Evidence

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Introduction

Tax is a branch of law. As such, disputes can turn on evidence.

In general, evidence is not needed until requested. There is no requirement to send invoices, receipts or other documents with tax returns. They should be kept available as they may be required.

In the UK, legal disputes are resolved by the **adversarial system**. This means that there are two sides who argue contradictory positions before a judge. In other countries, there is sometimes an inquisitorial process where the judge attempts to establish the facts for himself or herself. The only inquisitorial court in the UK is the coroner's court.

A dispute on tax (or indeed in almost any other matter) is either of:

- fact, or
- law.

Fact-based disputes on tax can include whether:

- income was earned
- expenses have been incurred
- the taxpayer was UK-resident
- an activity comprises a trade.

Law-based disputes include whether:

- there is reasonable excuse for a delay in sending a return or payment
- a transaction is outside the scope of taxation
- a payment is within the scope of a tax-advantaged provision.

Neither of these lists is exhaustive.

Any dispute with HMRC must start with an attempt to resolve the issue with HMRC. Most issues relating to evidence arise when a dispute cannot be so resolved.

Whatever the nature of the dispute with the tax authorities, it is always advisable to produce a **statement of agreed facts.** These are facts that both sides accept as being true. Usually one side will draft such a statement and send it to the other side to ask if they agree. If the other

side asks for some change of wording (such as to remove any hint of bias), it is usually advisable to agree.

A statement of agreed facts means that:

- neither side wastes time proving something that is not disputed
- the areas of disagreement are clearly defined
- time and costs are reduced.

It has been known for the process of agreeing facts to resolve the issue completely.

What is evidence?

Evidence is anything which tends to prove a fact.

The first consideration is therefore who needs to prove what and to what standard.

In general, the principle is that whoever brings a case must prove it. Under tax law, a taxpayer does not have to prove that he complied with tax law; HMRC must prove that he did not. HMRC frequently needs to be reminded of this fundamental principle of law.

Evidence only needs to be adduced for a fact in dispute. This is legally known as a **principal fact** or **factum probandum.**

A fact is only in contention if it is a **relevant fact** or a **factum probans.** HMRC may dispute that they kept a taxpayer waiting an hour at a meeting, but that is unlikely to be relevant in determining whether tax is payable.

The **standard of proof** depends on whether a matter is regarded as civil or criminal. The standard is:

- balance of probabilities, for a civil case
- beyond reasonable doubt, for a criminal case.

This difference was neatly illustrated by the much-publicised murder trial of O J Simpson in 1994. He was acquitted of the criminal charge of murdering his former wife Nicole but was later successfully sued in the civil courts for compensation for her murder. In other words, the courts could not prove beyond reasonable doubt that he killed her, but on balance of probabilities he did. This principle of American law is the same as under English law.

Tax disputes are usually regarded as civil disputes. Disputes on penalties are regarded as criminal only if the amount is large. If a tax penalty is unreasonably large, it may be set aside entirely (not reduced) by the court as a contravention of Article 6 of the European Court of Human Rights. This unsatisfactory state of affairs is crying out for legislative clarity.

There is also a **collateral fact** or **subordinate fact.** This is something that must be demonstrated before accepting other evidence. Examples of collateral facts are:

- a document is not a forgery
- a person who says he saw something is not blind
- a person who says he wrote a document can write and understand what is written.

Collateral facts are usually only required if disputed by the other side.

What comprises evidence?

Under English law, almost anything can be evidence. This includes:

- verbal statements
- documents
- general knowledge
- tangible items
- computer files.

The legal definition is that anything is evidence unless it is specifically excluded.

It is a mistake to believe that only documents are evidence. Someone may say "I paid £100 for advice but I have no evidence for this". Yes, you have. Your verbal statement is itself evidence. It may be disbelieved evidence, uncorroborated evidence or even doubtful evidence, but it is still evidence.

What is acceptable evidence?

Evidence acceptable to a court or tribunal is known as **judicial evidence.** It has three forms:

- oral evidence
- written evidence
- tangible evidence.

Judicial evidence may also be classified by its substantive nature. In this regard, each piece of judicial evidence may conveniently be regarded as one of:

- testimony
- hearsay
- documentary evidence
- real evidence
- circumstantial evidence.

Testimony is the first-hand evidence of a witness under oath in open court as to what he or she knows as a consequence of what they saw, heard or otherwise learned from using their natural senses. Such evidence is sometimes called **direct testimony** to distinguish it from hearsay or circumstantial evidence.

Hearsay is repeating what someone else has said but where the person repeating it has no other way of knowing whether it is true. This means that saying:

- "I saw him enter the house" is testimony, but
- "she told me that she saw him enter the house" is hearsay.

Under common law, hearsay evidence could rarely be admitted as evidence. However, this has been considerably amended by statute law.

Documentary evidence comprises all forms of document, such as maps, graphs, charts, print-outs, discs, tapes and films. Usually the original, unredacted document must be produced. A copy is usually only acceptable if the original is unavailable and someone can testify that the copy fairly represents the original. In practice, all parties are usually given a bundle of photocopies of all documents, the veracity of such copies are rarely questioned.

The value of documentary evidence follows that of testimony and hearsay, where the latter is worth much less. It is usually necessary for someone to testify as to the contents of documentary evidence.

Real evidence is a material object that can be inspected. This is rarely relevant in tax cases. Real evidence usually requires some testimony from the person admitting it to evidence.

Circumstantial evidence is broadly evidence that can prove some facts but not the whole charge. Circumstantial evidence may demonstrate that a person was at the place where someone was murdered and had an intense dislike of the deceased. That does not prove that the person did murder the deceased, but it does makes it more likely.

Circumstantial evidence has been likened to the strands of a rope; each strand may be weak, but sufficient strands may be strong enough.

Areas where circumstantial evidence may be useful include:

- motive
- preparatory acts
- capacity to carry out an act
- opportunity
- identity
- continuance of previously proved or admitted conduct
- failure to provide an adequate explanation
- comparison with normal standards of behaviour.

Relevance and admissibility

Evidence must be relevant and admissible.

Relevant evidence is that which relates to the matter in hand. Evidence that "muddies the water", wastes time or multiplies issues unreasonably is likely to be excluded.

Relevant evidence is that which makes a proposition more or less likely, while not necessarily providing any conclusive proof.

Often relevant evidence needs to be considered with other evidence. For example, a taxpayer states that he did not meet a supplier in Scotland because he was in London at the time. Relevant evidence could demonstrate that he was in Scotland on that date. This in itself does not prove the taxpayer met the supplier or did anything illegal, but it does demolish part of his defence.

Behavioural evidence is often held not to be relevant. The fact that a person did something once does not indicate that he will do it again. Evidence about patterns of behaviour or of the character of a person, presuppose that behaviour follows patterns and that a person fully displays their character to others capable of discerning it.

Even when evidence is relevant, it may be excluded if its value is outweighed by other factors, such as prejudice. This is the position for criminal proceedings. Evidence is less likely to be excluded in civil proceedings. A similar concept is **remoteness.**

Relevant evidence may also be excluded on the grounds that the time, cost and other burdens are not justified relative to the seriousness of the issue under consideration.

Admissibility

Admissibility rules allow evidence to be excluded, even though it is relevant. Examples include hearsay, opinion and past conduct. This common law principle for criminal proceedings is protected in Police and Criminal Evidence Act 1984 ss78 and 82.

Hearsay evidence was inadmissible under common law, as evidence must be what a person witnessed or can otherwise testify to. This has been amended by Criminal Justice Act 2003 which can allow hearsay evidence in certain circumstances.

Opinion is inadmissible as it is not fact. An expert witness can given an opinion on matter where he or she has expertise, but should not otherwise express an opinion on the issues of the case.

Past conduct is often inadmissible, though some exceptions have again been made by Criminal Justice Act 2003.

Legal privilege protects communications between lawyer and client. This does not extend to accountants and client, even when advising on tax law as was upheld by the Supreme Court in *R (aoa Prudential plc) v Special Commissioner. SC [2013] UKSC 1.*

Confidentiality restricts disclosure accountants, doctors and other professionals and by priests, subject to exceptions. Confidentiality may be overridden by the court.

Without prejudice on a document means that the document may not be shown to the judge, except in determining costs when the substantive matter has been determined. This is to allow the parties to conduct parallel negotiations to settle an issue during litigation.

Public interest immunity excludes disclosure of information that could be injurious to the public interest.

Evidence that has been **obtained improperly** *is* admissible, even if the data were stolen. HMRC relies on leaks, whistleblowers and informants. It may even pay informants. Informants are often jilted lovers or ex-employees. In 2010, a Swiss bank employee leaked a list of 6,000 names. This became known as the Lagarde List. In 2016, a law firm leaked the Panama Papers. HMRC has used these lists to pursue tax liabilities. The misunderstanding on this matter may be from watching American programmes where the law is different.

This matter was clarified in the House of Lords in the case *R v Sang [1980]:* "save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after the commission of the offence, [the judge] has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained."

In many cases, the admissibility of evidence is a balance. Judges often regard legal principles more as guiding principles which they can set aside. There is a reluctance to exclude evidence that is reliable and relevant.

Information obtained from **violence**, torture or blatant disregard of the law can not only exclude evidence but negate any conviction. The House of Lords stayed a prosecution when the police procured the presence of an individual by means that violated national law and disregarded extradition treaties. This questioned the legitimacy of the judicial process even when the trial itself was fair.

Weight of evidence

Once evidence has been admitted, consideration needs to be given to its weight. This is the strength of the evidence to prove one or more facts in connection with other evidence.

Relevance determines *whether* evidence could determine an issue. Weight determines by *how much* it could determine an issue.

Tax cases often need to consider the **reliability** of witnesses. In the case *Romark Jewellers [2012],* a taxpayer stated that £114,500 paid into a Guernsey bank account was proceeds of

sale of personal jewellery by his mother. The evidence was considered unreliable, but it was still evidence. As no evidence was submitted to contradict it, the taxpayer's evidence could not be dismissed.

Guidance has also been given in the case *Pacific Computers Ltd [2016] UKUTR 350.* Th
e upper tier tribunal found that the first tier tribunal had erred in four aspects:

- HMRC had not challenged evidence that was agreed between the parties. It was normal appeal procedure not to consider evidence that was accepted by both parties
- the tribunal had failed to give HMRC evidence sufficient weight. The written evidence was reliable, and the officer who attended could attest to its provenance and the material on which it was based
- while a tribunal does not have to weigh evidence as if on a scientific balance, it does have to provide a summary of how it has balanced competing evidence
- while a tribunal does not have to provide a compendious analysis of every item of evidence, it has to go further than merely saying that some evidence is reliable while other evidence is less so.

For these reasons, the first tier tribunal decision was set aside and the matter was remitted to be heard again.

Statistics can be evidence but great care is needed. In a notorious case two people were convicted of robbery in California. Eyewitness evidence was that the robbers were a mixed race couple driving a yellow car. She had blonde hair and a ponytail and he was black and had a beard. They assigned a probability factor to each feature and concluded that the chances of a couple accidentally meeting these factors was 1 in 12 million. The Californian Supreme Court overturned the guilty verdict. The factors were often guesswork, they were not independent variables. Even if the 12 million was correct, it did not mean they were guilty.

In the UK, solicitor Sally Clark was imprisoned for six years for murdering her two children after the second child was found dead in 1998. Sir Roy Meadow testified that the chances of this being coincidence was 1 in 73 million. The Royal Statistical Society has subsequently said the real probability was between 1 in 100 and 1 in 8,500. Clark was released in 2004 and died in 2007, aged 42.

Right to silence

The right to silence is a common law principle established no later than the 17th century. It means that the onus of proving something is on the person who makes the allegation. In civil proceedings, the claimant (or plaintiff) must prove his or her case; the defendant does not have to disprove it. In criminal proceedings, the prosecution must prove guilt; the accused does not have to prove innocence. Indeed, an accused person was not allowed to give evidence in his or her own trial. This was only progressively allowed between 1883 and 1898.

A defendant or accused can simply refuse to say anything and challenge the claimant or prosecution to prove their case. A caution by a police offer or tax prosecutor had specifically to

say “you do not have to say anything but anything you do say will be taken down and may be given in evidence”

Criminal Justice and Public Order Act 1994 modified the right to silence. The wording is now “you do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence”.

This does not refer just to the moment of arrest but at any time in the investigation. There is often such a strong desire for self-justification that a person can be tempted to blurt out a defence, including unrequested information. Sometimes the temptation can lead to the evidence being coloured by significant omissions, presenting the facts in an unduly favourable way (known as “versioning”) or even fabrication. The last of these is particularly harmful to a defence.

It is better to wait until the matter has been discussed with a solicitor, and then determine what information will be volunteered.

Under the 1994 Act, adverse inferences may be drawn in certain circumstances where before or on being charged, the accused:

- fails to mention any fact which he later relies upon and which in the circumstances at the time the accused could reasonably be expected to mention;
- fails to give evidence at trial or answer any question;
- fails to account on arrest for objects, substances or marks on his person, clothing or footwear, in his possession, or in the place where he is arrested; or
- fails to account on arrest for his presence at a place.

Where an inference is drawn from silence, the judge must direct a jury as to the limits of such inference. It is believed that someone cannot be convicted on “silence” evidence alone.

The law is designed to prevent **ambush defences,** when a defence is presented for the first time at court which the prosecution has had no opportunity to consider. This does not invalidate the ambush defence, but does allow a court to draw an inference.

Outside tax, there are some specific offences where refusal to give information is itself an offence. This includes identifying the driver of a vehicle involved in an offence, not providing an encryption key in relation to sexual offences, and not giving a name and address to a uniformed police officer.

There is a separate but similar right against **self-incrimination.** In the case *Tate Access Floors v Boswell [1991],* the judge said “a man is not bound to provide evidence against himself by being forced to answer questions or produce documents”.

Civil Evidence Act 1968 s14(1) states “the right of a person in any legal proceedings other than

criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings or for the recovery of a penalty".

For tax, there are also specific offences of not providing information formally requested by HMRC. Such information must be reasonably needed. HMRC is not allowed to go on a fishing expedition in the hope of finding wrongdoing from trawling through a large catch of evidence. These rights mean that a murderer has more rights than a tax evader.

Spousal privilege generally means that a husband and wife cannot be compelled to give evidence in a *criminal* trial against the other unless the offence relates to the other, such as domestic violence. For civil cases, a spouse may give evidence and can, in some circumstances, be compelled to do so.

There is a separate **marital communications privilege** that prevents disclosure of information that passes between husband and wife in confidence, sometimes known as "pillow talk".

There is now a new right known as **right to be forgotten.** This allows an individual Internet protection to stop personal data being instantly accessible indefinitely. This was generally introduced from 2014. This right breaks the link provided by such companies as Google. It does not destroy the information itself, which may still be accessible such as in newspaper archives or other records. It is better described as a right not to be indexed.

Confessions

A confession is an admission by a person that he or she committed the offence of which they are accused. In the majority of criminal cases, the person confesses to the offence and pleads guilty. This can result in a reduced sentence.

For tax penalties, admitting an offence reduces the penalty. It can also mean that criminal charges are avoided.

Police and Criminal Evidence Act 1984 s82(1) gives a confession the wide definition of "any statement wholly or partly adverse to the person who made it". A statement may therefore be a confession even though it does not admit guilt.

A confession is not conclusive. Objections can arise on three separate grounds of authenticity, legitimacy and reliability.

Authenticity means that the statement is really a confession and not something fabricated by the police, a practice known as "verballing". In the successful appeals against convictions of the Birmingham Six and Tottenham Three on IRA offences, evidence was presented to the Court of Appeal that pages had been added after the accused had signed their statements. There is no known example of HMRC amending a confession or admission.

Legitimacy means that the confession was properly obtained. While an authority may put pressure on a person to confess, there are limits. In addition to violence, this can include intimidation, over-lengthy interviews and other forms of oppression.

Reliability means that there is reason to believe the confession. Some people are ready to admit offences they did not commit. Others may want the attention, perhaps because the crime was notorious. More than 200 people confessed to kidnapping the 20-month old son of aviator of Charles Lindbergh in 1932.

Identification

Identification of an offender is a key part of a criminal investigation, though it tends to have less relevance for tax offences where identity is less likely to be an issue.

Identity may be by eye witness or from forensic evidence. The former is when a person testifies that he or she saw something with their own eyes. Devlin Report 1976 para 8.1 states "we are satisfied that in cases which depend wholly or mainly on eyewitness evidence of identification there is a special risk of wrong conviction. It arises because the value of such evidence is exceptionally difficult to assess; the witness who has sincerely convinced himself and whose sincerity carries conviction is not infrequently mistaken".

Burden of proof

The burden of proof, also known as onus of proof, refers to the legal obligation on a party to show that certain facts are true.

The **standard of proof,** also known as the quantum of proof, means the level of proof required.

The burden comprises the evidential burden and the legal burden. **Evidential burden** is producing evidence; the **legal burden** is to show that this meets the required standard of proof.

All burdens of proof start with the **presumption of innocence.** This is the principle that a person is innocent until proved guilty. This principle can be of little comfort to those who are suspended while investigations proceeds. The disc jockey Paul Gambaccini was arrested in 2013 for alleged historic sex offences for which he was never prosecuted. He was suspended by the BBC for 13 months without pay and had legal costs. He lost £200,000 in lost earnings and legal fees.

Examination

Verbal examination of a witness involves examination in chief and cross-examination.

Examination in chief is the first examination, usually by the person who has called the witness. Usually this means that the witness must appear in person, though there are occasions when

written evidence or communication by video link is accepted. Special provisions are made for vulnerable witnesses such as children or people of restricted mental capacity. There are also provisions when a victim may feel intimidated by the physical presence of a witness.

There are restrictions on what may be asked in an examination in chief. In particular, the witness may not be asked a **leading question.** This is a question phrased to suggest an answer. "Did you see Mr X pass money to Mr Y?" is a leading question. "What happened when Mr X met Mr Y?" is not (presuming that it is not disputed that Mr X and Mr Y did meet).

A witness may **refresh his or her memory** by looking at a document made soon after the event it describes. Wherever anything happens that could lead to a dispute, it is good practice to make a **file note** detailing all salient points while still fresh in the memory. A file note is in effect a memorandum to oneself. The document must be made available to the court. Great reliance is placed on a contemporary record.

After an examination in chief, the other side may **cross-examine** the witness. Cross-examination may have any of these purposes:

- test the truth and credibility of evidence given
- undermine the honesty of the witness
- demonstrate the unreliability of the evidence.

Any party whose interests are affected by evidence from a witness may cross-examine that witness. This means that one accused person may cross-examine another accused person.

The practice of cross-examination differs from examination in chief in that:

- the witness may be asked leading questions
- questions may be asked that go to the credit of the witness and are not confined to the issues of the case.

A party who has called a witness who has then been cross-examined may **re-examine** the witness. This is to deal with issues raised in cross-examination and is not intended to re-run the examination in chief.

Mitigation

Mitigation is an appeal that a person who has been found guilty should be treated leniently.

Arguments in favour of mitigation include provocation, previous good character, acceptance of guilt, and efforts to minimise the consequences of the offence.

Appeals

An appeal lies against most decisions of a tribunal or court. The appeal may be against guilt or sentence. The latter means that the person accepts their guilt but believes the sentence was

too severe. The Attorney-General has the right to bring an appeal in cases where it seems the sentence was too lenient.

For an appeal, the burden of proof is reversed. A person who has been found guilty must now prove himself or herself innocent.

Note that for appeals on tax and some other matters, there are specific provisions regarding appeals. In particular, a decision of the first-tier tribunal is final on a **point of fact.** This cannot usually be disturbed by any higher court. A **point of law** may be appealed to higher courts up to Supreme Court. This usually requires the permission of either the court that made the decision or of the higher court.

Tax law sets out what may be appealed. There are a few decisions that cannot be appealed through the tribunals.

There is a procedure known as **judicial review** where the High Court can overturn a decision made by any body where there is no other appeal procedure.

Advocacy

Advocacy is the skill of presenting an argument.

In the UK, a person may generally represent himself or herself in any court or tribunal, even up to the Supreme Court.

A person may prefer to use someone else to represent them. This may be a lawyer (solicitor or barrister). In the tax tribunal a qualified accountant may also represent a taxpayer.

Someone who needs representation may be able to get free help by contacting Citizens Advice Bureau. Low income claimants can contact Tax Aid on 0345 120 3779 between 10 am and 12 noon. Taxpayers over 60 can contact Tax Help for Older People on 01308 488066.