

WhatsApp Chats - Evidentiary Value?

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Usage of WhatsApp: The unprecedented usage and secrecy of WhatsApp is one of the most commonly celebrated aspect of social media. WhatsApp does not have advertisements and it is quite safe and secure to use, is the common reason for such huge usage of WhatsApp application. This is the reason why most of the people, whatever their digital literacy might be, must be aware that the person with whom we are contacting is using WhatsApp, including any Government Department, which presupposes that the person searched, is using WhatsApp. Hence, during search proceedings under any act, the relevant department thoroughly investigates each and every WhatsApp chat to unearth black money dealings or fabricated transactions or crime. Recently, there is a debate that even WhatsApp calls are prone to be recorded, the authorities of WhatsApp have continued to claim that the calls are not recorded, but we never know what weapon exchequer may deploy to attack the suspicious target. The basic idea is to catch the black money dealings from such chats, and charge the Taxpayer with addition of income.

Transactions may not be materialized: It is not fundamentally true that the dealings in the WhatsApp chat may or may not have ever concluded. Say, Mr. A has mentioned to give Rs. 20 Lakhs on money for construction of residential unit to Mr. B, but suppose the unit is not sold to Mr. A and sold to Mr. C. In such case, the department would try to presuppose presumed value of Rs. 20 Lakhs collected from Mr. C and the burden is always on the Taxpayer to support his contention. Continue with different example, say Mr. A has mentioned to give Rs. 10 Lakhs on the date of Agreement to Sale and balance on the day of sale deed and the booking of unit is cancelled after agreement to sale. Hence, the department would presume that the Black money transaction of Rs. 10 Lakhs has happened supporting the fact the agreement to sale has been duly executed as stipulated in WhatsApp chat. Now, the burden is always on the Taxpayer, hence it would be equivalent to climbing Mount Everest, to prove that the actual cash dealings has not been ever happened although the schedule of WhatsApp chat clearly mentions Rs. 10 Lakhs on the date of Agreement to Sale. In such cases the basic ground for making addition for the department is not only clear but quite strong, since the Taxpayer will have to prove the dealings have not been happened.

How Assessments are done: If the department has accessed the WhatsApp chat by way of search, then the department makes addition during search assessment carried out section 153A of the act. If the searched person is having chat with other person whose assessment is covered in search proceedings, then the addition is made in separate proceedings initiated under section 153C of the Act. Many times, the time limit for opening under section 153C of the Act has elapsed, hence in such cases, the department does not want to miss the bus and the department resorts to reopening under section 148 of the Act. The said fact can be vouched from the newly inserted as well as amended provisions in section 149 where, it has been provided to reopen cases beyond 3 years where there is involvement of the asset or entry etc which are generally accessed or unearthed during search proceedings by accessing WhatsApp or other social media presence of the Taxpayer. Whether the transactions are accessed by search proceedings or 153C proceedings or reopening, the department has habit of making additions which is emanating from Appraisal Report of Investigation Wing. The Appraisal report is bible for the AO and often the orders upholding addition on basis of Appraisal Report are passed without giving Logical base.

Evidentiary Value under Common Law: The Hon'ble Supreme Court, while hearing the case of **A2Z InfraserVICES Ltd. V. Quippo Infrastructure Ltd.** in SLP(C) No. 8636/2021^[1], observed that WhatsApp chat does not have any evidentiary value. The bench of Hon'ble Mr. Chief Justice N V Ramana and Hon'ble Mr. Justice A S Bopanna and Hon'ble Mr. Justice Hrishikesh Roy observed,

"What is the evidential value of WhatsApp messages these days? Anything can be created and deleted on social media these days. We don't attach any value to the WhatsApp messages. Prima facie we are not satisfied with the HC direction for depositing the money in an escrow account. We are not considering the purported admission in WhatsApp messages. If it is not late, then go before the arbitrator and parties would be bound by the arbitrator's award."

Aryan Khan's Case: The latest case which grabbed the attention of whole media since last 8 months is the Drugs Case of Aryan Khan whereby the detention of son of Bollywood superstar was primarily on the basis of WhatsApp Chat. However, after inquiry, the NCB chief SN Pradhan told reporters in Delhi that WhatsApp chats unless corroborated by physical evidence have "no value", making it clear that Aryan Khan's leaked drug hinting conversation on the social media platform had no significance to the NDPS case the agency was pursuing. "There should be physical corroboration of WhatsApp chat. Courts have clarified that WhatsApp chat in itself holds no value. You can talk about anything on WhatsApp, but if not corroborated with physical evidence, it's not complete evidence," the NCB chief told media at a press conference held at the agency headquarters. The principle of preponderance and probability, clarified Pradhan, is not applicable to the NDPS Act.^[2]

Under Income Tax Act: Under the Income Tax Act, 1961 also, it has been consistent principle that addition cannot be made merely on the basis of WhatsApp chat unless there are corroborative evidences in relation to happening of the transaction alleged in WhatsApp chat. In case of **Shri Manchukonda Shyam**^[3], Visakhapatnam ITAT holds that addition made merely on the basis of WhatsApp messages is not sustainable; AO made addition of Rs.1.05 Cr as undisclosed income in the hands of the assessee based on WhatsApp messages found on the phone of the person whose premises were searched which suggested that cash loan was given by assessee. The ITAT observed that in the search proceedings in the residence of Shri Anil Kumar, no evidence with regard to unaccounted investment or expenditure representing the loan supposed to be taken from the assessee was found. ITAT remarked that *"Merely on the basis of the statement given by Shri Lanka Anil Kumar, which was subsequently retracted, the AO made the addition on the presumption that the assessee had advanced the sums to Shri Lanka Anil Kumar without bringing any evidence on record."*; Thus, held that there is no reason to disbelieve the statement given by the assessee that the payments were given for meeting petty cash or miscellaneous expenses which were in the range of Rs.5,000/- to Rs.10,000/- only, therefore, held that the addition made by the AO was unsustainable.

The latest judgement is of **A. Johnkumar**^[4] where the Chennai ITAT deleted the addition towards alleged cash distribution of Rs.17 Cr. over assembly election contested by Mr. Narayana Swamy (Former Chief Minister, Puducherry) as unexplained expenditure under Section 69C and held WhatsApp messages and other incriminating material insufficient to sustain additions in absence of any finding by the Election Authorities and inadmissibility under Section 65B of Evidence Act. The Taxpayer (presently MLA, Nellithope Assembly Constituency in Puducherry) was subjected to post-search assessment for AY 2017-18 that led to additions on different counts including Rs.17 Cr. as 'election expenses' over by-election contested by Mr. Narayana Swamy after Taxpayer resigned as MLA, Nellithope in 2016. ITAT noted that the sole basis for the said additions under Section 69C was photo identity cards issued by M/s Johnkumar Trust and WhatsApp message sent from Taxpayer's mobile phone to Mr. Somu alias Somasundaram S/o Mr. Narayana Swamy; Observed that, *"WhatsApp messages cannot be considered as a conclusive evidence to draw an adverse inference against the assessee, unless those WhatsApp messages are supported by corroborative evidences to indicate that those messages and contents represents undisclosed income of the assessee"*. ITAT analysed the messages and observed that the messages were not readable in terms of any income or expenditure and remarks that Revenue neither tested the admissibility of WhatsApp messages as evidence under Section 65B of Evidence Act, nor examined Mr. Somasundaram, the recipient of messages. ITAT found that that Revenue failed to demonstrate from which person, the Taxpayer has received cash and to whom the Taxpayer distributed the cash but abruptly concluded in his own understanding of the messages that the Taxpayer has received and paid cash for votes of Rs.17 Cr. ITAT further observes that the Taxpayer did not contest for the said election for which allegedly cash is paid for votes, thus opined that, *"the question of assessee*

spending such huge money to distribute to voters does not arise". ITAT also noted that Revenue has made inference that the Taxpayer has paid a sum of Rs.4,000/- to each photo identity cards holder, however has not found any physical cash distribution to voters and not examined any of the photo identity card holder to ascertain the fact that cash was distributed to them. In ITAT's opinion, the Revenue arrived at conclusion that such messages are meant for distribution of cash and the assessee has spent a sum of Rs.17 Cr. for election expenses, without carrying out necessary enquiries and examination of the concerned persons. ITAT, thus, held that Revenue's findings are purely on suspicion without any evidences to justify its findings and deleted the addition made in the hands of the Assessee on both substantive and protective basis towards alleged cash distribution for election amounting to Rs.17 Cr.

To conclude: Since the concept of electronic evidence has not been carved out in substantial litigation by way of enough Supreme Court & High Court Judgements under the Income Tax Act, 1961, the principles will be currently deduced from Tribunal decisions & judgements from the other laws. Whatever the facts may be, whatever the law may be say Income Tax Act or under any other criminal or commercial law, the judgements have revealed that the authorities have to satisfy section 65B of Indian Evidence Act, WhatsApp does not have evidentiary value until supported by surrounding circumstances, corroboration of evidences, cross examination of the persons involved in the WhatsApp chat etc. Hence, the WhatsApp Chats are never Gospel Truth and more litigation will shape up the aspect in more visible manner.

[1] <https://www.lexology.com/library/detail.aspx?g=22e7d2c4-f54b-4543-b419-039a39f4e1fa>

[2]<https://www.latestly.com/socially/india/news/there-should-be-physical-corroboration-of-whatsapp-chat-courts-have-clarified-that-latest-tweet-by-ani-3755923.html>

[3] [TS-491-ITAT-2020(VIZ)]

[4] [TS-384-ITAT-2022(CHNY)]