital products over digital or electronic network. Further, the E-Commerce Rules define an “e-commerce entity” to mean any person who owns, operates or manages digital or electronic facility or platform for electronic commerce. This definition does not include a seller offering his goods or services for sale on a marketplace e-commerce entity. For example, any EdTech platform providing or facilitating services (such as online tutoring, test prep, skill-based learning courses), etc. for a fee would likely fall within the definition of an “e-commerce entity”. An e-commerce entity which is not established in India, but systematically offers goods or services to consumers in India is also governed by the E-Commerce Rules. There is no threshold provided in the E-Commerce Rules for determination of the term “systematically”.

If an entity is categorized as an e-commerce entity, it would be subject to the various compliance requirements under the E-Commerce Rules, such as disclosure of address, contact details of customer care and grievance officer, etc. on their website, establishment of a grievance redressal mechanism, etc. Under the E-Commerce Rules, there was also a requirement for all e-commerce entities to have a local presence in India in the form of a foreign company, branch, office or agency. However, through a recent amendment to the E-Commerce Rules notified on May 17, 2021²⁸, the Government of India appears to have sought to remove this localization requirement. However, the provision under this amendment is not clear and there are certain interpretations which need to be taken. The requirement of a local entity for EdTech entities will have to be determined once there is more clarity in the law in the coming days.²⁹

E-commerce entities are further categorized as inventory e-commerce entities³⁰ and marketplace e-commerce entities³¹. Consequently, an EdTech platform or entity offering its own programmes or services to students in India may also be categorized as an “inventory e-commerce entity” under the E-Commerce Rules. Similarly, if an EdTech platform facilitates transactions and services between service providers and customers, they may be categorised as a “marketplace e-commerce entity”. There are additional compliance requirements for both these categories³² in addition to those enumerated above.

VII. Education specific laws for EdTech Ventures

Although 100% foreign direct investment has been allowed in education, investors have always been wary of investing in the education sector in India because of its highly regulated nature. The benefit of EdTech in India is that it is currently not subject to such stringent regulation.

26. Available at <https://consumeraffairs.nic.in/sites/default/files/CP%20Act%202019.pdf> (Last accessed on June 8, 2021).

27. Available at <https://consumeraffairs.nic.in/sites/default/files/E%20commerce%20rules.pdf> (English version from p. 7) (Last accessed on June 8, 2021).

28. Available at: <https://egazette.nic.in/WriteReadData/2021/227003.pdf> (Last accessed on June 7, 2021).

29. Our analysis on the impact of the E-Commerce Rules on EdTech platforms is available here https://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/consumer-protection-e-commerce-rules-should-ed-tech-platforms-comply.html?no_cache=1&cHash=321334e3f267d87106d49ca7726883ef (Last accessed on June 7, 2021)

30. Defined as “an e-commerce entity which owns the inventory of goods or services and sells such goods or services directly to the consumers and shall include single brand retailers and multi-channel single brand retailers.”

31. Defined as an “e-commerce entity which provides an information technology platform on a digital or electronic network to facilitate transactions between buyers and sellers.”

32. Rules 5 and 7 of the E-Commerce Rules.

In 2020, the UGC³³ introduced the UGC (Open and Distance Learning Programmes and Online Programmes) Regulations, 2020 (“**UGC Online Regulations**”)³⁴ which are applicable to a university³⁵ and an institution deemed to be university³⁶.

The UGC Online Regulations is applicable only to undergraduate and post graduate degree programmes and post graduate diploma programmes. It excludes programmes like engineering, medicine, law, dental, pharmacy and research-based programmes such as PhD and any other programme not allowed by any regulatory body to be offered in open distance learning or online form, unless the regulatory body concerned permits such programmes to be offered and the UGC subsequently notifies such programmes through an order. These regulations permit higher educational institutions (“**HEI**”) in India to offer their online programmes through learning platforms, provided these platforms are approved by the UGC. Further, the UGC Online Regulations also permit HEIs to source up to 40% of the e-learning from external sources which are duly approved by the statutory authorities of the HEI. Therefore, the UGC Online Regulations expressly enable HEIs in India to partner with various kinds of EdTech platforms.

Following the UGC’s footsteps, the AICTE recently published the AICTE (Open and Distance Learning Education and Online Education) Guidelines, 2021^{37 38} (“**AICTE Online Guidelines**”) paving the way for certain technical education courses to be offered online as well. The AICTE Online Guidelines apply to HEIs including standalone institutions,³⁹ institutions-deemed to be universities and universities and the programmes offered by such HEIs in online and open and distance learning (“**ODL**”) mode which lead to the award of diploma, post diploma certificate, post graduate certificate, post graduate diploma and post graduate degree level programmes. Notably, the AICTE Online Guidelines are only applicable to management and allied areas, computer applications, artificial intelligence and data science in the engineering & technology domain, logistics, and travel and tourism. Technical education programmes other than these have been expressly prohibited for online and ODL mode.

The AICTE Online Guidelines state that certain aspects such as e-learning material, platforms for offering online programmes, etc. will be governed by the relevant provisions of the UGC. Further, once the AICTE approves the respective programmes, the UGC Online Regulations including the approval process thereunder will continue to apply. EdTech platforms now have a wide range of courses, including certain technical courses, for which they are expressly permitted to partner with Indian HEIs.

The recognition by the UGC and AICTE of online degrees and diplomas has brought more structure and certainty to the online learning segment and encouraged degree seekers to pursue online education. Another benefit is that universities also are able to enroll more students when they offer courses online, increasing access for students to better universities. However, neither the UGC Online Regulations nor the AICTE Online Guidelines currently

33. UGC was set up under the University Grants Commission Act, 1956 to inter alia make provisions for the co-ordination and determination of standards in universities, for promotion and co-ordination of University education and for the determination and maintenance of standards of teaching, examination and research in universities.

34. Available at: <https://www.ugc.ac.in/pdfnews/221580.pdf> (Last accessed on June 7, 2021).

35. 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 this Act.*

36. 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 this 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.

37. Available at <https://www.aicte-india.org/sites/default/files/aicte-odl-online-guidelines-2021.pdf> (Last accessed on June 7, 2021).

38. Our analysis on the AICTE Online Guidelines is available at: https://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/aicte-notifies-guidelines-for-online-and-open-and-distance-learning.html?no_cache=1&cHash=c2db75cfa58a0d7e15f9e680f79e3b78 (Last accessed on June 7, 2021).

39. The AICTE Online Guidelines do not define Standalone Institutions. However, Section 2.8 of the AICTE (Categorisation of Standalone Institutions (SIs) for Grant of Graded Autonomy) Guidelines, 2019 define them as “those institutions which are not affiliated to any of the Universities, and imparting courses through regular or through Open and Distance Learning Systems, leading to Diploma, Post Diploma Certificate, Post Graduate Certificate and Post Graduate Diploma Levels in Management and allied areas, Computer Applications and Travel and Tourism with the approval of AICTE.

extend to programs offered by FEIs in India. Hence, courses or programmes offered directly through the FEIs from outside India remain unregulated.

VIII. Tax Considerations

Income tax in India is levied under the Income Tax Act, 1961 (“**ITA**”). Under the ITA, residents are taxed on their worldwide income while non-residents are only taxed on income arising from sources in India. Thus, where EdTech services are offered by a resident legal entity, the global income of such entity will be subject to tax in India.

For this purpose, a company is said to be resident in India if it is incorporated under the laws of India or when its place of effective management (“**POEM**”) is in India. The POEM of a company is the place where the key management and commercial decisions that are necessary for the conduct of the business are in substance made. This test however, remains substantially subjective and is decided on a case-to-case basis. The Central Board of Direct Taxes (“**CBDT**”) in India has also clarified that provisions relating to POEM would not apply to companies having turnover or gross receipts less than INR 500 million during a financial year.⁴⁰

In the case of a resident company, the ordinary corporate tax rate of 30% (exclusive of applicable surcharge and cess) applies. In some cases, depending on the total turnover of the company, a lower rate of 25% may be applicable. The same rate of 30% also applies to an LLP. Further, if the amount of income-tax payable under general provisions of the ITA is less than 15% of the company’s book profits, the company is liable to pay minimum alternate tax (“**MAT**”) on its book profits at the rate of 15%.

In respect of dividends paid by Indian companies till March 31, 2020, India did not levy a withholding tax and instead levied a Dividend Distribution Tax (“**DDT**”) on the Indian company. In a landmark move, vide the Finance Act, 2020 India has abolished the DDT and reverted to the classical system of taxation of dividends in the hands of shareholders, at the applicable tax rate with a corresponding withholding liability on the Indian payer company. The regular withholding rate on dividends is 20% for non-resident shareholders, and lower rates may apply if provided for in an applicable Double Taxation Avoidance Agreement. In contrast, an LLP is subject only to a single level of taxation at the entity level, and distributions by the LLP to its constituent partners are exempt from tax.

Indian companies may opt for the concessional tax regime under section 115BAA of the IT Act. As per section 115BAA, concessional corporate tax rate applicable to an Indian company is applicable at 25.17% (inclusive of surcharge and cess) provided certain specified deductions / benefits (additional depreciation, carry forward or set off of losses etc.) are not taken. The Indian company has to specifically opt for this regime before filing the income-tax return and the option cannot be subsequently withdrawn once opted. Also, MAT does not apply to companies which opt for this concessional regime.

On the contrary, in the case of non-residents, the applicable rate of tax on all income sourced from India is 40% (exclusive of surcharge and cess). Moreover, even where a non-resident entity is deemed to be a resident by virtue of having its POEM in India, it has been clarified that the 40% rate of tax would continue to apply.⁴¹

Additionally, where the EdTech platform provides services in India, withholding taxes may apply on the consideration paid by the resident entity to the entity resident outside India for the provision of EdTech services. In such cases, the resident entity shall have to deduct tax at the applicable rates which would vary depending on the nature of income in the hands of the non-resident entity. Such an obligation shall arise only if the consideration flowing from the payor has an element of income that is taxable in India.

40. CBDT, Circular No. 08 of 2017, dated 23rd February, 2017.

41. CBDT, Circular No. 29 of 2018, dated 22nd June, 2018.

Since non-residents are only taxed to the extent income is sourced in India, ordinarily, business profits earned by a non-resident would not be taxable in India in the absence of a permanent establishment (“PE”) / Business Connection (“BC”). If a non-resident does have a PE / BC in India, the non-resident would be taxable in India at 40% (exclusive of surcharge and cess) to the extent of profits attributable to the PE / BC. In cases where the EdTech platform sends staff, teachers or other employees to India specifically there may be a risk of creating a service PE. Even the presence of a server in India, which enables the Indian customers to access the educational content provided by the EdTech platform, may lead to the creation of a PE. Further, the definition of BC has also been expanded to include the concept of Significant Economic Presence (“SEP”), the presence of which would constitute a BC. A non-resident would constitute SEP in India in two cases. Firstly, if such non-resident undertakes transaction in respect of any goods, services or property with any person in India (including provision of download of data or software in India). Secondly, if such non-resident systematically and continuously solicits business activities or engages in interaction with users in India. According to the recent notification, a non-resident would constitute SEP if the aggregate of transactions with any person in India exceeds two crores in the previous year or the number of users in India with whom systematic and continuous business activities are solicited or who are engaged in interaction is greater than or equal to three lakhs. Considering the wide definition of SEP, non-resident entities providing EdTech services in India may also be considered as having a BC in India.

Furthermore, should the profits qualify as royalties or fee for technical services (“FTS”) they should be taxable only at 10% under the ITA. Therefore, the characterization of income should directly impact the tax cost of doing business in India. Particularly, where characterization by Indian tax authorities is not in consonance with international principles, non-residents could potentially face the risk of double taxation (arising from non-availability of credit for the taxes paid in India).

As regards FTS, under tax treaties with some countries (for e.g., US and Singapore), consideration paid for teaching in or by an educational institution is specifically excluded from the purview of FTS. However, under several Indian tax treaties (including the tax treaty with the US), consideration for any kind of services qualifies as FTS only where the services ‘make available’ and enable the service recipient to apply the underlying technology or technical knowledge independently in the future. If the payment for services do not constitute FTS, they would consequently not be taxable in India unless the entity has a PE/BC in India. Additionally, it is to be noted that under domestic law, payment of royalty or FTS even between two non-residents is also considered to be sourced in India, if the payer utilizes the information, property or rights or services for a business or profession carried out in India.

Another important consideration from a tax perspective includes the personal taxation of faculty or other employees visiting India and risk of collaboration arrangements between Indian and foreign institutes being regarded as an Associations of Persons (“AOPs”) under the ITA. Characterization as an AOP, a separate taxable entity under Indian law, subjects the total income of all participants in the AOP to tax in India.

India has also introduced wide General Anti Avoidance Rules (“GAAR”) which provide broad powers to the tax authorities to deny a tax benefits in the context of “impermissible avoidance arrangements”. GAAR has come into effect from April 1, 2017 in India and would override tax treaties signed by India. The GAAR provisions in India allow the tax authorities the power to disregard entities in a structure, reallocate income and expenditure between parties to the arrangement, alter the tax residence of such entities and the legal situs of assets involved, look through an arrangement by disregarding any corporate structure, treat debt as equity and vice versa, and the like. Further, there exists a possibility of a wide interpretation given to subjective terms in the definition of GAAR, leading to a large number of transactions coming under the scrutiny of the tax authorities. In effect, there arise two main concerns - lack of clarity in how these provisions would be and the wide discretionary power conferred on the revenue authorities.

Moreover, Goods and Services Tax (“GST”) would also be applicable on the services provided by the EdTech platform, such as training, certification programmes, etc. The rates of tax would vary depending on the type of services provided. The GST rates for services ranges from 0-28%. However, if the services performed qualify as an export of services under the Integrated-GST Act, 2017 then such export of services should be zero rated and no GST should be payable. Normally the liability to pay the GST is on the service provider but in some cases, such as where the supplier is not a registered person under the GST regime, the service recipient may become responsible for payment of the GST. However, in almost all cases, the economic burden of the tax is passed on to the consumers.

The Government of India has also introduced the Equalisation Levy (“EL” / “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; and
- 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 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”. The aggregate consideration should however be more than INR 100,000 in a year. The scope of EL has been expanded by the Finance Act, 2020 to apply EL at rate of 2% on the amount of consideration received or receivable by e-commerce operators from e-commerce supply or services provided or facilitated by it inter-alia to person resident in India (“2020 EL”). The term ‘e-commerce operators’ has been defined to mean a non-resident who owns, operates or manages digital or electronic facility or platform for online sale of goods or online provision of services or both. The term ‘e-commerce supply or services’ is defined to mean i) online sale of goods owned by the e-commerce operator; ii) online provision of services provided by the e-commerce operator; iii) online sale of goods or provision of services or both, facilitated by the e-commerce operator; or iv) any combination of the above. Please note that the provisions in relation to the 2020 EL have been drafted very widely and do not enjoy the benefit of an explanatory memorandum or statement of intent clarifying the applicability of these provisions. The 2020 EL may impact the EdTech sector and EL at rate of 2% may be applicable on non-residents providing services through digital platforms. Further, EL has been deliberately kept outside the purview of India’s income tax regime and consequently, the government has taken the position that tax treaty relief should not be available. As a consequence, countries of residence of the foreign service providers could potentially refuse to grant tax credits against the EL paid in India thereby leading to double taxation.

4. Conclusion

With technology advancing at a fast pace, and AI becoming a reality, it is clear that EdTech will rapidly evolve and with it bring new legal, regulatory and tax challenges. Given the boost that online learning has gained from the various regulatory authorities, it may not be too unrealistic to say that the future of EdTech and its impact on education systems will soon be driven by AI and allied technologies.

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