United States Tax Court
Washington, DC 20217

GARY THOMAS,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

Docket No. 10795-22.

ORDER

This case was tried on September 17, 2024, in Atlanta, Georgia. In preparing for trial, the Court noticed that some of the authorities cited in petitioner's Pretrial Memorandum did not exist, evidencing possible AI hallucinations. To inquire into these authorities, the Court held a hearing to provide petitioner's counsel an opportunity to clarify the Pretrial Memorandum. During that hearing, petitioner's counsel explained that someone else had prepared the Pretrial Memorandum, and she did not review the work that was provided to her. Rule 33 instructs that, in signing a pleading, counsel is certifying that he or she has read the pleading, that it is well grounded in fact; and that it is warranted by existing law. Because the Pretrial Memorandum violates this standard, we will deem it to be stricken. We will also take this occasion to address the use of AI as a tool to assist petitioners and practitioners. As discussed below, however, striking the Pretrial Memorandum will not affect the ultimate outcome in this case.

BACKGROUND

This is a deficiency case brought by Gary Thomas, through his counsel, in which he challenges the Commissioner's disallowing of unreimbursed employee business expenses that Mr. Thomas had reported on his 2016 and 2017 federal income tax returns. The total deficiency for both years combined is less than $10,000. In conjunction with setting this case for trial, the Court issued its customary Standing Pretrial Order. That Order sets forth a schedule for tasks to be completed and documents to be filed in preparation for trial. One of those documents to be filed is a Pretrial Memorandum.

To provide guidance as to the expected content of a Pretrial Memorandum, the Court's Standing Pretrial Order refers the reader to a form that is served along with the Order. That form includes sections intended to assist the Court in preparing for

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trial, if necessary. By filing Pretrial Memoranda, the parties inform the Court of their respective views as to the years and amounts at issue and of what the Court should expect at trial, such as the estimated duration of trial, a summary of expected testimony, and any expected evidentiary issues.

A Pretrial Memorandum should also provide what is, in effect, a short pretrial brief. The form contains a section for a summary of the facts, in which the parties are instructed to include a chronological narrative of the facts of the case. This factual summary is then followed by a brief synopsis of the legal authorities, in which the parties are instructed to fully discuss their legal positions.

On initial reading, petitioner's Pretrial Memorandum conformed to what the Court expects. It contained a helpful summary of petitioner's view of the facts and law. And on broad principles, the legal discussion accurately stated the rules regarding the deductibility of unreimbursed employee business expenses. After citing the applicable Internal Revenue Code sections and Treasury regulations, the petitioner's Pretrial Memorandum went on to discuss our caselaw, stating in part:

> In the case of *Schluter v. Commissioner*, T.C. Memo 1998-269, the Tax Court held that an employee who was required to submit business expenses for reimbursement, but who was not reimbursed by the employer, was entitled to deduct those expenses. Similarly, in *Meneguzzo v. Commissioner*, T.C. Memo 1969-15, the Court allowed deductions where the employer had an obligation to reimburse the employee, but reimbursement was not made.

And after accurately stating the rules regarding burden of proof, the Pretrial Memorandum continued, stating:

> However, as demonstrated in *Gagliardi v. Commissioner*, T.C. Memo 2011-194, if the taxpayer provides credible evidence that the expenses were incurred and not reimbursed, the burden may shift back to the IRS to prove that the disallowance of the deduction was correct.

In preparation for trial of this case, the Court observed that none of the cases referenced in the passages quoted above exist as cited. Moreover, neither the named cases nor their accompanying citations stand for the propositions for which they were cited. Petitioner's counsel cited *Schluter v. Commissioner*, T.C. Memo. 1998-269. But *Schluter v. Commissioner* is actually T.C. Memo. 1970-67, a dependency exemption case. And T.C. Memo. 1998-269 is actually *Schmitt v. Commissioner*, a method of accounting case. Petitioner's counsel cited *Meneguzzo v. Commissioner*, T.C. Memo 1969-15. But *Meneguzzo v. Commissioner* is actually 43 T.C. 824 (1965), a tip reporting case. And T.C. Memo. 1969-15 is actually *B-E-C-K McLaughlin & Assoc. v. Renegotiation Board*, an excess profits case. Petitioner's counsel cited *Gagliardi v. Commissioner*, T.C. Memo. 2011-194. But *Gagliardi v. Commissioner* is actually T.C. Memo. 2008-10, a gambling loss case. And T.C. Memo. 2011-194 is actually *Layton v. Commissioner*, a collection case.

After trial of this case, the Court informed petitioner's counsel that it had been unable to locate three of the four cases cited in the Pretrial Memorandum, provided those citations to petitioner's counsel, and set a hearing for the following day to address those citations. During that hearing, petitioner's counsel stated that she had recently joined a new law firm and had relied on a new paralegal to draft the Pretrial Memorandum. Petitioner's counsel stated that she did not review what the paralegal had prepared. The Court specifically inquired whether petitioner's counsel had used a so-called artificial intelligence platform or large language model to prepare a portion of the Pretrial Memorandum. Petitioner's counsel stated that she had not; but it was also apparent to the Court that petitioner's counsel was unaware whether her paralegal might have used such a tool to assist in drafting the Pretrial Memorandum.

DISCUSSION

We must decide what, if anything, to do with respect to petitioner's Pretrial Memorandum. For this purpose, we will focus on Tax Court Rule 33.

Signing Pleadings

Rule 33 not only requires that pleadings be signed, but it also describes the effect of that signature. It provides, in part,

> Counsel or a party signing a pleading certifies that the signer has read the pleading; that, to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; and that it is not presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.

In short, it is the attorney who signs a pleading who is responsible for its content. This approach is consistent with ABA Model Rule 5.1, which requires reasonable steps by a supervising attorney to ensure that those acting at her direction are likewise acting in conformity with the Model Rules.

The Use of AI

We take this occasion to address the use of AI. On this record, it is unclear whether, or to what extent, some form of AI may have been used to assist in preparing petitioner's Pretrial Memorandum. But the Pretrial Memorandum has the hallmarks of a document prepared with the assistance of a large language model.

Large language models have the ability to give the appearance of understanding text and generating what appear to be thoughtful responses. In reality, a language model "generates its response by selecting the most probable sequence of tokens that follow the prompt's tokens; therefore, it essentially functions as a probability distribution over these tokens." Matthew Dahl et al., *Large Legal*

Fictions: Profiling Legal Hallucinations in Large Language Models, 16 Journal of Legal Analysis 64, 66 (2024). This description of a language model applies equally to a *large* language model, except that it has a larger set of reference parameters and a larger set of training data. At its core, however, large language models function much the same as text prediction when typing a message on a smartphone; they make their best guess as to what the next word or string of words should be.

Large language models are prone to what have been termed "hallucinations." An AI hallucination occurs when a large language model perceives a word pattern and generates output that is inaccurate or even nonsensical. The problem arises because "LLMs are liable to generate language that is inconsistent with current legal doctrine and case law, and, in the legal field, where adherence to authorities is paramount, unfaithful or imprecise interpretations of the law can lead to nonsensical—or worse, harmful and inaccurate—legal advice or decisions." *Id.* at 64.

The Court is not in the business of dictating to attorneys the extent to which they can or should rely on advancing technology to assist them in representing their clients. For example, in *Dynamo Holdings L.P. v. Commissioner*, 143 T.C. 183 (2014), we were asked to opine on a party's use of predictive coding to assist it in responding to discovery. We noted that "it is a proper role of the Court to supervise the discovery process and intervene when it is abused by the parties, [but that] the Court is not normally in the business of dictating to parties the process that they should use when responding to discovery." *Id.*, 143 T.C. at 188. In that case, the parties asked the Court to consider whether document review could be done with the assistance of computers. Although we approved the use of predictive coding, in doing so, we directed the parties to the normative rules for discovery when evaluating the end product of the discovery as distinguished from the means to reach that end. *Id.*, 143 T.C. at 194.

We take a similar view with respect to the use of AI and large language models. As with any tool that assists lawyers or litigants in preparing their cases, "AI [has the] potential to increase access to justice, particularly for litigants with limited resources. … For those who cannot afford a lawyer, AI can help. … These tools have the welcome potential to smooth out any mismatch between available resources and urgent needs in our court system." John G. Roberts, Jr., 2023 Year-End Report on the Federal Judiciary at 5 (2023). But the Chief Justice went on to provide a warning.

> But any use of AI requires caution and humility. One of AI's prominent applications made headlines this year for a shortcoming known as 'hallucination,' which caused the lawyers using the application to submit briefs with citations to non-existent cases.

This is what appears to have happened here, as well.

Remedy and Result

Rule 33(b) authorizes the Court to impose a sanction if a pleading is filed in

violation of the Rule. It provides,

> If, after notice and a reasonable opportunity to respond, the Court determines that a pleading has been signed in violation of this Rule, the Court may impose on the person who signed it, a represented party, or both, an appropriate sanction…

The Court followed this process with respect to petitioner's Pretrial Memorandum and provided a separate hearing during which petitioner's counsel had the opportunity to address the erroneously cited cases. Her explanation made clear that her signature on the Pretrial Memorandum did not meet the standard of Rule 33.

The circumstances of this case warrant a minimal sanction. We begin by noting that, substantively, the Pretrial Memorandum accurately stated the law, even if its case citations were erroneous. Substantively, it provided the Court with information that was useful in preparing for trial, although Court resources were diverted in attempts to track down the erroneous citations.

We are also mindful that, in representing Mr. Thomas, petitioner's counsel is serving the type of petitioner who is often left unserved by the legal community. This case has less than $10,000 at issue (not including interest), and Mr. Thomas reported a little over $50,000 of income per year. This amount was likely sufficient to make him ineligible for assistance by a low income taxpayer clinic. *See*, https://www.taxpayeradvocate.irs.gov/about-us/low-income-taxpayer-clinics-litc/ (last visited Sept. 25, 2024) (stating that the income ceiling for qualification for clinic assistance for a family of two is $51,100). And the amount at issue makes it economically difficult for a petitioner such as Mr. Thomas to justify paying for an attorney to represent him. Small firms bill at rates in excess of $300 per hour. Themis Solutions Inc., *2024 Legal Trends for Solo and Small Law Firms* (Clio, 2024). And large firm rates average just under $1000 per hour with partner rates at the largest law firms approaching $1500 per hour. Michael Dineen & Sarah Scales, *Hourly Rates in Am Law 100 Firms: Increases and Key Drivers* (Brightflag Inc., 2023).

Given this unique situation, we will take the symbolic action of deeming the Pretrial Memorandum to be stricken. This action is "symbolic" because it will not impose an economic burden on either petitioner or his counsel. The applicable law in this case is clear and the facts presented at trial were likewise clear. And the outcome of this case is unaffected by striking the Pretrial Memorandum. The Court is reluctant, in this situation, to impose a pecuniary cost on petitioner's counsel, who is serving a petitioner who is in an economic "no man's land" and who might otherwise have gone unserved. Thus, consistent with the foregoing, it is

ORDERED that petitioner's Pretrial Memorandum (doc. no. 28) is deemed stricken.

(Signed) Ronald L. Buch
Judge