The Aver Advisory

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Artificial Intelligence

Lawyer faces disciplinary action after ChatGPT generates fake legal research

A New York City lawyer—who relied on an artificial intelligence chatbot to carry out legal research for a matter before the Manhattan federal court—has admitted that more than a half-dozen cases cited in support of his client's claim turned out to be fictitious and had been researched for him by ChatGPT.

ChatGPT is trained on enormous amounts of online data and creates original text on request. It has been used to generate original essays, write emails, and has even drafted research paper abstracts that fooled some scientists.

In July 2022, ChatGPT passed the Uniform Bar Examination with a score so high that it approaches the 90th percentile of test-takers, according to researchers at Michigan State University College of Law. While AI is most certainly here to stay, this recent episode demonstrates that caution should be exercised when accuracy, trustworthiness and reliability matter.

Facts. Roberto Mata sued Colombia's largest airline Avianca after he was injured by a metal serving cart, which hit his knee during a flight to New York City. Avianca sought to dismiss the claim on the grounds that it had expired under the statute of limitations.

Mata's lawyers opposed the motion to dismiss and cited multiple cases that supported their client's legal position, including: *Estate of Durden* v. *KLM Royal Dutch Airlines*, *Martinez* v. *Delta Airlines*, and *Varghese* v. *China Southern Airlines*.

When Avianca's lawyers tried to familiarize themselves with the decisions cited in the motion, they could not find the cases anywhere. They raised the issue in a letter to the court stating that "the authenticity of many of these cases is questionable."

Mata's lawyer Steven A. Schwartz submitted an affidavit explaining that he had used the artificial intelligence program ChatGPT to "supplement the legal research" while drafting the documents. ChatGPT provided case names, captions, summaries, and citations in a standard legal format.

Screenshots attached to the filing show a conversation between Schwartz and ChatGPT. "Is varghese a real case," reads one message from Schwartz. ChatGPT responds: "yes, it is", prompting Schwartz to ask: "What is your source". ChatGPT responds again that the case is real and can be found on legal reference databases such as LexisNexis and Westlaw. ChatGPT says that the other cases it has provided to Schwartz are also real.

Schwartz stated that he "was unaware of the possibility that its content could be false." Schwartz accepted responsibility for the error and stated that he had no intent to deceive the court, adding that he "greatly regrets using generative artificial intelligence" and promised he "will never do so in the future without absolute verification of its authenticity."

Decision. The court pointed out that it was "presented with an unprecedented circumstance," and confirmed that "six of the submitted cases appear to be bogus judicial decisions with bogus quotes and bogus internal citations."

The court ordered Schwartz to appear before the court to face possible sanctions for "the citation of non-existent cases." ■

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Inheritance Tax

Court confirms exemption of German inheritance tax for local real estate

In re: Judgment of 23 November 2022, II R 37/19, Federal Fiscal Court (Bundesfinanzhof)

The German Federal Fiscal Court—Germany's court of last resort in tax matters—recently confirmed that real estate located in Germany can be transferred tax-free, where the testator bequeaths the real estate to the beneficiary by means of a foreign bequest. There are two conditions:

i) neither the testator nor the beneficiary are German citizens; and
ii) both the testator and the beneficiary live abroad.

Facts. The testator lived in Switzerland and died in 2013. In her Will, she bequeathed her real estate property in Munich to her niece. The beneficiary lived in the United States. In 2014, the bequest was formalized and the beneficiary was registered in the land registry as the owner of the property. The German tax authority then assessed inheritance tax resulting from the transfer of the property by way of a gift. The beneficiary argued that she did not owe any tax due to her foreign domicile.

Decision. The court decided in favor of the beneficiary, confirming that if a testator living abroad bequeaths domestic real estate to a person also living abroad, the foreign beneficiary is exempt from German inheritance tax.

In contrast to German citizens, foreign beneficiaries are subject to German tax only at the time of formal acquisition of certain legally defined assets, including domestic real estate. However, they are exempt from inheritance tax, if they are bequeathed such real estate through a legacy in the testator's will—as opposed to being appointed as heirs through statutory succession.

In the case of a bequest, the beneficiary only has a claim to the transfer of ownership, which must then take place separately through formal notarization. Conversely, where a foreign heir receives German real estate as part of a statutory succession, ownership passes directly to the foreign heir upon the death of the foreign testator. German inheritance tax is then due.

The decision provides a planning opportunity for a tax-free transfer of German real estate. All that is required is that the acquisition of German real estate is effected by means of a legally valid foreign bequest/legacy that does not result in a direct transfer of ownership of the German real estate.

In that context, it may be worthwhile to have a look at whether German inheritance law would be an option for testamentary dispositions in order to ensure that the bequest/legacy has the intended tax consequences. It remains to be seen whether the German legislator will change the law to align the treatment of foreign bequests with benefits received by foreign resident heirs. ■

Tax Residency

Tax residency certificate issued by Chinese tax authorities has no binding effect

In re: Ruling of 4 August 2022 – 1 K 2898/21, Fiscal Court of Baden-Württemberg

A recent decision of the Tax Court of Baden-Württemberg illustrates the wide range of tools available to the tax authority when determining German tax resident status after a move from Germany to a foreign country.

Facts. The taxpayer and his wife are German nationals, and they have a son who was born in Germany. The couple own a house in Germany and the taxpayer admitted that the house was available to him at any time. A car used by the taxpayer was parked on the property. The taxpayer's wife stayed in the house at all times except vacation days.

The taxpayer is the owner of ten companies in China and Taiwan with approximately 320 employees. In September 2007, the taxpayer purchased a house in China. He stated that he had been living separately from his wife and his family since 2006. He said that "he lives, works, receives his family and friends, and keeps his personal belongings" at his house in China and that the house in Germany is now merely a "building for his wife" and a "place of retreat in the event of political crisis in China." In addition, the Chinese tax authorities certified the taxpayer as a "Chinese fiscal resident".

Decision. The court found the taxpayer's residence to be in Germany. The mere establishment of a residence abroad by itself does not result in the loss of domestic residence status. Rather, it must be consciously abandoned. Neither a permanent residence, nor the so-called centre of vital interests are relevant.

A decisive factor is the so-called "key" power. The taxpayer held a key to the house in Germany and was entitled to use it without any contractual limitation. In addition there remained a close relationship of the taxpayer to his wife and son, who have their centre of life in Germany. The fact there are also family relationships in China does not create an equivalent personal bond.

Finally, the court noted that the certificate of residence issued by the Chinese tax authorities has no binding effect on Germany. ■

Tax Treaties

Court rules on remittance provision in Dutch-Maltese tax treaty

In re: case number 22/01140 (ECLI:NL:HR:2022:979), July 1, 2022, Dutch Supreme Court

The case involved a company incorporated under Dutch law, whose actual management was in Malta. The company was resident in Malta for treaty purposes. The entire business was conducted in Malta. There was no permanent establishment in the Netherlands.

The company's sole shareholder was a resident of Switzerland. The company had granted a loan to its Swiss shareholder, but the interest payable by the shareholder was not (yet) paid out to the company in Malta. At issue was whether the Netherlands may include the interest in the assessment of Dutch corporate income tax.

The company was treated as a non-domiciled resident in Malta, so that it was taxed for income generated outside Malta only to the extent that such income is received in Malta—typically zero in this kind of set-up. "Without a treaty, the company incorporated under Dutch law as a domestic taxpayer would be subject to taxation entirely for the interest," the court noted. Therefore, the Netherlands may include the interest in its assessment. ■

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Celebrity Estates

Out-of-court settlement reached in dispute over Lisa Marie Presley's estate

Despite being one of the most recognized and successful entertainers of his day, Elvis Presley, who died in 1977, left behind an illiquid estate worth only $5 million (the equivalent of $20 million today).

By 1993, his widow Priscilla Presley was able to grow the Elvis estate to $100 million through wise use of Graceland profits, merchandising and royalties. By all accounts, Priscilla has been a dedicated keeper of the Elvis legacy and had successfully grown Elvis' estate after his death.

When Lisa Marie Presley—Elvis and Priscilla Presley's only child—turned 25, she became eligible to receive and control her inheritance under Elvis' will. Lisa Marie established the Promenade Trust to hold her inheritance.

Lisa Marie appointed business manager Barry Siegel as co-trustee with her mother Priscilla, and granted Siegel primary managerial control over her trust assets. By the time, Siegel was removed as co-trustee, the trust had lost most of its value and was saddled with significant debt. Lisa Marie sued Siegel for financial mismanagement and for hiding the true value and financial condition of her trust. Siegel asserted that Lisa Marie habitually overspent despite his warnings.

Lisa Marie Presley died in January 2023 after being hospitalized for cardiac arrest at her California home. Shortly after Lisa Marie's death, Priscilla learned of a 2016 amendment to Lisa Marie's trust. The amendment removed Priscilla and Siegel, as co-trustees, and replaced them with Lisa Marie's children Riley and Benjamin Keough (Benjamin Keough died in 2020).

Priscilla filed a petition to challenge the validity of the 2016 amendment. She alleged that she did not receive the amendment while her daughter was alive, as required by the trust. The petition also states that the amendment was neither witnessed nor notarized, that it misspells Priscilla's name, and raises suspicion about the authenticity of Lisa Marie's signature.

In May 2023, it was announced that the dispute over Lisa Marie's estate had been resolved. A sealed, confidential settlement agreement was filed with the court.

In a statement, Priscilla said the family was pleased to reach a resolution and insisted that her petition was not a lawsuit against her granddaughter Riley. Based on court filings, it is believed that Riley will now act as co-trustee alongside her grandmother.

Squashing a family squabble early on should be the goal for any family. When relatives are famous and in the public eye, such as the Presleys, resolving a family conflict without airing too much dirty laundry becomes even more prudent. ■

Wealth Preservation

Court provides guidance on exposure to criminal liability for transfers of Luxembourg or Swiss savings

Belgian Supreme Court (Court of Cassation, November 15, 2022)

Belgians with historical Luxembourg or Swiss savings are familiar with the issue: a bank transfer of funds quickly triggers questions about their origin.

Banks undertake this verification exercise in the context of so-called money laundering compliance.

A recent decision of the Belgian Supreme Court has confirmed that possession and control of a transferred asset—for example, in the case of a transfer to a third party, who determines the further destination of the asset—ends at the moment of transfer.

This decision is relevant for donations of old savings that are poorly documented. The donor loses his connection to the donated assets at the moment of donation; that is, the donation is the last relevant act on behalf of the donor, thus starting the five-year limitation period for criminal law.

Beneficiaries of such donations are usually also out of reach of criminal law. They can usually only be targeted, if they knowingly accept illicit wealth benefits; an act which is not presumed. ■

Estate Planning

Court increases spousal financial award despite prenuptial agreement

HD v WB [2023] EWFC 2

In a recent decision of the England and Wales Family Court, a wife was ordered to pay her husband an award which exceeded the amount he would have been entitled to under their prenuptial agreement ("PNA").

Facts. Both parties were 46 years old. The wife was British, while her husband was from Northern Europe. The couple met in 1996 as athletes and had a keen interest in their sport of choice. Financial support from the wife's wealthy parents allowed the couple to pursue a shared sporting career.

They married in 2014 and the husband was asked to sign a PNA, limiting his claim on the wife's assets to just over £100,000. The couple separated in 2020. The husband wanted the PNA to be disregarded, arguing that it was entered into with undue haste, insufficient disclosure, and no legal advice.

The total assets held by the wife in a family trust exceeded £43 million. The husband claimed £8 million from the wife, while the wife offered £360,000; an amount she calculated he was entitled to under the PNA.

Decision. The court found the PNA had been entered into freely with full appreciation of its meaning and consequences. However, it was noted that there must be "a proper recognition of the limiting consequences of the PNA, balanced against all other criteria."

The court ordered the wife to pay her husband a financial remedy of £1.9 million (equal to 4% of the couple's liquid wealth), plus a £2.5 million housing fund that reverts to the wife on the husband's death. ■