APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-5078

FITZGERALD TRUCK PARTS AND SALES, LLC,

Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Tennessee at Cookeville.
No. 2:20-cv-00026—
Waverly D. Crenshaw, Jr., District Judge.

Argued: October 31, 2024

Decided and Filed: March 31, 2025

Before: BATCHELDER, STRANCH, and READLER, Circuit Judges.

COUNSEL

ARGUED: Douglas C. Rennie, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Kendall C. Jones, EVERSHEDS SUTHERLAND (US) LLP, Washington, D.C., for Appellee. ON BRIEF: Douglas C. Rennie, Michael J. Haungs, UNITED STATES DEPARTMENT OF

JUSTICE, Washington, D.C., for Appellant. Kendall C. Jones, Zachariah W. Lindsey, EVERSHEDS SUTHERLAND (US) LLP, Washington, D.C., for Appellee.

OPINION

READLER, Circuit Judge. For years, Fitzgerald Truck Parts & Sales, LLC built and sold highway tractors by installing old engines and transmissions from third-party salvage yards into otherwise new tractors. Ordinarily, the sale of a newly manufactured tractor triggers a 12% excise tax. *See* 26 U.S.C. §§ 4051(a)(1), 4052(a)(1). Fitzgerald believes its sales are exempt from those taxes due to its reincorporation of engines and transmissions. For support, it points to 26 U.S.C. § 4052(f)(1), which authorizes a safe harbor applicable when "repairs or modifications" to an existing tractor "do[] not exceed 75 percent of the retail price of a comparable new [tractor]." The IRS disagreed and assessed unpaid excise taxes, penalties, and interest to the tune of $268 million. Fitzgerald sued. And it won before a jury, a verdict the government now appeals.

We agree with Fitzgerald that § 4052(f)(1) poses a bright-line, 75% test without any further qualitative inquiry, meaning its vehicles constructed with used engines and transmissions could qualify for the safe harbor. But there is more to consider, namely, that § 4052(f)(2) forecloses this exemption for tractors that never triggered the excise tax when they were new. And so far, Fitzgerald has not met its burden of proving that this latter provision does not apply to its tractors. In fact, evidence suggests that at least some of those vehicles were first sold in tax-exempt transactions, *see* 26 U.S.C. § 4221(a)(2), (4), with the

original purchasers being either entities abroad or state or local governments. Accordingly, to escape § 4052(f)(2) and invoke the safe harbor, Fitzgerald must show that each refurbished tractor, when new, incurred the excise tax under § 4051. We reverse and remand on that basis.

I.

Beginning in 1989, Fitzgerald built and sold "glider tractors" using repaired engines, repaired transmissions, and "glider kits." Each glider kit contained a "set of unassembled new parts" that, when installed with other new or used components, formed a functional large-scale highway tractor. Rev. Rul. 86-130, 1986-2 C.B. 179. For Fitzgerald, these kits "essentially" constituted "new tractor[s] . . . missing the engine and transmission." R. 208, PageID#16766. That meant they included a cab, chassis, axles, and wheels, among other new parts. In its early years, Fitzgerald combined glider kits with old engines and transmissions that the company itself extracted from recently purchased, second-hand tractors. Over time, however, it increasingly forewent acquiring ownership of these "salvaged" tractors, and instead began buying used engines and transmissions alone for their assembly into new glider kits.

That latter practice gave rise to the issues contested in this appeal. Between 2012 and 2017, Fitzgerald built glider tractors using old engines and old transmissions. Those used items were delivered by salvage yards, which had dismantled the components from worn and wrecked tractors. Following delivery, Fitzgerald would typically remanufacture the engines in-house and send the transmissions to a third party to do the same. Due to these partially outsourced operations, Fitzgerald often did not receive title to, nor

did it know the vehicle identification numbers of, the salvaged tractors. And at least some of the salvaged tractors came from government agencies and municipalities. Fitzgerald bought other engines from salvaged tractors that had first been sold in Mexico and Canada.

Through this process, Fitzgerald restored and sold 12,830 tractors. Each one facially triggered a corresponding sales tax. Specifically, § 4051(a) imposes on the seller a 12% excise tax on the "first retail sale" of certain "articles" (including highway tractors) above specified "gross vehicle weight[s]," thresholds that captured all of Fitzgerald's vehicles. 26 U.S.C. § 4051(a)(1)–(2). Section 4052(a)(1) defines "first retail sale" as the "first sale, for a purpose other than for resale or leasing in a long-term lease, after production, manufacture, or importation." *Id.* § 4052(a)(1); *see also id.* § 4052(a)(3)(A) (taxing first use of a tractor if it occurs before first retail sale). Because Fitzgerald partly "manufacture[d]" glider tractors by assembling them, the company landed within the tax's reach. If that were the end of the story, Fitzgerald's sales would have incurred over $175 million in excise taxes from § 4051(a).

Like many provisions in the Tax Code, however, § 4051(a) has an exception. In 1997, Congress codified a safe harbor from this excise tax for restored tractors "if the cost of such repairs and modifications does not exceed 75 percent of the retail price of a comparable new [tractor]":

> (f) Certain repairs and modifications not treated as manufacture
>
> (1) In general
>
> An article described in section 4051(a)(1) shall not be treated as manufactured or

> produced solely by reason of repairs or modifications to the article (including any modification which changes the transportation function of the article or restores a wrecked article to a functional condition) if the cost of such repairs and modifications does not exceed 75 percent of the retail price of a comparable new article.

26 U.S.C. § 4052(f)(1); *see* Taxpayer Relief Act of 1997, § 1434, Pub L. No. 105-34, 111 Stat. 788, 1052. Fitzgerald claims that § 4052(f)(1) exempts it from § 4051(a)'s otherwise applicable grasp. To show why, the company resorts to some basic math. On average, Fitzgerald paid $4,000 for each salvaged engine and incurred about $110,000 in restoration costs per glider tractor. It then sold the vehicles for a modest profit, roughly $8,000 per vehicle. But the retail price of a comparable new tractor—the meaning of which is now undisputed by the parties as "the amount at which an article is sold in individual, arms-length transactions"—hovered around $210,000. In other words, Fitzgerald's expenses ($114,000) totaled just over half of the benchmark price ($210,000) in § 4052(f)(1), a figure far below that provision's 75% threshold. So Fitzgerald claimed it qualified for the exemption and accordingly opted not to pay any excise taxes on the sales.

The government took issue with this position. Across two assessments, the IRS determined that Fitzgerald's sales triggered § 4051(a)(1) without any applicable exemptions. That meant Fitzgerald needed to pay approximately $175 million in uncollected excise taxes. Adding unpaid penalties and interest, the company's tax bill rose to a staggering $267,796,595. Fitzgerald paid taxes on one tractor for each disputed tax quarter and claimed a refund. When the IRS

denied those requests, Fitzgerald sued in federal district court for tax refunds as well as an abatement of unpaid assessments. *See* 28 U.S.C. § 1346(a)(1). Following a five-day trial, a jury returned a verdict for Fitzgerald.

The government moved for judgment as a matter of law and a new trial. It argued that Fitzgerald failed to satisfy the safe harbor because it did not repair or modify an "article" (in other words, a "tractor") under § 4052(f)(1) and, regardless, triggered an exception to the safe harbor in § 4052(f)(2) because not all of its tractors were taxable when new. The district court rejected both arguments, *Fitzgerald Truck Parts & Sales, LLC v. United States*, No. 20-cv00026, 2023 WL 8100540, at *15 (M.D. Tenn. Nov. 21, 2023), and the government timely appealed.

II.

We review de novo the district court's legal conclusions, including matters of statutory interpretation. *Johnson v. United States*, 64 F.4th 715, 721 (6th Cir. 2023). We do the same as to the district court's ruling on the government's motion for judgment as a matter of law, viewing the evidence "in the light most favorable to" Fitzgerald, "the party against whom the motion [wa]s made," and giving Fitzgerald "the benefit of all reasonable inferences." *K & T Enters., Inc. v. Zurich Ins.*, 97 F.3d 171, 175–76 (6th Cir. 1996). By contrast, we review the denial of a motion for a new trial for an abuse of discretion, which occurs when a district court "improperly applies the law[] or uses an erroneous legal standard." *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 405 (6th Cir. 2006) (citation omitted). Employing these standards, we agree with the district court that Fitzgerald's operations qualified for the safe harbor in § 4052(f)(1).

Nevertheless, we reverse and remand for further proceedings regarding the applicability of § 4052(f)(2), which hinges on whether Fitzgerald's salvaged tractors, when new, incurred taxes under § 4051.

A. Begin with Fitzgerald's eligibility for § 4052(f)(1)'s safe harbor. And start, as we must, with the statute's text. *Hardt v. Reliance Standard Life Ins.*, 560 U.S. 242, 251 (2010). Section 4052(f)(1) exempts "[a]n article described in section 4051(a)(1)" from the latter's excise tax when the cost of "repairs or modifications" to the article "does not exceed 75 percent of the retail price of a comparable new article." 26 U.S.C. § 4052(f)(1). At issue here is whether this provision applies when repairs or modifications were made to deconstructed articles (i.e., tractors) that are not identifiable. Do § 4052(f)(1)'s plain terms, in other words, require more than Fitzgerald's mere installation of salvaged engines and transmissions into otherwise new tractors?

We agree with Fitzgerald that they do not. The company's reused engines and transmissions originally derived from once-functional tractors sold or donated to salvage yards. Those vehicles, when new, were "[t]ractors of the kind chiefly used for highway transportation in combination with a trailer or semi-trailer," *id.* § 4051(a)(1)(E), rendering them "article[s] described in section 4051(a)(1)," *id.* § 4052(f)(1). The salvage yards then "modifi[ed]" the tractors so that only their engines and transmissions remained, and Fitzgerald further "modifi[ed]" and "repair[ed]" those remnants such that they could resume functioning within a glider kit. This series of changes never cost Fitzgerald more than 75% of the retail price of a comparable new tractor. Taking these steps together, Fitzgerald's tractors are "article[s] described in section 4051(a)(1)" that received "repairs or modifications"

that did "not exceed 75 percent of the retail price of a comparable new article," thereby satisfying the plain text of § 4052(f)(1).

True, such extensive changes to the tractors—extracting their engines and transmissions for installation into otherwise new vehicles—exceed the traditional understanding of "repair" and "modify," terms that typically accommodate only incremental changes. *See, e.g.*, *Modification, Merriam-Webster's New International Dictionary* 1577 (2d ed. 1934) ("Alteration or change of a partial character . . . ."). But § 4052(f)(1) supplants the qualitative scope of these standards with a bright-line rule: if the cost of restoration falls below the 75% threshold, § 4051(a)(1) does not apply. 26 U.S.C. § 4052(f)(1); *see also Digital Realty Tr. v. Somers*, 583 U.S. 149, 160 (2018) ("'When a statute includes an explicit definition, we must follow that definition,' even if it varies from a term's ordinary meaning." (quoting *Burgess v. United States*, 553 U.S. 124, 130 (2008))). Of course, "repair[]" and "modification[]" still wield an independent bite in that they require the safe harbor–qualifying restoration process to involve an old tractor. Beyond that categorical determination, however, the 75% test replaces any degree-based limit implied by the plain meaning of those words.

That conclusion may sweep broadly, but the result here is in line with thrust of the statute. The 75% threshold itself implies the existence of repairs and modifications totaling three-fourths of a comparable new tractor's price. Had Congress intended this exemption for only middling changes, it would have picked a lower number. *See Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 209 (1997) (holding that laws "must be interpreted, if possible, to give each word

some operative effect"). Likewise, the safe harbor encompasses modifications that "change[] the transportation function of the article or restore[] a wrecked article to a functional condition," 26 U.S.C. § 4052(f)(1), developments that are themselves substantial. Consider, for example, a taxpayer who, after her tractor sustains a serious head-on collision, restores the vehicle with a new cab and engine. No one would likely describe that restoration as incremental. Yet so long as the effort satisfies the 75% threshold, the safe harbor applies. *See id.* This generous phrasing thus fortifies Fitzgerald's position regarding the safe harbor's application to its operations. After all, as even textualism's most prominent champions recognize, "[w]ords are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012); *see also United States v. Tate*, 999 F.3d 374, 378 (6th Cir. 2021) ("[W]e do not woodenly interpret a legal text in a vacuum . . . but instead discern the meaning of a statement in a law from the context in which it is made . . . ." (citations and quotations omitted)); James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 Duke L.J. 1231, 1266–67 (2009) (observing that the Supreme Court disproportionately invokes "presumptions about the larger cohesion or structural integrity of the text" in tax cases).

Before the safe harbor's enactment, we note, courts routinely engaged in an open-ended inquiry into whether changes to an existing tractor qualified as "production, manufacture, or importation" of a new vehicle to determine whether it was exempt from an excise tax on its first retail sale. *See, e.g.*, *Boise Nat'l*

Leasing, Inc. v. United States, 389 F.2d 633, 636 (9th Cir. 1968) (approving qualitative test that considered extent and nature of changes to vehicle); *Ruan Fin. Corp. v. United States*, 976 F.2d 452, 455 (8th Cir. 1992) (affirming district court's application of test from *Boise*). Now, § 4052(f)(1) gives taxpayers a readily calculable guideline for determining when they qualify for the safe harbor. Such a marked shift exhibits Congress's desire for the tax exemption's applicability to hinge on solely a quantitative inquiry. *See, e.g.*, *Lomax v. Ortiz-Marquez*, 590 U.S. 595, 602–03 (2020) (concluding the purpose of a new statute was to go beyond existing laws regulating the same topic and rejecting an interpretation that would have made the new statute coextensive with prior coverage). Were the rule otherwise, taxpayers, left to engage in an imprecise inquiry into the meanings of "repair" and "modification," could claim the exemption only at the risk of the IRS's interpreting those words differently—and in turn imposing a substantial, unanticipated tax liability, with penalties and interest to boot. *Cf. Pac. Bell Tel. Co. v. LinkLine Commc'ns, Inc.*, 555 U.S. 438, 453 (2009) (noting importance of clearly defined safe harbors in antitrust). That concern is not so far-fetched; it describes the facts of this case. This undesirable outcome may be avoided by recognizing the statutory inclusion of a bright-line, 75% threshold to trigger § 4052(f)(1).

B. We are not the first to do so. In *Schneider National Leasing, Inc. v. United States*, 11 F.4th 548 (7th Cir. 2021), the Seventh Circuit addressed whether a trucking company qualified for § 4052(f)(1)'s safe harbor when "overhaul[ing]" and then using its own worn tractors. *Id.* at 551; *see also* 26 U.S.C. § 4052(a)(3)(A) (imposing excise tax on "use[]" of a tractor if such use occurs before the first retail sale).

Like Fitzgerald, Schneider had been restoring tractors with glider kits that "[a]t a minimum, . . . came with a cab, chassis, radiator, front axle, front suspension, front wheels, front tires, front brakes, brake system, and trailer connections." *Schneider*, 11 F.4th at 551. Many of them even included remanufactured engines in "powered" variants of glider kits. *Id.* When Schneider tried invoking § 4052(f)(1), the IRS resisted. *Id.* at 552. According to the agency, Schneider could not claim exemptions for tractors with new engines because its refurbishment process "exceeded permissible 'repairs or modifications' and instead resulted in the manufacture of new 'articles.'" *Id.*

The Seventh Circuit thought otherwise. Section 4052(f)(1)'s "safe harbor," the appeals court thoughtfully explained, "does not contemplate a measurement for 'repairs or modifications' apart from the 75% test." *Id.* at 554. Whereas the IRS supported supplementing § 4052(f)(1) with a qualitative test based on the quantity or kind of replacement parts utilized, the statute, the Seventh Circuit concluded, forbids "defin[ing] what does (and does not) constitute 'manufacture' with qualitative standards"; rather, it establishes "a quantitative test based on cost." *Id.* at 556. As for the IRS's alternative claim that "article" in § 4052(f)(1) requires "that the same identifiable article exist before and after the repairs," this argument too, the appeals courts held, lacked support in the statute's text. *Id.* at 557. The Seventh Circuit took particular issue with the government's inability to offer a text-based standard "for determining whether the same identifiable article survived the refurbishment process." *Id.* Rather, the government merely "posited" that all parts rendering a vehicle "self-propelled" constitute "the immutable core of a single, identifiable tractor." *Id.* As the Seventh Circuit aptly explained, § 4052(f)(1)'s

express accommodation for wrecked tractors needing replacement engines readily contradicted the government's amorphous test. *Id.*

That reasoning applies with equal force here. As in *Schneider*, Fitzgerald conducted tractor restorations that, while facially extensive, nevertheless fell below the 75% threshold in § 4052(f)(1). Unlike Fitzgerald, Schneider installed new engines into hundreds of its overhauled trucks, and yet still qualified for the safe harbor. *See Schneider*, 11 F.4th at 552, 555. So too, then, does Fitzgerald. Perhaps even more squarely so, given that its restoration process preserved each old tractor's engine, a component essential to maintaining "the immutable core" of the vehicle. *Cf.* Walter Raleigh, 1 *The War in the Air* 414 (1922) ("The engine is the heart of an aeroplane . . . .").

The government nevertheless points out another distinction: whereas Fitzgerald purchased engines and transmissions from third-party salvage yards, Schneider refurbished portions of its own fleet. That fact matters, says the government, in view of a pair of technical advice memoranda issued after a 1991 revenue ruling that established an IRS-created predecessor to § 4052(f)(1), before Congress's 1997 enactment of the safe harbor itself. *See* Rev. Rul. 91-27, 1991-1 C.B. 192. One memorandum clarified that the safe harbor applied to a taxpayer who assembled each glider kit with salvaged parts from a single used tractor, reasoning that the restored tractors were "essentially the same vehicles as the prerestoration tractors" because used parts from multiple vehicles "were not intermingled." I.R.S. Tech. Adv. Mem. 93-33-007 (May 11, 1993). The other concluded that the safe harbor did not apply to a taxpayer who manufactured tractors utilizing glider kits consisting of parts from more than one

salvaged tractor. I.R.S. Tech. Adv. Mem. 92-38-008 (June 11, 1992). Under those facts, the IRS reasoned, the resulting tractor "[wa]s essentially a new vehicle." *Id.* The government urges us to read these conclusions into § 4052(f)(1), equating the facts of the former with Schneider's operations, and the facts of the latter with Fitzgerald's business model.

Based on the language of the statute, we decline the invitation. Consider its source. Technical advice memoranda "have no precedential value to parties other than the taxpayer they are issued to." *Downs, Inc. v. Comm'r*, 307 F.3d 423, 429 (6th Cir. 2002). Nor can we accept the government's suggestion that Congress looked to these documents when enacting the safe harbor. Whereas the IRS infers that Congress tacitly endorsed the agency's earlier guidance when codifying § 4052(f)(1), it could just as easily be inferred that Congress tacitly rejected it by failing to write the IRS's conclusions into the statute. *Cf. Girouard v. United States*, 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law.").

Even if we set aside these fundamental flaws in the IRS's position, the IRS reads its memoranda in a way that makes the two difficult to reconcile with each other, let alone with the statute that purportedly incorporated them. The guidance documents seemingly tease out legal relevance in the number of salvaged tractors from which the taxpayer extracts second-hand parts, not in tractor ownership itself. According to the memoranda, a taxpayer may claim an exemption for tractors with reused engines alone but may not claim an exemption for tractors with reused engines and transmissions if those parts each came from a different salvaged tractor. *Compare* I.R.S. Tech.

Adv. Mem. 93-33-007 ("The used components of the worn tractors were not intermingled, that is, the engine, transmission, and axles of a particular tractor were combined with a glider kit . . . ."), *with* I.R.S. Tech. Adv. Mem. 92-38-008 ("The taxpayer fabricated a truck tractor by combining a newly-purchased glider kit . . . with other new parts and certain salvaged parts . . . from two truck tractors that were originally built by different manufacturers."). That is an unusual way to read § 4052(f)(1). As the statute's text seemingly favors rehabilitating used tractor parts by rewarding those efforts with favorable tax consequences, it is odd to understand the law as including a non-textual limit tied to parts that originate from multiple vehicles. *See* 26 U.S.C. § 4052(f)(1) (exempting *all* sales of repaired or modified articles that pass the 75% test). After all, refurbishment is refurbishment, whether it encompasses one vehicle or many.

As the government portrays things, because Fitzgerald bought engines and transmissions from salvage yards after those parts had been extracted from donated tractors, the acquired parts were detached from any identifiable tractor. That characterization, however, is in tension with the fact that both parties recognize that the used engines and transmissions had all previously been part of functional tractors. Equally true, even if, as the government stresses, Fitzgerald did not secure title to these trucks before their dismantling, § 4051(a)(1) contains no prior-ownership-related condition. Instead, its application rests on whether the 75% threshold has been eclipsed. We accordingly reject the government's invitation to read such a condition into the statute. *See Nestlé Waters N. Am., Inc. v. Mountain Glacier LLC (In re Mountain Glacier LLC)*, 877 F.3d 246, 248 (6th Cir. 2017) ("[C]ourts cannot add to statutes."); *cf. Polselli v. IRS*,

598 U.S. 432, 438–39 (2023) (declining to read judicially fabricated limit into Tax Code due to its lack of support in the act's plain text).

At a surface level, it is perhaps fair to say (as does the government) that Fitzgerald simply paid salvage yards for standalone engines and transmissions. In practice, however, the salvaging and subsequent refurbishment together reflected one process for purposes of the excise tax and its safe harbor. And that process began with salvaged tractors; that is, "self-propelled vehicle[s] . . . designed to perform a function of transporting a load over public highways"—the very definition of "article" endorsed by the government. 26 C.F.R. § 48.4061(a)-1(d)(1).

C. Besides factually distinguishing *Schneider*, the government offers a laundry list of reasons that, in its view, justify departing from that case on its merits. None persuade us.

Plain Meaning. The government first tries its hand at plain meaning. It reads the terms "repair[]" and "modification[]," as used in the safe harbor, to carry a "connotation of increment or limitation." Appellant Br. 43 (quoting *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994)). With this understanding in mind, the government argues that the installation of an old engine into a new glider kit far eclipses the mere repair or modification of the salvaged tractor from which the engine derived.

Its point is misplaced for several reasons. Most notably, as explained earlier, § 4052(f)(1) supplants the lay scope of "repair[]" and "modification[]" by establishing a quantitative 75% test to identify when repairs and modifications, in the aggregate, receive the exemption. True, a statute's use of "modify" can

sometimes connote "increment or limitation." *E.g.*, *MCI Telecomms.*, 512 U.S. at 225. Yet the safe harbor here, it bears reminding, also includes the word "repair[]." 26 U.S.C. § 4052(f)(1). The government reads that latter term to mean "to restore by replacing a part or putting together what is torn or broken." But in many instances, "restor[ation]" of a once-"broken" object or structure requires more than merely "increment[al]" alterations. *See, e.g.*, Glenn Brown, *History of the United States Capitol* 140 (2008) (referring to "the repairs of the [U.S.] Capitol" after it had been severely damaged in the Burning of Washington). At any rate, § 4052(f)(1) accommodates more extensive restorations by using "modification*s*" and "repair*s*" in the plural. So even if those terms connote an incremental change in the singular, modest alternations taken together can form a substantial change in the aggregate. And whereas the government depicts Fitzgerald's business as a single, dramatic overhaul (i.e., the manufacturing of essentially new trucks), one can also describe it as a series of smaller, incremental changes. The repeated invocation of "repairs" and "modifications" in § 4052(f)(1) fairly indicates that Congress codified protection based on the latter understanding. *See Life Techs. Corp. v. Promega Corp.*, 580 U.S. 140, 149–50 (2017) (deeming a statute's use of the plural form legally significant).

The Whole-Text Canon. Reminding us that we must construe statutory text as a whole, the government next directs us to 26 U.S.C. § 4052(b)(1)(B)(iii). That provision grants a lower tax base for reusing "any component" of an "article" when building a new truck. *See* 26 U.S.C. § 4052(b)(1)(B)(iii) (excluding the value of used components from a tractor's purchase price if those components were "furnished by the first user of [the] article"). Based on this distinct tax benefit, the

government asserts that Congress intended taxpayer reuse of "individual" parts, including parts as significant as engines, to qualify only for a reduced sales price under § 4052(b)(1)(B)(iii)—not complete exemption under § 4052(f)(1).

Not so. For one thing, the government's position raises more questions than it purports to answer. Chief among them, at what point does the reuse of "individual" components suffice to render § 4052(f)(1) available? In the government's eyes, engines and transmissions, without more, seemingly fall short, but it otherwise fails to quantify how many more used parts would have been needed for Fitzgerald to claim the safe harbor. For another, as the government concedes, Fitzgerald cannot even claim the milder benefit under § 4052(b)(1)(B)(iii) because it was not "the first user" of its tractors. 26 U.S.C. § 4052(b)(1)(B)(iii)(I). True, in other circumstances not before us, Fitzgerald's reading of § 4052(f)(1) creates partial overlap with § 4052(b)(1)(B)(iii). *See, e.g.*, *Schneider*, 11 F.4th at 551–52 (involving a taxpayer who qualifies for both provisions). But such coextension makes sense: taxpayers can enjoy a full exemption for modifications and repairs of reused components that do not exceed the 75% test but can still receive a more modest tax benefit for simply employing a used component or two when the 75% threshold is exceeded. The Tax Code is rife with comparable instances of cascading tax breaks. *See, e.g.*, 26 U.S.C. § 25A (establishing the American Opportunity Tax Credit and Lifetime Learning Credit, the former of which demands stricter qualifications but always delivers equal or better tax benefits). Even were we to disagree with this legislative calibration, we may not unsettle those choices due to our preferred view of tax policy.

The Absurdity Doctrine. The government next points to a seeming loophole in Fitzgerald's reading of § 4052(f)(1), which it says leads to an absurd result. *See United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486 (1868) ("All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to . . . an absurd consequence.") Recall that Fitzgerald bought engines for roughly $4,000 yet incurred around $110,000 in other expenses for each tractor. Emphasizing the $106,000 disparity in those costs, the government argues that "[i]t would make no sense for the reuse of [engines alone] to entitle Fitzgerald to eliminate the tax in its entirety." Appellant Br. 48.

At bottom, however, this perceived absurdity derives less from a reading of "the article" in § 4052(f)(1), than it does from how the government would read the phrase "retail price of a comparable new article" in that same provision. Yet there is no need for assumptions. On appeal, it bears emphasizing, the parties do not dispute the latter's meaning, agreeing with *Schneider* that the "retail price" of a "comparable new" tractor refers to "the amount at which an article is sold in individual, arms-length transactions." *Schneider*, 11 F.4th at 559. That sets a relatively high sales-price input for the 75% test (around $210,000 here), conferring on taxpayers like Fitzgerald substantial room to qualify for the safe harbor even after conducting extensive repairs. By contrast, the government in *Schneider* argued (albeit unsuccessfully) "that 'retail price' reflects the price the taxpayer actually paid for comparable tractors, including any discount off the market price." *Id.* This alternative reading would often result in a dramatically stricter threshold for the 75% test, foreclosing the safe harbor for a higher proportion of taxpayers performing significant restorations. But

this is not a case where that point is contested. For today's purposes, it is enough to recognize that Congress plausibly could have wanted to create a strong incentive for even mild reuse of worn truck components. This consideration alone suffices to reject application of the absurdity doctrine. *See Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) (noting the doctrine applies only "under rare and exceptional circumstances" when the absurdity is "so gross as to shock the general moral or common sense").

Legislative History. The government also posits that its statutory reading is consistent with the conference committee's report on § 4052(f)(1). But beyond the existing disputes regarding reliance on legislative history, the highlighted report at most suggests that Congress intended the exemption for only those taxpayers who modify "existing vehicle[s]." H.R. Rep. 105-220, at 727 (1997) (Conf. Rep.). When viewing their respective businesses as one cohesive operation, Fitzgerald and its supplying salvage yards did exactly that.

The "Strict" Construction of Exemptions. Lastly, the government relies on a familiar friend in tax jurisprudence: the statement that "exemptions from taxation are to be construed narrowly." *Wilson v. United States*, 588 F.2d 1168, 1171 (6th Cir. 1978) (quotation marks and citations omitted)). It is fair at the outset to question the assertion's pedigree, as "many Supreme Court cases denying an exemption make no mention of this rule, and even some cases granting an exemption ignore it." Scalia & Garner, *supra*, at 359; *see also id.* (labeling the presumption a "false notion" and endorsing precedent that ignores it). At any rate, even when taking the point at face value, Fitzgerald has met the allegedly strict burden to justify exemption. As explained above, the company's

operations land within the plain language of § 4052(f)(1), which sets out a bright-line, 75% threshold.

III.

A. Section 4051(f)(1) aside, Fitzgerald is still not out of the woods. Once again, like many exemptions in the Tax Code, § 4052(f)(1) *itself* has an exception. When codifying the safe harbor, Congress also enacted a carveout in an adjoining paragraph of the statute. *See* Taxpayer Relief Act of 1997, § 1434, Pub L. No. 105-34, 111 Stat. 788, 1052. That companion paragraph instructs that § 4052(f)(1) "shall not apply if the article (as repaired or modified) would, if new, be taxable under section 4051 and the article when new was not taxable under such section or the corresponding provision of prior law." 26 U.S.C. § 4052(f)(2).

This provision too informs today's resolution, as it requires us to ask about the origin of the used engines and transmissions Fitzgerald purchased from salvage yards. Record evidence suggests that the salvage yards received at least some of their tractors from government agencies and municipalities as well as sellers who had originally bought the vehicles in Mexico and Canada. Those tractors would not have been taxable when new, says the government, because 26 U.S.C. § 4221(a) generally exempts transactions with those kinds of buyers from federal sales taxes. If so, § 4052(f)(2) kicks in to render the safe harbor unavailable.

By and large, we agree with the government. Walking through these statutory commands, begin with § 4051(a)(1)'s imposition of a tax on the "first retail sale" of certain trucks. *Id.* § 4051(a)(1). Section 4052(a)(1) in turn defines "[f]irst retail sale" to "mean[] the first sale, for a purpose other than for resale or

leasing in a long-term lease, after production, manufacture, or importation." *Id.* § 4052(a)(1). Treasury Regulations clarify this definition, explaining that "'first retail sale' means a taxable sale," and that "[t]he sale of an article is a taxable sale unless . . . [t]he sale is a tax-free sale under section 4221." 26 C.F.R. § 145.4052-1(a)(2)(i). Turn then to § 4221(a), which lists six types of sales on which "no tax shall be imposed," including exports, 26 U.S.C. § 4221(a)(2), and sales "to a State or local government," *id.* § 4221(a)(4). Read together, this series of intertwined statutes and regulations instructs that tractors first sold abroad or to state and local governments were not taxable under § 4051 when new. And for purposes of § 4052(f)(1)'s safe harbor, § 4052(f)(2) makes clear that articles that "when new w[ere] not taxable under [§ 4051]" do not qualify. *Id.* § 4052(f)(2).

Precedent confirms this conclusion. In *CenTra, Inc. v. United States*, 953 F.2d 1051 (6th Cir. 1992), we interpreted "taxable sale" in 26 C.F.R. § 145.4052-1(a)(2) to exclude truck sales in Canada. *Id.* at 1054. Rejecting the taxpayer's attempt to deem the nontaxation of these exports "immaterial," *CenTra* read "prior taxable sale" to "mean[] a prior sale that was in fact capable of being taxed under current law." *Id. CenTra*, we note, then deemed § 4051(a)(1) applicable to imports of American-made trucks that had first been leased abroad. *Id.* at 1056–57. In so doing, it relied on a revenue ruling and invoked *Chevron* deference, *id.* at 1055—a practice we have since abandoned, *see Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024). Exercising our "independent judgment," *id.* at 412, however, we continue to agree with *CenTra*'s holding because it accurately reflects the statute's plain meaning. After all, § 4051(a)(1) applies to an

article's "first retail sale," which § 4052(a)(1) defines to include "the first sale . . . after . . . importation."

Of course, § 4052(f)(2), the provision at issue here, does not itself include the words "prior taxable sale." But it does reference articles previously "taxable" under a provision applicable only to their "first retail sale[s]." 26 U.S.C. § 4052(f)(2); *id.* § 4051(a)(1). In substance, then, we see no meaningful reason that this analysis of "prior taxable sale" in § 145.4052-1(a)(2) does not apply equally to "taxable" in § 4052(f)(2).

Whether we approach this issue through first principles or case law, the outcome is the same: to escape § 4052(f)(2), a taxpayer must prove that the respective tractor was capable of being taxed when new. In other words, § 4051's excise tax must have been payable, taking all cross-referenced statutes and regulations—including § 4221—into account. And on that front, Fitzgerald seemingly comes up short. For any restored tractor lacking sufficient proof, by a preponderance of the evidence, that it incurred the excise tax under § 4051 when new, Fitzgerald cannot claim the safe harbor. *See Sherwin-Williams Co. v. United States*, 403 F.3d 793, 796 (6th Cir. 2005) ("The taxpayer must prove its entitlement to a tax refund by a preponderance of the evidence."). The language of § 4052(f)(2) does not require taxpayers to show that money was remitted to the Treasury in satisfaction of the excise tax. Rather, consistent with the statute's plain meaning, the taxpayer must show that every tractor was "subject to" and caused the imposition of § 4051 when new. *See Taxable*, 17 *Oxford English Dictionary* 678 (2d ed. 1989) ("Liable to be taxed; subject to a tax or duty.")

At this juncture, Fitzgerald has not done so. Again, the record reflects that at least some of the salvaged

tractors acquired by Fitzgerald were likely first sold in foreign countries or to state and local governments. Fitzgerald alleges that the government gave no "credible evidence" that these tractors first derived from tax-exempt sales. But beyond disregarding the government's numerous citations to that exact kind of evidence, Fitzgerald has implicitly shirked its burden of proof. "[T]axes paid are rightly collected upon assessments correctly made by the Commissioner, and in a suit to recover them the burden rests upon the taxpayer to prove all the facts necessary to establish the illegality of the collection." *Niles Bement Pond Co. v. United States*, 281 U.S. 357, 361 (1930). With Fitzgerald having failed to do so, we cannot affirm the wholesale exemption of all 12,830 of the company's tractor sales without further factfinding.

B. Fitzgerald resists the government's reading of § 4052(f)(2) on several fronts. We analyze each in turn.

Forfeiture. First up are procedural matters. According to Fitzgerald, the government failed to preserve its argument under § 4052(f)(2) because it never objected to the absence of jury instructions that captured its reading of the statute. True, the government did not object to the district court's jury instructions at trial. But that makes no difference because a party's failure to object to jury instructions does not change our "normal appellate review" when, as here, that party moves for judgment as a matter of law after trial. *K & T Enters., Inc.*, 97 F.3d 174–75; *see also City of St. Louis v. Praprotnik*, 485 U.S. 112, 118–20 (1988) (plurality opinion). And besides, for its own part, Fitzgerald never raised this argument in its briefing on the motion before the district court, which is itself forfeiture. *See, e.g.*, *Ford v. County of Grand Traverse*, 535 F.3d 483, 490 (6th Cir. 2008).

Even then, Fitzgerald continues, the government committed a second forfeiture, this time by making a different argument on appeal than it did in district court. Before us, says Fitzgerald, the government argues that "taxable" means "the tax had to be 'payable,'" whereas in district court the government argued that "taxable" means "previously taxed." The record citations relied upon by Fitzgerald, however, reflect the government stating that Fitzgerald *could* prove the inapplicability of § 4052(f)(2) by showing that taxes were actually paid on the salvaged tractors—not that such payments were the *only* method of escaping this provision. As Fitzgerald repeatedly used the same "previously taxed" language before the district court, the government was merely responding to those assertions without endorsing Fitzgerald's interpretation. At the end of the day, the government squarely equated "taxable" with "payable" before the district court, and it permissibly raises that exact argument here.

Plain Meaning. Turning to the merits, Fitzgerald asserts that the plain text of § 4052(f)(2) is satisfied only when articles—not sales thereof—are taxable as a class under § 4051. In other words, says Fitzgerald, in analyzing whether § 4052(f)(2) exempts a tractor from the safe harbor, we ask only whether the tractor landed within the taxable weight thresholds of § 4051 when new, regardless whether the original sale was in fact a taxable event. According to Fitzgerald, because its salvaged tractors met such thresholds, they facially triggered the excise tax and were therefore all taxable under § 4051 when new.

Fitzgerald's narrow interpretation of the Tax Code fails to consider its cross-references. As explained above, § 4051(a)(1) imposes an excise tax on the "first

retail sale" of certain articles, 26 U.S.C. § 4051(a)(1), which, as other statutes and regulations make plain, exclude the tax-exempt transactions listed in § 4221, *id.* § 4052(a)(1); 26 C.F.R. § 145.4052-1(a)(2)(i). In lieu of the word "sale," § 4052(f)(2) utilizes the phrase "taxable under section 4051" to describe whether articles were subject to tax upon being sold, leased, or used—a condition that at least some of Fitzgerald's tractors likely did not meet when new.

Even the plain meaning of § 4052(f)(2)'s terms alone does not support Fitzgerald's position. Laypeople and legislators alike frequently label goods "taxable" when describing the taxation of such goods upon sale. *See, e.g.*, 26 U.S.C. § 4181 (referring to firearms and ammunition, which are subject to tax only "upon . . . sale," as "[a]rticles taxable"); *Taxable*, 17 *Oxford English Dictionary*, *supra*, at 678. Consider a real-world example. If someone buys a can of pop in Ohio, it would be entirely normal for them to describe the can as being "taxable in Ohio" given the sales tax incurred upon their purchase. *See* Ohio Rev. Code. Ann. §§ 5739.01(CCC)(1), 5739.02(A)(1), (B) (2024). By contrast, it would be entirely abnormal for that person to describe the same can as being "taxable in Minnesota" even though pop, as a class of goods, is taxable when sold in the Land of 10,000 Lakes. *See* Minn. Stat. § 297A.61, subdiv. 3(d)(2) (2024). It seems equally odd to say that donor trucks sold in foreign countries are "taxable under section 4051" because they are subject to tax as a class when sold in the United States.

Fitzgerald's reading of § 4052(f)(2) also raises statutory consistency concerns. What does it mean for an article—rather than the sale thereof—to be "subject to tax" when new? The Tax Code does not impose an

excise tax on trucks due to their mere existence. Rather, § 4051(a)(1) is triggered only upon "the first retail sale" of certain articles. 26 U.S.C. § 4051(a)(1). From an administrability standpoint, holding otherwise would demand that the IRS somehow determine when new trucks come into existence.

Statutory Purpose. Fitzgerald next contests the purpose behind § 4052(f)(2). Whereas the government argues the statute "ensure[s] that the excise tax is payable at least once for each article," Fitzgerald labels that explanation as little more than "guesswork" and "conjecture." True, as Fitzgerald reminds, presumed congressional intent should not be prioritized over a statute's clear, ordinary meaning. *See, e.g.*, *Hudson v. Reno*, 130 F.3d 1193, 1199 (6th Cir. 1997) ("[I]f the words of the statute are unambiguous, the judicial inquiry is at an end, and the plain meaning of the text must be enforced . . . ." (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989))). Our analysis above honors that longstanding principle by beginning and ending with the statute's ordinary meaning. *See, e.g.*, *BedRoc Ltd., LLC v. United* States, 541 U.S. 176, 183 (2004) (plurality opinion); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 126–27 (2018). That a rational legislative purpose can be gleaned from said meaning—Congress's desire to ensure that each truck triggers the excise tax at least once—further bolsters the propriety of our analysis.

Ironically, Fitzgerald, after criticizing any reliance on congressional intent, asserts that the government's reading "produce[s] unintended results" and "create[s] unintended taxpayer burdens" in enabling repeated taxation of certain trucks. That criticism warrants some context. In *CenTra*, we held that the sale of a used truck can nevertheless constitute its "first retail

sale" when a tax-paying entity buys or leases the truck from a tax-exempt original owner. *See* 953 F.3d at 1056. If that truck is later repaired, however, § 4052(f)(2) potentially denies invoking the safe harbor because the truck was first sold to a tax-exempt entity "when new." 26 U.S.C. § 4052(f)(2). The rub, says Fitzgerald, is that trucks under those circumstances will always trigger § 4052(f)(2). In other words, tertiary purchasers or beyond will still be required to pay excise taxes even when those trucks otherwise land within the safe harbor. That presumably rare anomaly is an odd basis to support Fitzgerald's contorted interpretation of § 4052(f)(2). Equally true, it is an issue for a future case, not this one.

Agency Procedure. Fitzgerald closes with a virtual Hail Mary. In its view, the IRS violated its "duty" to inform taxpayers of the interaction between the safe harbor and § 4221 rather than merely announcing that interpretation during litigation. We see at least two flaws in this claim. First, considering that regulations to § 4052 expressly invoke the list of tax-exempt transactions in § 4221, *see* 26 C.F.R. § 145.4052-1(a)(2)(i), the IRS had no obligation to redundantly confirm that it would follow binding law. Second, it has long been the case that the choice between a general rule and individual litigation "lies primarily in the informed discretion of the administrative agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). This point deserves particular emphasis in the tax law realm, where sophisticated parties are constantly on the lookout for novel and unanticipated workarounds. That said, it remains true that the government had no obligation to inform Fitzgerald that articles eligible for the safe harbor had to be capable of being taxed when new, excluding sales listed in § 4221.

* * * * *

Because the statute sets out a bright-line, 75% threshold for articles that were capable of being taxed when new, we reverse the judgment of the district court and remand for proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

No. 2:20-cv-00026

FITZGERALD TRUCK PARTS AND SALES, LLC,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION

After a trial held in Cookeville, Tennessee between July 10 and July 14, 2023, a jury found that Fitzgerald Truck Parts and Sales, LLC ("Fitzgerald") was not liable for excise tax on some 12,830 glider semi trucks sold between 2012 and 2017. The Government has now filed a Motion for Judgment as a Matter of Law or New Trial (Doc. No. 198), to which Fitzgerald has filed a response in opposition (Doc. No. 212) and the Government has replied (Doc. No. 216). Also before the Court is the Government's fully briefed Motion to Redact (Doc. Nos. 195, 196, 201). For the reasons that follow, both Motions will be denied. First, however, a bit of background will help place the parties' arguments in context.

I. Background

On two prior occasions, the Court has discussed the facts underlying the parties dispute: *Fitzgerald Truck*

Parts & Sales, LLC v. United States, *("Fitzgerald* II"), No. 2:20-CV-00026, ___ F. Supp. 3d ___, 2023 WL 3195470 (M.D. Tenn. May 2, 2023); *Fitzgerald Truck Parts & Sales, LLC v. United States*, *(Fitzgerald* I"), 391 F. Supp. 3d 794 (M.D. Tenn. 2019). In a nutshell, those facts are as follows:

For more than 30 years, and up until Environmental Protection Agency ("EPA") regulations essentially abolished the market, Fitzgerald manufactured glider semi-trucks. It did so by placing rebuilt engines and transmissions from wrecked highway tractors into glider kits produced by original equipment manufacturers. The kits from those manufacturers generally included such things as the cab, frame, sheet metal, mounting brackets and steering gear, to which the rebuilt powertrains were then added. Through this method, the goal was to offer for sale essentially a new truck – albeit with a rebuilt engine and transmission – at a lower price than a comparable truck from the factory. Not only did the customer receive a reduction in price, the customer was also not on the hook for excise taxes, at least if the governing regulations were followed. Herein lies the core of the parties' dispute.

Under the Internal Revenue Code, a 12% federal excise tax is imposed "on the first retail sale" of "tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer." 26 U.S.C. § 4051(a)(1). The code also contains a safe harbor provision that states:

> (f) Certain repairs and modifications not treated as manufacture
>
> (1) In general

> An article described in section 4051(a)(1) shall not be treated as manufactured or produced solely by reason of repairs or modifications to the article (including any modification which changes the transportation function of the article or restores a wrecked article to a functional condition) if the cost of such repairs and modifications does not exceed 75 percent of the retail price of a comparable new article.

26 U.S.C. § 4052(f)(1).

It has been Fitzgerald's position throughout that the trucks it produced met the safe harbor provision. The Internal Revenue Service ("IRS") disagrees. In accordance with IRS regulations, Fitzgerald paid the excise tax on one truck for each quarter of the tax years at issue, meaning excise taxes were not paid on some 12,800-plus gliders. The stakes are enormous, especially for a company that is no longer producing trucks, and never collected the excise tax from the purchaser in the first place. Those taxes are more than ten million dollars. Penalties and interest place that figure in the neighborhood of $300 million.

At the conclusion of the bifurcated trial,[1] the jury was called upon to answer three questions. First, the jury was asked, "[d]id Fitzgerald Truck Parts and Sales, LLC prove that the cost of repair of the glider tractors it assembled and sold during the years 2012 through 2017 did not exceed 75% of the retail price of

[1] The second phase of the trial – which became unnecessary given the jury's verdict – would have dealt with the issue of whether the Government should be collaterally stopped from collecting taxes because of its repeated findings that Fitzgerald allegedly met the safe harbor provision.

a comparable new highway tractor?" (Doc. No. 191 at 1). Second, the jury was asked, "[d]id Fitzgerald prove that the original highway tractor was taxable when it was new?" (*Id.*). The jury answered both of those questions in the affirmative. Third, the jury answered "all" when asked, "[h]ow many of the glider tractors did Fitzgerald prove met all the requirements for the Safe Harbor Exemption Provision?" (*Id.*). Judgment was thereafter entered on that verdict. (Doc. No. 194).

II. Motion to Redact

In a first for the Court, the Government accuses the Court of acting libelously in its *Daubert*[2] ruling in relation to the Government's proposed expert Dr. Yingzhen Li. It seeks to redact two pages of the transcript of the *Daubert* hearing wherein the Court discusses Dr. Li's insipid testimony and suggests that he reached a foregone conclusion based upon what the Government told him. In other words, Dr. Li was a hired gun. The bulk of the Government's brief, however, both in support and in reply on its Motion to Redact, focuses on whether the Court reached the correct conclusion in not permitting Dr. Li to testify. Perhaps this is because the Government has no legal basis to request the transcript be redacted.

Leaving aside the general proposition that statements in judicial proceedings, if relevant to the issues involved, are absolutely privileged, *see*, *Gen. Elec. Co. v. Sargent & Lundy*, 916 F.2d 1119, 1126 (6th Cir. 1990), there is a "presumption of openness" to court proceedings, *Press-Enter. Co. v. Superior Ct. of Cal.*, 464 U.S. 501, 510 (1984). The same is true for the records of those proceedings. *See Cox Broad. Corp. v. Cohn*, 420

[2] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

U.S. 469, 492-93 (1975). As Justice William O. Douglas once observed:

> "A trial [or hearing] is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."

Id. (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947)).

Because of "the strong presumption in favor of openness," *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983), "[o]nly the most compelling reasons can justify non-disclosure of judicial records, *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 476 (6th Cir. 1983). "The burden" to restrict access "is a heavy one." *Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 305 (6th Cir. 2016); *accord*, *Mitchell v. Tennessee*, No. 3:17-CV-00973, 2020 WL 6712169, at *2 (M.D. Tenn. Nov. 16, 2020). That burden may be even greater where, as here, a party seeks to redact a court's ruling or opinion because "the public is entitled to assess for itself the merits of judicial decisions." *Id.; see also Moroughan v. Cnty. of Suffolk*, No. 12CV0512JFBAKT, 2021 WL 280053, at *2 (E.D.N.Y. Jan. 24, 2021) ("[T]he weight given to that presumption of access for judicial

opinions is extremely strong.); *Adler v. Ingle*, No. 1:20-CV-00048 (TNM), 2020 WL 7682392, at *1 (D.D.C. Oct 29, 2020) (citation omitted) ("The presumption of full disclosure is 'especially strong for judicial orders and opinions.'").

The Government has not come close to meeting its burden. The most the Court can glean from its arguments is that it did not like this Court's ruling and that the insinuation that Dr. Li and the Government were in cahoots in formulating Dr. Li's opinion is simply wrong. However, disagreeing with a ruling is hardly a basis for redaction. Further, "a litigant's 'natural desire' to safeguard its reputation against potentially prejudicial information 'cannot be accommodated by courts without seriously undermining the tradition of an open judicial system.'" *Nat'l Credit Union Admin. Bd. v. Lucic*, No. 1:14-CV-254, 2015 WL 1738054, at *2 (N.D. Ohio Apr. 16, 2015) (quoting *Brown & Williamson* 710 F.2d at 1179-80); *see also Kiwewa v. Postmaster Gen. of United States*, No. 18-3807, 2019 WL 4122013, at *2 (6th Cir. Mar. 26, 2019) ("Harm to reputation is insufficient to overcome the strong presumption in favor of public access[.]").

The Government's Motion to Redact will accordingly be denied.

III. Motion for Judgment as a Matter of Law or New Trial

The Government takes a shotgun approach in moving for judgment as a matter of law or a new trial. Even so, its arguments fall into six camps, identified by the Government as follows: (1) Plaintiff failed to meet its burden to produce legally sufficient evidence from which a jury could find that it met the safe harbor in 26 U.S.C. § 4052(f); (2) the evidence established that

Plaintiff was buying parts, but the safe harbor requires repair of an article; (3) the Court improperly excluded Dr. Li's testimony; (4) the Court abused its discretion in limiting Mr. Stuart MacKay's testimony; (5) comments by Plaintiff's trial counsel and witnesses and exhibits about prior audits were irrelevant and highly prejudicial because of the Court's order to bifurcate the trial; and (6) the Court improperly excluded certain exhibits. Each of those arguments will be considered in turn after a review of the standards governing a request for judgment or a new trial.

A. Standard of Review

1. Motion for Judgment as a Matter of Law

Rule 50(b) of the Federal Rules of Civil Procedure allows a party to renew a previously denied motion for judgment as a matter of law within 28 days of the entry of judgment following trial. Fed. R. Civ. P. 50(b). Such a renewed motion may only proffer arguments that were advanced in the pre-verdict motion. *Ford v. Cty. of Grand Traverse*, 535 F.3d 483, 491-92 (6th Cir. 2008).

A motion for judgment as a matter of law may be granted only if, "when viewing the evidence in a light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences, there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion in favor of the moving party." *Rhinehimer v. U.S. Bancorp Invs., Inc.*, 787 F.3d 797, 804 (6th Cir. 2015) (quoting *Barnes v. City of Cincinnati*, 401 F.3d 729, 736 (6th Cir. 2005)). "The evidence should not be weighed, and the credibility of the witnesses should not be questioned. The judgment of [the] court should not be substituted for that of the jury." Id. (quoting *Balsley v. LFP, Inc.*,

691 F.3d 747, 757 (6th Cir. 2012)). "In other words, the decision to grant judgment as a matter of law . . . is appropriate whenever there is a complete absence of pleading or proof on an issue material to the cause of action or when no disputed issues of fact exist such that reasonable minds would not differ." *Jackson v. FedEx Corp. Servs.*, 518 F.3d 388, 392 (6th Cir. 2008) (citation omitted). Under Rule 50(b), the Court may allow the verdict to stand, order a new trial, or direct entry of judgment as a matter of law. Fed. R. Civ. P. 50(b).

2. Motion for a New Trial

Rule 59 provides in part that "[t]he court may, on motion, grant a new trial on all or some of the issues – and to any party . . . for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). "The language of Rule 59(a) has been interpreted to mean that a new trial is warranted when a jury has reached a seriously erroneous result as evidenced by: (1) the verdict being against the weight of the evidence; (2) the damages being excessive; or (3) the trial being unfair to the moving party in some fashion, i.e., the proceedings being influenced by prejudice or bias." *E.E.O.C. v. New Breed Logistics*, 783 F.3d 1057, 1066 (6th Cir. 2015) (internal quotation marks and citations omitted).

B. Sufficiency of the Evidence

"The Internal Revenue Code specifies that . . . [a] taxpayer must comply with the tax refund scheme established in the code before bringing suit 'seeking a refund of taxes erroneously or unlawfully assessed.'" *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 4 (2008) (citation omitted). Once suit is brought,

"[t]he taxpayer must prove its entitlement to a tax refund by a preponderance of the evidence." *Sherwin-Williams Co. v. United States*, 403 F.3d 793, 796 (6th Cir. 2005) (collecting cases).

It is true, as the Government is quick to point out, that "'[t]he presumption is that taxes paid are rightly collected upon assessments correctly made by the [IRS], and in a suit to recover them the burden rests upon the taxpayer to prove all the facts necessary to establish the illegality of the collection.'" *Id.* (quoting *Niles Bement Pond Co. v. United States*, 281 U.S. 357, 361 (1930)). It does not follow, as the Government seems to believe however, that, to prevail, Fitzgerald needed documentary evidence in the form of a title to each of the 12,800+ wrecked trucks that it allegedly repaired. Nor is it true, as the Government argues, that "the self-serving testimony of Plaintiff's witnesses . . . is insufficient, *as a matter of law*, to meet Plaintiff's burden of proof." (Doc. No. 198- 1) (emphasis in original).

Self-serving testimony is hardly novel. Many times it is the norm. Otherwise one would likely forego calling that witness. *See*, *Ledbetter v. Good Samaritan Ministries*, 777 F.3d 955, 958 (7th Cir. 2015) ("[M]ost testimony by a party to a lawsuit is self-serving and is not to be rejected on that account."); *Salekin v. McDonough*, No. 3:21-CV-00107, 2023 WL 5538981, at *1 (M.D. Tenn. Aug. 28, 2023) ("[T]here would be little point in filing an affidavit or declaration if it was not self-serving, at least to an extent."). "[O]nly when testimony spins a 'visible fiction . . . so utterly discredited by the record that no reasonable jury would have believed it' will Plaintiff's testimony be set aside and ignored." *Corpus v. Aim Leasing Co.*, No. 3:19 CV 2250, 2021 WL 3737911, at *9 (N.D. Ohio Aug. 24, 2021) (quoting *United States v. Hughes*, 606 F.3d 311,

319 (6th Cir. 2010)). Beyond that, and assuming the witnesses are testifying based upon personal knowledge, it is for the jury to assess their credibility, including their biases and allegiances, not the Court, and certainly not the Government. Taxpayer actions are no different. *See*, *Lewis v. United States*, 336 F. App'x 535, 538 (6th Cir. 2009) ("[T]he Government claims, the normal rules of summary judgment somehow do not apply to tax cases, and 'the uncorroborated oral testimony of the taxpayer is insufficient as a matter of law to overcome summary judgment.' The cases that the Government cites do not, however, support such a position."); *United States v. Stein*, 881 F.3d 853, 856 (11th Cir. 2018) (overruling circuit precedent "to the extent it holds or suggests that self-serving and uncorroborated statements in a taxpayer's affidavit cannot create an issue of material fact with respect to the correctness of the government's assessments").

In an ideal world, perhaps, Fitzgerald would have been able to produce titles for each of the tractors that had been scrapped. However, such a world would not take into account the unrefuted testimony that, at least in some states, it is unlawful to transfer titles for such tractors.[3] Even Andrew Waite, a salvage yard operator called by the Government testified to that effect. (Doc. No. 207 at 82 (A. Aaron). And it would ignore that, contrary to some tax laws that require taxpayers to maintain records, Section 4052(f) does not require producing or keeping specific records. Indeed, Fitzgerald argues – and the Government does not dispute – that "[t]he IRS has never issued any

[3] In some states, the titles must remain at the salvage yard or wherever the carcass of the vehicle is located. In lieu of a title, Fitzgerald maintained bills of sale for the tractors and engines it purchased.

guidance telling taxpayers to keep certain records for the safe harbor[.]" (Doc. No. 212 at 4).

Next, the Government argues that the "record contains insufficient evidence that Plaintiff satisfied the Safe Harbor for 2012-2014," and "contain no evidence for the tractors sold between 2015-2017." (Doc. No. 198-1 at 5, 6). The Government continues:

> The cost of repair includes all of the costs to get the highway tractor ready for sale to an individual purchaser, other than federal, state, or local taxes [sic]. A "comparable new" highway tractor is a highway tractor which is functionally identical to the repaired highway tractor and is new. "Retail price," according to the Seventh Circuit opinion, which the Court repeatedly said it was going to follow, is the price at which a new highway tractor is sold directly to the consumer or end-user, usually an individual purchaser or small business, in the open market from a dealer ready for use. In other words, the price is what the end use of the product pays.

(Id. at 5).

The Government submits that because there was no evidence for years 2015-2017 and insufficient evidence for the years 2012-2014 as to the cost repairs performed *vis-a-vis* the cost of a new tractor, it is entitled to judgment or a new trial. The Government also asserts that it is entitled to the same relief because no evidence shows for the years in question that "the original tractor was not sold to a state or municipal government, exported out of the United States for sale, or not sold to a tax-exempt organization." *(Id.* at 7).

The Seventh Circuit decision referenced by the Government is *Schneider Nat'l Leasing, Inc. v. United States*, 11 F.4th 548 (7th Cir. 2021) wherein the court decided "two questions of first impression" concerning the 75% rule and the safe harbor exception under Section 4052(f)(1). Based upon the plain text of the statute, the Seventh Circuit held: "first, the safe harbor does not contemplate a measurement for 'repairs or modifications' apart from the 75% test Congress expressly incorporated into the statutory text; and second, the appropriate measurement for the 'retail price of a comparable new article' is the market price in ordinary, arms-length transactions." *Id.* at 554.

Even though a Seventh Circuit decision is not controlling, the parties were informed long before trial this Court found *Schneider* to be "a cogent and well-reasoned opinion" and that, "unless the parties showed compelling reasons" for not following *Schneider*, that decision would provide the "correct framework for analysis" going forward. *Fitzgerald II*, 2023 WL 3195470, at *2.[4] No such reasons were provided by either party.

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[4] In that same opinion, the parties were forewarned about how the Court viewed the presentation of proof:

> The Court finds it appropriate to pause and take a step back to consider what will be tried this summer. Even leaving aside whatever the size the universe comprising exported/local government/nonprofit and blood collector tractors is, certainly the Government cannot be seriously claiming that, to prevail, Fitzgerald will need to prove that each and every one of the thousands of tractors it repaired was taxed when new. Even a lifetime appointment would probably not allow for that to happen. Fortunately, that is not what the statute demands.

Id. at *4.

Contrary to the Government's apparent belief, evidence consists of more than just documents. Rather, evidence consists of witness testimony, exhibits allowed into evidence, the parties stipulations and facts judicially notice. *See* 6th Circ. Pattern Jury Inst. § 1.04. Based upon *all* of the evidence presented at trial, and giving Fitzgerald "the benefit of all reasonable inferences," *Rhinehimer*, 787 F.3d at 804, the Court cannot conclude that the jury got it wrong when it found, more likely than not, that Fitzgerald proved that (1) "the cost of the repair or modification to the highway tractor did not exceed 75 percent of the retail price of a comparable tractor"; and (2) "the highway tractor, when new, was taxable," as required by this Court's Jury Instruction to which the Government did not object. (Doc. No. 192 at 36).

At trial, the testimony of three individuals provided the bulk of Fitzgerald's case regarding its business: Tommy Fitzgerald, its owner; Nick Bresaw who served as Vice President of Operations, and Joe Depew, who was in-house counsel. Their testimony was consistent, straight forward, and showed that Fitzgerald had a pretty simple business model.

First, Fitzgerald would find a worn or wrecked tractor, or purchase the same from assorted sources, such as Koch Parts, salvage yards, and auction houses. Fitzgerald would then use an acetylene torch to cut out the engine, snip the attached wires and hoses, and rebuild the engine. If the transmission was salvageable, that would be cut out as well, and sent to a facility such as Eaton transmissions for rebuilding.[5] All of the

[5] Initially, Fitzgerald would receive the entire wrecked tractor in order to extract the engine. Later, it reduced costs by having the salvage yard or auction house cut out the engine (and perhaps

purchased engines were Class 8 engines,[6] meaning they could pull a gross vehicle weight of up to 80,000 pounds, *i.e.* they came from a highway tractor. *(See e.g.*, Doc. No. 205 at 142,145, 151 (T. Fitzgerald); Doc. No. 206 at 31 (T. Fitzgerald), 52-54, 63-64 (Bresaw); 173, 201, 228 (DePew)).

Next, Fitzgerald would use a glider kit from a major truck manufacturer such as Peterbilt, Kenworth, or Western Star. The rebuilt engine (and sometimes transmission to which it was "married") would then be placed into the kit, thereby producing a glider tractor. If things went as planned, Fitzgerald would be able to sell the glider tractor for an average of $8,000 profit on each unit, and the customer would be able to buy a glider tractor for far less than 75% price of a new tractor. *(See e.g.*, Doc. No. 205 at 148-49 (T. Fitzgerald); Doc. No. 206 at 55, 56, 73, 106-07 (Bresaw)).

The testimony was also consistent as to pricing. Fitzgerald generally built top-of-the-line tractors, usually with sleeper cabs. Fitzgerald's looked at the Manufacturer's Suggested Retail Price ("MSRP") for a new tractor from truck companies such as Peterbilt or Kenworth that included the accessories found in Fitzgerald's newly minted, rebuilt tractor with the same bells and whistles. *(See e.g.*, Doc. No. 205 at 169, 171 (T. Fitzgerald); Doc. No. 206 at 89-90 (Bresaw);

Self-serving though it may have been, the jury was not left with just this testimony. Not only was the

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transmission) and just ship that, leaving the seller to scrap the remainder for whatever it could get.

[6] The vast majority of Class 8 engines that Fitzgerald used were the 60 Series manufactured by Detroit Diesel. Detroit Diesel or not, the pedigree of the engine was determined on site by Clarke Diesel.

testimony subjected to the crucible of cross examination, Fitzgerald produced a lengthy spreadsheet for 2012 to 2014 setting forth it sales price compared with its cost of repairs. That spreadsheet, for example, showed that on January 11, 2012, Fitzgerald sold a Freightliner Columbia for $110,500 that, if new, would have cost $173,727, meaning the cost of the glider was 61% of a new tractor. (Def. Ex. 340 at 1). Similarly, on April 16, 2014, Fitzgerald sold a 2014 Peterbilt 389 Day Cab for $129,010, which is 58% of a new one that had an MSRP of $221,968. *(Id.* at 92). Overall, the spreadsheet suggested that Fitzgerald generally sold its trucks during this period at somewhere around 50-68% of a comparable new tractor.

The jury was also presented with a spreadsheet produced by Detroit Diesel showing the serial numbers for some 11,819 engines that it manufactured and that were used by Fitzgerald in its glider tractors. (Pf. Ex. 16). With one exception relating to a marine engines, all of the engines on the spreadsheet were Series 60, Class 8 engines, meaning they were built for use in a highway tractor. (Doc. No. 205 at 86 (Bresaw)).

Notwithstanding this and other evidence in the form of both testimony and documents, the Government insists there was no (years 2015 to 2017) – or insufficient (years 2012 to 2014) – evidence[7] showing that Fitzgerald met the safe harbor provision because it (1) erroneously relied on MSRP as a proxy for "retail price"; and (2) failed to show that the engines it purchased were not in a truck originally sold to a

[7] The evidence at trial focused on the 2012 to 2014 tax years, and little evidence was presented about the 2015 to 2017 tax years. Nevertheless, the evidence was clear that Fitzgerald's practice did not change during those years – it was purchasing engines from wrecked tractors and placing them in gliders.

municipality, a non-profit organization, a foreign company, or otherwise exempt from tax. Neither argument is persuasive.

As to the first point, the Government argues that "[t]he meaning of 'retail price' as set forth in § 4052(f) is a question of law to be determined by the Court. It is not a fact question for the jury." (Doc. No. 198-1 at 9). After making this broad pronouncement, the Government never says what "retail price" means as a matter of law perhaps because "the excise tax and the safe harbor" do not define "retail price of a comparable new article, [n]or has the IRS promulgated any implementing regulations defining th[is] term[.]" *Schneider*, 11 F.4th at 551. In the absence of such a definition, *Schneider* teaches that "'retail price' reflects the amount at which an article is sold in individual, arms-length transactions to end consumers on the open market." *Id.* at 559 (citing *Oshkosh Truck Corp. v. United States*, 123 F.3d 1477, 1480 (Fed. Cir. 1997). This is precisely what the jury was instructed: "'[r]etail price' is the price that a new highway tractor is offered to a consumer or end-user in an arms-length transaction, usually an individual purchaser or small business, in the open market from a dealer ready for use," that it did "not include any federal, state, or local taxes." (Doc No. 192 at 37). Tellingly, the Government did not object to this instruction so its argument fails for that reason as well. *See*, *Howe v. City of Akron*, 723 F.3d 651, 661 (6th Cir. 2013) (noting that a party's failure to object specifically to a jury instructions constitutes waiver, "even if the party had raised the issue in its trial brief and even raised it 'obliquely in written and oral objections to jury instructions'"); *United States v. Newsom*, 452 F.3d 593, 607 (6th Cir. 2006) (finding that party waived any challenge when he failed to object to jury instructions).

As to the second point, the Government argues that Fitzgerald did not prove that all of its glider tractors were built from wrecked tractors that were previously taxed. This is because there was at least some proof that Fitzgerald purchased engines from A&A Truck Parts that sometimes salvaged wrecked municipal tractors, and Fitzgerald may have purchased an engine or two from trucks that had been originally shipped to Mexico or Canada. On this issue, the jury was instructed:

> A highway tractor would have been taxable when it was first manufactured if the original highway tractor in combination with a trailer or semitrailer had a gross vehicle weight of 33,000 pounds or more. However, not all sales necessarily are taxable.
>
> Tractors sold to state and local governments, including municipalities, are not subject to tax, as well as sales to certain tax-exempt organizations and sales made outside of the United States.
>
> Fitzgerald is not required to show that the excise tax was actually paid or that the actual sale was subject to the tax, only that the repaired article was taxable when new.

(Doc. No. 192 at 40-41). The jury was also instructed:

> [A]lthough there are over 12,000 separate tractors at issues, it is up to you to decide whether the 75 percent test was met for each tractor or collectively for all tractors. You are free to decide that the evidence supports Fitzgerald's contention that all of its repairs met the 75 percent test, just as you are free to decide that the evidence supports the

> Government's contention that none of the repairs met the 75 percent safe harbor test. Likewise, you are free to decide that Fitzgerald only met the 75 percent test for some of the repairs. In other words, you must determine whether Fitzgerald proved for all, some, or none of the highway tractors it sold, that the cost of repair did not exceed 75 percent of the retail price of a comparable new highway tractor by a preponderance of the evidence.

(Id. at 39). Based upon these instructions, the jury could have found that some of the engines Fitzgerald rebuilt were not taxable when new, but it chose not to do so, as was its prerogative based upon the evidence.

Regardless, the instruction given to the jury was more favorable to the Government than it should have been. This is because, as this Court has previously held:

> The statute requires that the tractor be "taxable," not that it was "taxed." Specifically, it requires that the article "would be, if new taxable" but "when new was not taxable." 26 U.S.C. § 4052(f). Had Congress meant taxed as opposed to taxable, it could and should have said so. See *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409, 113 S.Ct. 2151, 124 L.Ed.2d 368 (1993) (citation omitted) ("The starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter.'"). "Taxable" means "subject to being taxed: making one liable to taxation." https://www.merriam-webster.com/legal/taxable; accord *Am.*

> *Bankers Ins. Co. of Fla. v. United States*, 265 F. Supp. 67, 73 (S.D. Fla. 1967).
>
> How is "the article" subject to being taxed? The statute says it must "be taxable under section 4051 ... or the corresponding provision of prior law[.]" 26 U.S.C. § 4052(f)(2). Section 4051, in turn, imposes a 12% excise tax on a number of articles, including "[t]ractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer," so long as it weighs more than 33,000 pounds. 26 U.S.C. § 4051(a)(1), (2). The exported/local government/nonprofit and blood collector exceptions on which the Government relies are found in an entirely different section of the tax code, specifically Section 4221(a).

Fitzgerald II, 2023 WL 3195470, at *5 (M.D. Tenn. May 2, 2023).

The evidence was undisputed that Class 8 engines are the "heart and soul" of a tractor "chiefly used for highway transportation in combination with a trailer" that weighs more than 33,000 pounds. As such, the Class 8 engines that Fitzgerald harvested came from a tractor that was subject to taxation when new. That there may have been some exemptions under a different provision of the Tax Code for trucks sold to municipalities or non-profits does not change that fact.

For all of these reasons, the Government's sufficiency of the evidence argument fails.

C. Parts Versus Article

As noted at the outset, the Safe Harbor provides that "[a]n article described in section 4051(a)(1) shall not be treated as manufactured or produced solely by

reason of repairs or modifications to the article" so long as "the cost of such repairs and modifications does not exceed 75 percent of the retail price of a comparable new article." 26 U.S.C. 4052(a). Section 4051, in turn, defines "article" as including an "automobile truck chassis"; "automobile truck bodies"; a "truck trailer and semitrailer chassis"; a "truck trailer and semitrailer bodies"; and "tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer." *Id.* § 4051(a)(1). Because Fitzgerald repaired engines and not tractors, the Government argues that Fitzgerald is not entitled to the Safe Harbor provision as a matter of law.

In advancing its argument, the Government asserts that *Schneider* proves the point.[8] There, unlike here,

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[8] The Government also relies on *Boise Nat. Leasing, Inc. v. United States*, 389 F.2d 633 (9th Cir. 1968) and *Ruan Fin. Corp. v. United States*, 765 F. Supp. 985 (S.D. Iowa 1990). *Boise* dealt with the dismantling of trucks that "had as its very purpose the permanent severance from the old truck structures and entities of some of the major components thereof and the incorporation of them as elements in other structures which were to be assembled." 389 F.2d at 636. As such, the imposition of a excise tax on the new trucks was lawful. In *Ruan*, the company "disassembled the tractors and, on an individual basis, cleaned or replaced worn or damaged parts[,] replaced engines on the vast majority of the tractors," and performed "extensive cosmetic work" where appropriate. *Ruan*, 765 F. Supp. at 988. The question in *Ruan* (which could not be decided on summary judgment) was whether the company manufactured a new truck.

As interesting as both *Boise* and *Ruan* may be, neither is helpful because both were decided before the Safe Harbor provision was enacted. Indeed, on appeal, the Eighth Circuit in *Ruan* noted that, had the Safe Harbor provision been in effect, resolution would be "quite straightforward" because that provision allows "reconditioning that results in an article worth less

Schneider National Leasing owned the fleet of tractors on which the repairs and modifications were made. Fair enough, but the Seventh Circuit concluded that there was a "broad sweep" to the phrase "repairs or modifications," that "can be extensive and substantial, and yet still qualify for the safe harbor if they satisfy the 75% test." *Schneider*, 11 F.4th at 555. (7th Cir. 2021). "A tractor, for example, might sustain major damage in a head-on collision and require a new engine and cab (perhaps bundled in a powered glider kit) to be restored to working condition. [Section] 4052(f)(1) confirms that such a large-scale 'repair' can qualify for the safe harbor so long as the cost does not exceed the 75% limit." *Id.*

"[T]he reality of what Schneider's refurbishment process looked like [was this]: a used tractor was dismantled, a few parts were recovered and combined with ones from a new glider kit, and any components left behind were scrapped." *Id.* at 556. The reality of what Fitzgerald did (at least later on when it did not buy the entire wrecked tractor) was this: a used tractor was rendered inoperable when the engine (and perhaps transmission) was removed, this was combined with a glider kit, and whatever remained was scrapped.

It appears to be the Government's position that, had Fitzgerald continued its earlier practice of buying an entire wrecked tractor, removing the engine therefrom, and coupling it with a glider kit, then the safe harbor would be met even though Fitzgerald ditched everything but the engine from the tractor. This is because Fitzgerald owned "the article," *i.e.* the tractor. However, given the reality of what Fitzgerald was

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than 75 percent of the price of a new truck." *Ruan Fin. Corp. v. United States*, 976 F.2d 452, 454 (8th Cir. 1992).

doing, this exalts form over substance and is really a distinction without a meaningful difference. A different conclusion might be appropriate if there was even a shred of evidence to suggest that the wrecked and scrapped tractor (on any part thereof) from which the engine was removed was also refurbished. There was none. Instead, there was always only one "article," the "heart and soul" and unquestionably the most costly component of which was removed to create a glider tractor that was less than 75% of a new tractor.

The Government is not entitled to judgment as a matter of law on the grounds that Fitzgerald did not repair an "article."

D. Exclusion of Dr. Li's Testimony

At the conclusion of a *Daubert* hearing, the Court ruled that Dr. Li would not be allowed to testify as an expert witness. Among other things, the Court observed:

> Throughout his testimony today and many mentions in his written report, his goal is to say that plaintiff's claims and representations aren't truthful. And that, to a large extent, explains why he can identify no standards in the economic field to support his opinions.
>
> *Daubert* requires much more than a witness come in with a PhD, with an impressive work history, and simply give opinions because he says so. Indeed, that kind of analysis has been rejected by many courts. What he requires and what I was looking for from Dr. Li is some type of economic principles, accepted within the field, that he brought to bear in coming to his opinions and then let cross-examination and the wisdom of the jury, based upon the

> law that the Court will provide the jury, to determine what weight to give to it.
>
> But his inability to identify persuasively or credibly any type of economic principles he applied regretfully leads the Court to conclude that he's simply not satisfying the standard and I will say the low bar in Daubert for the Court to recognize him as an expert under 702.
>
> At the pretrial conference . . . , I identified the first part of this trial as the safe harbor analysis. Reading Dr. Li's written report, listening to his testimony here today and then analyzing the safe harbor analysis statute, the Court simply cannot find anything in his report that's going to be relevant or based upon reliable standards that will go – that will be helpful to the jury on the issue of the cost of repair or to modify an article that is less than 75 percent of the retail price of a comparable new article. Nothing he says is going to help the jury make a determination on whether or not the repaired or modified article, if new, is taxable under Section 4051. And nothing in his report and his testimony will help the jury determine was the original article not taxable for the purpose of Section 4051 or another provision. Without that kind of analysis supported by economic principles that have been accepted, even if Dr. Li meets this standard of qualifications based on his doctorate and work experience, the Court finds him lacking on the test of relevancy and reliability.

(Doc. No. 182 at 120-22).

The Government insists the exclusion of Dr. Li was error warranting a new trial because Fitzgerald "did not dispute Dr. Li's qualification as an expert"; "Dr. Li's analysis of the records went directly to [Fitzgerald's] credibility"; and "[t]he Court's gratuitous attacks upon the veracity and credibility of both Dr. Li and counsel for the United States were without reason or support" and "[a]s such, the court had no basis for its attack upon the reliability of Dr. Li's proposed testimony or his expert report." (Doc. No. 198-1 at 13, 15).

Whether Fitzgerald agreed that Dr. Li qualified as an expert is beside the point. *Daubert* and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) "placed the district courts in the role of 'gatekeeper,' charging them with evaluating the relevance and reliability of proffered expert testimony with heightened care." *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 294-95 (6th Cir. 2007). "[T]he Supreme Court also recognized that implicit in the rule is a district court's gatekeeping responsibility, 'ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.'" *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 276 (6th Cir. 2014) (quoting *Daubert*, 509 U.S. at 597).

"Daubert attempts to strike a balance between a liberal admissibility standard for relevant evidence on the one hand and the need to exclude misleading 'junk science' on the other," requiring a trial court to "consider whether the reasoning or methodology underlying the testimony is scientifically valid." *Best v. Lowe's Home Centers, Inc.*, 563 F.3d 171, 176 (6th Cir. 2009). "There is no 'definitive checklist or test' for striking this balance, but the Supreme Court in *Daubert* did identify four factors that normally bear on the inquiry:

> whether a theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique and the standards controlling the technique's operation; and (4) whether the theory or technique has been generally accepted in the particular scientific field."

United States v. LaVictor, 848 F.3d 428, 441 (6th Cir. 2017) (quoting *United States v. Semrau*, 693 F.3d 510, 520 (6th Cir. 2012)). The Court analyzed each of those factors in deciding to exclude Dr. Li.

To this day, Dr. Li's reasoning and/or methodology has yet to be cogently explained. He began his *Daubert* hearing testimony by stating that he was an expert in the "transactional analysis field," (Doc. No 182 at 73), even though that phraseology was not used in his expert report. (Doc. No. 182 at 73). Next, during a colloquy with the Court, Government's counsel suggested that "there is a concept that is recognized within the courts of testing economic substance," and Dr. Li then claimed that is what he did in relation to the samples he "tested." *(Id.* at 81). Later, during cross-examination, Dr. Li stated that he conducted a "forensic accounting analysis," even though he admitted he was not a forensic accountant. *(Id.* at 82). Finally, in its brief seeking a new trial, the Government contends that Dr. Li "was offered as an expert in economics and data analysis." (Doc. No. 19801 at 13).

As a part of his "method," Dr. Li performed text searches utilizing software. His "theory" – based on the premise provided to him by the Government – was that the highway tractors in the universe he was considering had to have been taxed. Upon review,

Dr. Li could not make that determination because the records supplied by Fitzgerald did not contain the titles for the tractors. *(Id.* at 85). Later, Dr. Li attempted to retreat from that position, claiming that his instruction from the Government was that "ownership was required," whether that be "reflected in the title or maybe purchase receipt[s]." *(Id.* at 89).

Whatever his methodology, it was not the "testing of economic substance" as argued by the Government. "The economic substance doctrine allows courts to enforce the legislative purpose of the [Tax] Code by preventing taxpayers from reaping tax benefits from transactions lacking in economic reality." *Klamath Strategic Inv. Fund ex rel. St. Croix Ventures v. United States*, 568 F.3d 537, 543 (5th Cir. 2009) (citing *Coltec Indus., Inc. v. United States*, 454 F.3d 1340, 1353–54 (Fed. Cir. 2006)). "The doctrine permits the IRS to 'ignore for tax purposes any sham transaction, *i.e.*, a transaction designed to create tax benefits rather than to serve a legitimate business purpose.'" *Est. of Kechijian v. Comm'r of Internal Revenue*, 962 F.3d 800, 808 (4th Cir. 2020) (quoting *Hines v. United States*, 912 F.2d 736, 739 (4th Cir. 1990)). In essence, "[t]he economic substance doctrine seeks to distinguish between structuring a real transaction in a particular way to obtain a tax benefit, which is legitimate, and creating a transaction to generate a tax benefit, which is illegitimate." *Stobie Creek Invs. LLC v. United States*, 608 F.3d 1366, 1375 (Fed. Cir. 2010) (citing *Coltec*, 454 F.3d at 1357). "Such transactions include those that have no business purpose beyond reducing or avoiding taxes, regardless of whether the taxpayer's subjective motivation was tax avoidance." *Id.*

Fitzgerald's placing repaired engines into glider kits and then reselling the combined unit as a glider

tractor was not a "sham transaction" serving "no legitimate purpose." Whether, in doing so, Fitzgerald met the safe harbor provision is a question that Dr. Li did not and could not address utilizing his expertise as an economist. The Government does not, and cannot, argue otherwise.

Regardless, the exclusion of Dr. Li was harmless evidence given the evidence presented at trial. Dr. Li's opinion was essentially that Fitzgerald (1) bought engines that it repaired and placed into glider kits and (2) did not have titles to the tractors from which the engines came. Beyond simply looking at documents, the Government has not shown how Dr. Li's education, training and/or experience led him to these less-than-startling conclusions that were admitted to by Fitzgerald's own witnesses.

Finally, the Court's did not make gratuitous comments or render such opinions in relation to Dr. Li. Those comments were based upon Dr. Li's report and his vacillating and wabbling answers to this Court's questions.

A new trial based upon the exclusion of Dr. Li will not be granted.

E. Limitation on MacKay's Testimony

In an underdeveloped argument covering less than a page, the Government next claims that this Court erred in limiting MacKay's opinion that Fitzgerald's glider tractors sold for more than 75% of a comparable new tractor. The Government argues that it was "an abuse of discretion" for the Court to order (1) "on the eve of trial, the production of communications with the dealer from whom [Mr. MacKay] had obtained comparable sales data"; and (2) "the revision of Mr. MacKay's expert report and the scope of his testimony

when the Court did not treat [Fitzgerald] the same." (Doc. No. 198-1 at 16).

"An expert is free to give a bottom line, provided that the underlying data and reasoning are available on demand," *Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002), and there was nothing unique about the Court requiring Mackay to provide underlying data. Besides, whatever MacKay was required to produce in anticipation of trial, has no bearing on the issue of whether MacKay's testimony was wrongfully limited at trial as argued by the Government.

As for requiring that MacKay's report be revised, the Court does not understand how Fitzgerald was treated any differently because Fitzgerald did not call an expert witness so there was no expert report to revise. In any event, and for at least two reasons, it was not an abuse of discretion for the Court to require MacKay to revise his report. First, this Court's Local Rule 39.01(c)(5)(E) requires than an expert's "written statement" contain and be limited to "every material fact and opinion" as to which he or she is going to testify. Second, assuming it is the proper basis for expert opinion, MacKay's proposed testimony about the "general background and history of the glider tractor industry" (Doc. No. 198-1 at 16) had no relevance to the issue of whether Fitzgerald was entitled to the safe harbor provision. *See*, *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 528 (6th Cir. 2008) (observing that, among other things, an expert's testimony under Rule 702 "must be relevant, meaning that it will assist the trier of fact to understand the evidence or to determine a fact in issue").

A new trial is not warranted based upon the supposed limitation of MacKay's testimony.

F. Comments and Testimony About Prior Audits

The Government argues that the comments and testimony about prior audits was irrelevant and highly prejudicial because the issue of equitable estoppel was scheduled to be addressed in the second phase of the trial, if necessary. It goes on to assert that Fitzgerald "in effect presented an equitable case without any instructions to the jury on the heavy burden it faced with an equitable estoppel claim." (Doc. No. 198-1 at 20).

As a preliminary matter, the Government has waived this claim. After Fitzgerald argued in its opening statement that "the IRS audited Fitzgerald consistently, starting in 1991, and found that Fitzgerald had met the safe harbor," (Doc. No. 205 at 123), the Government did not object, even though Fitzgerald repeated the assertion throughout its opening statement. To the contrary, the Government joyfully jumped on the bandwagon, asserting that, "[t]he IRS never told Mr. Fitzgerald, 'what you're doing is fine.' They never did that. The IRS, you'll see, continued to assess Mr. Fitzgerald time and time again." *(Id.* at 29). Thereafter, when Tommy Fitzgerald – the very first witness – testified he had been subjected to "four previous audit" and that the IRS essentially agreed with him that what he was doing was fine, *(Id.* at 152), the Government did not object. Nor did it object when Alan Wainscott testified that his employer (Thompson Trucks) had been audited four times by the IRS in relation to gliders sourced from Fitzgerald and no issue was found during the audits. (Doc. No. 206 at 165-66). And so on, through closing arguments wherein the Government argued that "those audits had determined that Mr. – the taxpayer here, Fitzgerald, owed the tax," and that Fitzgerald

managed to "fool" an appeals officer. (Doc. No. 208 at 190-91, 193). Further, regarding the audits, the Government argued, "not once did the examining agent agree with Fitzgerald's position. Not once did he say, 'Oh, you're right.' Not once. There's no evidence. It's just counsel's argument saying the IRS agreed with [Fitzgerald]. They didn't." *(Id.* at 199).

The Court recognizes that some view objecting during opening statements or closing arguments to be bad form. However, the failure to object means that the issue is not preserved. *See*, *Smego v. Mitchell*, 645 F. App'x 523, 527 (7th Cir. 2016) (collecting cases); *State Auto Prop. & Cas. Co. v. Matty*, 438 F. App'x 820, 822 (11th Cir. 2011); *Rosemann v. Roto-Die, Inc.*, 377 F.3d 897, 902 (8th Cir. 2004). Moreover, even if the Government thought it bad form to object during opening, it could have requested a sidebar at the close of opening statements to address the matter at that time. At a minimum, the Government should have timely, specifically, and clearly objected during trial when the audits were raised. The Court does not recall the Government doing so.[9]

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[9] The closest the Government came was during Tommy Fitzgerald's testimony when it asserted that the parties agreed to bifurcate the case and would "not go into the estoppel area as to what the IRS" allegedly told Fitzgerald. (Doc. No. 205 at 160). By then, according to the Court's count, the jury had heard about Fitzgerald being audited at least twenty times. This is hardly timely.

Moreover, in reply to Fitzgerald's argument that the issue is waived, the Government does not argue to the contrary, let alone point to where in the record it preserved the issue. Instead, it argues that the "prejudicial testimony turned the trial into a one-sided trial of the IRS based on an ill-defined and unproven estoppel claim." (Doc. No. 216 at 5).

Regardless, evidence can go to more than one issue and the evidence about prior audits went not only to the equitable estoppel claim, but also Fitzgerald's thinking. Throughout trial, the Government painted Fitzgerald as a recalcitrant, unwilling to do what it was told. Prior approval of Fitzgerald's practices by the IRS goes not only to that issue but also to Fitzgerald's explanation of why it continued to utilize the same business practices after the audits. *See Trucks, Inc. v. United States*, 234 F.3d 1340, 1342 (11th Cir. 2000) (stating, in tax refund suit, that "evidence about the state of mind of the company's president, who made many of the decisions at issue here, is considered direct evidence as to the reasonableness of h[is] decisions, and will not be seen as merely self-serving statements").

A new trial will not be granted based upon the jury hearing that Fitzgerald had been repeatedly audited by the IRS in the past.

G. Exclusion of Exhibits

Finally, the Government complains that this Court improperly excluded four exhibits: Government's Exhibits 50, 51, 102 and 234. However, the decision of whether to allow the introduction of specific exhibits is a matter of discretion, *United States v. Nixon*, 694 F.3d 623, 634 (6th Cir. 2012), one which the Government has not shown was abused in this case.

Exhibit 50 was an email and invoice from Armando Fuentes, and Exhibit 51 was an invoice from Tractorfacciones, both of which the Government sought to introduce to impeach Tommy Fitzgerald's testimony that he only bought engines from salvage yards in the United States. At first, the Government sought to introduce the documents through Tommy

Fitzgerald, but he had never seen the documents before. Next, the Government sought to introduce the documents through Michael Aaron, a former Fitzgerald employee called by the Government, but he did not recognized them either. Accordingly, the documents were excluded for lack of foundation. The Government now argues this was error because the documents were admissible as business records or a party admission. These arguments fail for three reasons.

First, the arguments are new and are therefore waived. *See United States v. Sadler*, 24 F.4th 515, 562 (6th Cir. 2022) (stating that plain error review applies where an objection is raised that is different from the one presented at trial). Second, the business records exception to the hearsay rule is only "available if the evidence to be introduced was (1) made in the course of a regularly conducted business activity; (2) kept in the regular course of [ ] business; (3) a result of a 'regular practice of the business' to create the documents; and (4) 'made by a person with knowledge of the transaction or from information transmitted by a person with knowledge," *United States v. Laster*, 258 F.3d 525, 529 (6th Cir. 2001) (citation omitted), none of which was established by the Government through Fitzgerald or Aaron. Third, "[s]tatements by a party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, are not hearsay," but "the party seeking admission 'bears the burden of establishing the proper foundation for the admissibility of the statements,'" *Thompson v. City of Lansing*, 410 F. App'x 922, 930 (6th Cir. 2011) (citation omitted), which, again, the Government did not do.

Exhibit 102 was an email from a potential customer (Chuck Clark) to a Fitzgerald sales representative

(Jim Bourke), complaining that the price Fitzgerald quoted for a Peterbilt glider was comparable to the price of a new Freightliner. When asked the relevance, the Government argued that it tended to show that Fitzgerald's reliance on MSRP as a proxy for comparison was baseless. The Court denied admission of Exhibit 102 because it was cumulative to plenty of other evidence about the propriety of Fitzgerald's use of MSRP as a benchmark. The Government does not even address the cumulative nature of this evidence in its Motion for a New Trial. Regardless, the Court finds no error. *See Jones v. Wiseman*, 838 F. App'x 942, 949 (6th Cir. 2020) ("[W]hile Rule 403 places a thumb on the scale in favor of admission of relevant evidence by requiring that the probative value of the evidence be substantially outweighed a listed danger, the rule ultimately calls for a weighing. And the upshot is that evidence that is only slightly probative is more susceptible to exclusion under rule 403.").

Lastly, Exhibit 234 was an email from Bresaw to Jamie Cooke attaching correspondence from Larry Hyatt, Fitzgerald's former accountant. That correspondence dealt with potential settlement of the potential penalty during the protest of an audit and was therefore potentially inadmissible under Federal Rules of Evidence 408. However, the Court ultimately excluded the exhibit under Rule 401 as not relevant and likely to confuse issues because the IRS conceded the audit at issue.

Without addressing this Court's reason for excluding Exhibit 234, the Government now argues that it was admissible as a party admission and/or a business record. Even if that is true, the argument is waived because it was not raised at trial. In any event, and as previously noted, those exceptions to the hearsay rule

require that an appropriate foundation be laid which the Government did not even attempt to do.

The Government is not entitled to a new trial based upon the allegedly erroneous exclusion of Exhibits 50, 51, 102 and 234.

IV. Conclusion

On the basis of the foregoing, the Government's Motion for Judgment as a Matter of Law or New Trial (Doc. No. 198) will be denied. Its Motion to Redact (Doc. No. 195) will also be denied.

An appropriate Order will enter.

/s/ Waverly D. Crenshaw, Jr.
WAVERLY D. CRENSHAW, JR.
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 24-5078

FITZGERALD TRUCK PARTS AND SALES, LLC,
fka Fitzgerald Kit Trucks and Sales, LLC

Plaintiff-Appellee

v.

UNITED STATES OF AMERICA

Defendant-Appellant

ORDER

BEFORE: BATCHELDER, Circuit Judge; STRANCH, Circuit Judge; READLER, Circuit Judge

Upon consideration of the petition for rehearing filed by the appellee,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT
Kelly L. Stephens, Clerk

/s/ Kelly L. Stephens

Issued: May 21, 2025

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

No. 2:20-cv-00026

FITZGERALD TRUCK PARTS AND SALES, LLC,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION

This is yet another chapter in the continuing saga of Fitzgerald Truck Parts and Sales, LLC's alleged liability for excise tax on thousands of glider semi-trucks sold between 2012 and 2017. The Court has previously set forth the nuts and bolts of the underlying dispute as follows:

> This is a case about glider semi-trucks and, more particularly, whether excise taxes are properly imposed on the sale of those trucks. A glider truck is built from a kit. Glider kits consisting of new tractor parts, including such things as the cab, frame, sheet metal, mounting brackets and steering gear, are produced by original equipment manufacturers like Peterbilt, Kenworth, Freightliner, and Western Star. Powertrains and other necessary parts are then added and the

> glider trucks are offered for sale, usually at a price that is less that 75% of the cost of a new truck.
>
> Fitzgerald Truck Parts and Sales, LLC ("FTPS") is a glider kit assembler, and has been for 30 years. (Doc. No. 1, Complaint ¶ 13). FTPS's gliders "begin as worn or wrecked highway tractors, the engines and transmissions of which are capable of being repaired (i.e., rebuilt)." (Id. ¶ 18). When a glider truck is assembled and sold to a customer (usually an independent owner-operator or a small to mid-size trucking fleet), FTPS retains a copy of the previously taxed tractor's title. (Id. ¶¶ 18, 21).

Fitzgerald Truck Parts & Sales, LLC v. United States, 391 F. Supp. 3d 794, 795 (M.D. Tenn. 2019) *(Fitzgerald* I).

Under the Internal Revenue Code, a 12% federal excise tax is imposed "on the first retail sale" of "tractors of the kind chiefly used for highway transportation in combination with a trailer or semi-trailer." 26 U.S.C. § 4051(a)(1). The code also contains a safe harbor provision that states:

> (f) Certain repairs and modifications not treated as manufacture
>
> > (1) In general
> >
> > An article described in section 4051(a)(1) shall not be treated as manufactured or produced solely by reason of repairs or modifications to the article (including any modification which changes the transportation function of the article or restores a

> wrecked article to a functional condition) if the cost of such repairs and modifications does not exceed 75 percent of the retail price of a comparable new article.

26 U.S.C. § 4052(f)(1).

Against this backdrop, Fitzgerald filed a motion for partial summary judgment in an earlier case, Docket No. 2:19-cv-00008, wherein

> Fitzgerald claimed that judicial economy would be served by deciding the threshold "question of the proper interpretation of the scope and meaning of the § 4052(f)(1) safe harbor rule as applied to its worn or wrecked repaired [sic] with glider kits." (Doc. No. 55 at 4). From its perspective, "the safe harbor rule sets forth a bright-line, purely mathematical test based on a comparison between the cost of repairs to the worn or wrecked tractor and the retail price of a comparable new tractor," as opposed to what it characterizes as the Government's "parts and pieces" test. In Fitzgerald's view, resolution of this issue would effectively decide Count One either in favor of the Government (under the parts and pieces test), or narrow the scope of discovery were a bright-line math test appropriate.

Fitzgerald Truck Parts & Sales, LLC v. United States, No. 2:19-CV-00008, 2020 WL 12893862, at *2 (M.D. Tenn. Sept. 25, 2020) *(Fitzgerald II).* The Court denied the motion after finding it improvidently granted. That case was then consolidated into this action and the earlier case was administratively closed. (Doc. No. 43).

Now before the Court is the Government's Revised Motion for Summary Judgment (Doc. No. 128). In it, the Government argues that Fitzgerald cannot (1) meet its burden to qualify for the safe harbor exemption; (2) prove its equitable defenses to liability; or (3) prevail on its Administrative Procedures Act ("APA") challenge to IRS Notice 2017-5. The Government also argues that Fitzgerald is liable for the excise taxes on its tractors, as well as assorted penalties for not having paid them when allegedly due.

I.

Prior to reaching the Government's argument, a bit of further background is necessary. After the Court denied Fitzgerald's Motion for Partial Summary Judgment in the earlier case, the Seventh Circuit issued an opinion in *Schneider Nat'l Leasing, Inc. v. United States* and decided "two questions of first impression concerning a federal excise tax on heavy trucks and the scope of a statutory safe harbor." 11 F.4th 548, 549 (7th Cir. 2021). Although *Schneider* is not controlling, it is a cogent and well-reasoned opinion that could hardly be more one point. Consequently, at the status conference on January 27, 2023, the Court informed the parties that it was inclined to follow that case, unless the parties showed compelling reasons for it not to do so. The Government was also granted permission to file two partial summary judgment motions, "one relating to the 75% rule under the analysis adopted by the Seventh Circuit in *Schneider[,]*" and the other related to the equitable estoppel and APA claims raised by Fitzgerald. (Doc. No. 108 at 1). Since then, the Court has not been provided with anything from which it could conclude that *Schneider* does not provide the

correct framework for analysis and the Court finds that it does and will in the life of this case.

A.

The issues of first impression addressed in *Schneider* both relate to the 75% rule and the safe harbor exception under Section 4052(f)(1) at issue in this case. Based upon the plain text of the statute, the Seventh Circuit found: "first, the safe harbor does not contemplate a measurement for 'repairs or modifications' apart from the 75% test Congress expressly incorporated into the statutory text[.]" *Id.* at 544. Indeed, the language of Section 4052 allows repairs to be "extensive and substantial," and can include the use of "a glider kit – so long as the taxpayer stays within the 75% test." *Id.* at 556. In short, "Congress's establishment of the 75% limit as a condition for qualifying for the safe harbor means that the question whether a repair or a manufacture occurred is not answered by looking at what replacement parts—which ones or how many—were used as part of refurbishing. What marks the line between 'repairs or modifications' and 'manufacture' is the 75% cost measurement." *Id.* at 555.

B.

The court in *Schneider* also decided "second, the appropriate measurement for the 'retail price of a comparable new article' is the market price in ordinary, arms-length transactions." *Id.* at 544. As to what this means, the Seventh Circuit wrote:

> Congress did not define the "retail price of a comparable new article" in the § 4052(f)(1) safe harbor. Nor do the implementing regulations supply any definition. Regardless, Congress elected to use the term "retail

price," and we "ordinarily assume, 'absent a clearly expressed legislative intention to the contrary,' that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" *Jam v. Int'l Fin. Corp.,* —— U.S. ——, 139 S. Ct. 759, 769, 203 L.Ed.2d 53 (2019) (quoting *Am. Tobacco Co. v. Patterson,* 456 U.S. 63, 68, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982)).

The plain meaning of the noun "retail" is "the sale of commodities or goods in small quantities to ultimate consumers," and the adjective form of "retail" means "of, relating to, or engaged in the sale of commodities at retail." Retail, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 999; see also Retail, BLACK'S LAW DICTIONARY 1573 (defining retail as "[t]he sale of goods or commodities to ultimate consumers, as opposed to the sale for further distribution or processing"). We also know that the term "price" is "the amount of money given or set as consideration for the sale of a specified thing." Price, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 924; see also Price, BLACK'S LAW DICTIONARY 1439 (defining price as "[t]he amount of money or other consideration asked for or given in exchange for something else; the cost at which something is bought or sold").

Reading the two words together, then, "retail price" reflects the amount at which an article is sold in individual, arms-length transactions to end consumers on the open market. *Accord Oshkosh Truck Corp. v.*

> *United States,* 123 F.3d 1477, 1480 (Fed. Cir. 1997) ("When a manufacturer sells directly to the end-user, i.e. at a retail sale, the price at which it sells is the 'retail price' as that is the price at which these items are being sold in the marketplace.").

Schneider, 11 F.4th at 559.

II.

Although the Government has long taken the position that the 75% rule should be based upon the percentage of parts and pieces used to repair or modify, it argues here that, even under the rules announced in *Schneider,* summary judgment is warranted. It begins by placing heavy reliance on the expert report of Stuart MacKay for the proposition that Fitzgerald incorrectly relies on the MSRP (manufacturers suggested retail price) as the benchmark for making the 75% calculation.

In his 87-page report, MacKay explains that a survey of the trucking industry in which Fitzgerald competes shows that tractors usually sold below the MSRP, sometimes significantly so. For example, Freightliner Cascadia models that had an MSRP of $182,000 to $195,000 generally sold for somewhere around $108,000 to $112,000. (Doc. No. 129 at 12). Similarly, Peterbilt 389 models that listed for $182,000 to $212,000 actually sold for between $126,000 and $131,000. *(Id.;* Doc. No. 129-3, ¶¶ 89-96). MacKay further states that a prospectus prepared for Fitzgerald when it contemplated selling its business further supports the conclusion that the MSRP does not equate with the actual retail price.

Fitzgerald's own records, according to MacKay, show that its cost of repairing and modifying tractors

is more than the 75% permitted by Section 4052(f). No. 192 at 11). Not only did MacKay's own review of Fitzgerald's records suggest that Fitzgerald's retail prices were in excess of 90% of the actual retail sales prices of comparable new tractors, the prospectus prepared for Fitzgerald suggests as much. (Id.). For example, the prospectus contains a chart labeled "Glider Kit vs. New Truck Cost Comparison" that lists the MSRP for a "New Truck" as being $180,00, the "Sales Price" being $140,000 and the price of a "Glider" being $120,000. (Doc. No. 129-7 at 20). While 75% of $180,000 is $135,000, 75% of $140,000 is $105,000. Hence, if the actual "retail price" is the "Sales Price," as MacKay submits it should be, then Fitzgerald's selling price is 85.71% of that price.[1]

Without question, MacKay's opinions have facial appeal. Then again, so does Fitzgerald's assertion that MSRP should serve as the benchmark, if for no other reason than, by definition, it "suggest[s]" a "retail price." It also accounts for some variations that MacKay's formulation might not, including premium and additional components not found in a base model. Then again, maybe the "Truck Blue Book" mentioned in passing in *Schneider* should set the benchmark because, according to plaintiff's expert there, it "provides retail price information by aggregating data from actual transactions to determine the ordinary price paid by consumers in the open market." 11 F.4th at 559. Beyond referencing the "Blue Book" as a potential source, the Seventh Circuit in *Schneider* did not attempt to define "retail

[1] Obviously, there must be some accounting for profit, but for the sake of this argument the Court will assume that, all things being equal, profits of roughly the same amount were calculated into both the "Sales Price" and the "Glider" price.

price" other than to say that the "'retail price of a comparable new article' is the market price in ordinary, arms-length transactions," to wit, "the price at which a comparable tractor could be acquired in the open market." 11 F.3th at 554, 651.

Mackay, as the Government's proferred expert, is certainly entitled to his opinions but that is not the be-all and end-all of the matter. To be sure, and as the Government points out, "the Sixth Circuit allows an expert report at summary judgment as long as it is more than 'a conclusory assertion about ultimate legal issues' and meet the standards of Fed. R. Civ. P. 56 and Fed. R. Evid. 702." (Doc. No. 134 at 1 (quoting *Brainard v. Am. Skandia Life Assurance Corp.,* 432 F..3d 655, 663 (6th Cir. 2005)). But, *Brainard* does not hold or even intimate that an expert opinion is to be given determinative weight, or that an expert opinion can usurp the jury's fact finding role. Quite the contrary, the Sixth Circuit in *Brainard* upheld the trial court's decision to discount an expert's testimony when ruling on summary judgment. This is hardly surprising because the "credibility of an expert witness and the weight to give h[is] testimony are matters entrusted to the trier of fact." *Burgett v. Troy-Bilt LLC,* 579 F. App'x 372, 381 (6th Cir. 2014). Even though the Supreme Court in *Daubert v. Merrell Dow Pharms., Inc.* placed a gatekeeping role on trial judges under Rule 702, it did not supplant the adversary role of the jury: "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert,* 509 U.S. at 579, 596 (1993). The same holds true for "shaky" lay testimony that Fitzgerald may seek to introduce through its corporate representatives.

The Government's second argument under the safe harbor provision fails as well. The statute provides that the safe harbor will "not apply if the article (as repaired or modified) would, if new, be taxable under section 4051 and the article when new was not taxable under such section or the corresponding provision of prior law[.]" 26 U.S.C. § 4052(f)(2). Based on this language, the Government argues that summary judgment is warranted because Fitzgerald cannot show that the "'repaired tractor,' when new, was taxable." (Doc. No. 129 at 13). The Government notes that tractors exported out of the United States are not taxed, nor are excise taxes paid on tractors initially purchased by local government, nonprofit educational organizations, or qualified blood collectors. *(Id.* at 14). It then argues that "plaintiff cannot trace the remanufactured transmissions and rear axles installed," and "none of plaintiff's records demonstrate that the repaired tractor, when new was taxable." (Id.).

At this point, the Court finds it appropriate to pause and take a step back to consider what will be tried this summer. Even leaving aside whatever the size the universe comprising exported/local government/nonprofit and blood collector tractors is, certainly the Government cannot be seriously claiming that, to prevail, Fitzgerald will need to prove that each and every one of the thousands of tractors it repaired was taxed when new. Even a lifetime appointment would probably not allow for that to happen. Fortunately, that is not what the statute demands.

The statute requires that the tractor be "taxable," not that it was "taxed." Specifically, it requires that the article "would be, if new taxable" but "when new

was not taxable." 26 U.S.C. § 4052(f). Had Congress meant taxed as opposed to taxable, it could and should have said so. *See Good Samaritan Hosp. v. Shalala,* 508 U.S. 402, 409 (1993) (citation omitted) ("The starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter.'"). "Taxable" means "subject to being taxed: making one liable to taxation." *https://www.merriam-webster.com/legal/taxable;* accord *Am. Bankers Ins. Co. of Fla. v. United States,* 265 F. Supp. 67, 73 (S.D. Fla. 1967).

How is "the article" subject to being taxed? The statute says it must "be taxable under section 4051 . . . or the corresponding provision of prior law[.]" 26 U.S.C. § 4052(f)(2). Section 4051, in turn, imposes a 12% excise tax on a number of articles, including "[t]ractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer," so long as it weighs more than 33,000 pounds. 26 U.S.C. § 4051(a)(1), (2). The exported/local government/nonprofit and blood collector exceptions on which the Government relies are found in an entirely different section of the tax code, specifically Section 4221(a).

In response to the Government's Motion for Summary Judgment, Fitzgerald has submitted declarations from Tommy Fitzgerald, a partner in the family owned business, and from Nick Bresaw, a former Vice President of the company. Both declare that it was their understanding that the engines Fitzgerald used in its glider kits were extracted from worn or wrecked tractors that they understood were taxable, and that its business records would confirm as much. (Doc. Nos. 131-2, -3). Obviously, these statements are conclusory and cross-examination at trial

will be robust. On the other hand, there is nothing before the Court that suggests that the worn or wrecked tractors from which the engines came would not have been taxable. In any event, Fitzgerald is seeking to enforce a subpoena in the Eastern District of Michigan requiring Detroit Diesel to produce engine records that would presumably show that the original tractors into which the engines were installed would have been taxable. (Doc. No. 131-14, Kendall C. Jones Decl. ¶ 7). So, it appears, that the tax-paying jurors will have evidence to make a decision.

The Government's Motion for summary judgment on Fitzgerald's safe harbor claims will be denied.

III.

Next, the Government seeks summary judgment on Fitzgerald's equitable estoppel claim. There, Fitzgerald alleges that, even if it owes excise taxes, it should be relieved of liability because of the Government's vacillating positions over time.

It appears undisputed that the IRS previously audited dozens of Fitzgerald's quarterly returns and found that the safe harbor applied to its glider kit in accordance with Revenue Ruling 91-27. According to Tommy Fitzgerald:

> 43. The IRS conducted excise tax audits for all four quarters for 1996, 1997, 2005, 2006, 2007, 2008, 2009, 2010, and the first quarter of 2011, and it was ultimately determined that Fitzgerald's sales of glider tractors met the section 4052(f) safe harbor requirements.

> 44. In none of the audits prior to the years in issue did the IRS tell Fitzgerald that its books and records did not substantiate compliance with the safe harbor statute.
>
> 45. In no audits did the IRS ever inform Fitzgerald that its business records were incomplete or inaccurate.
>
> 46. In no audits did the IRS ever inform Fitzgerald that the worn or wrecked tractors from which engines were extracted would not have been taxable, if new, and in all audits the IRS never determined that any of the worn or wrecked tractors would not have been taxable.
>
> 47. In no audits did the IRS ever inform Fitzgerald that it must have title to the worn or wrecked tractors, and in all audits the IRS never determined that title or ownership of the worn or wrecked tractors was required.

(Doc. No. 131-2, Fitzgerald Decl. ¶¶ 43-47). Joseph DePew, who was Fitzgerald's general counsel from early 2017 through 2021, and who represented Fitzgerald before the IRS from 2005 through 2017, also states "that the IRS agreed that the safe harbor applied for 2006 to 2008 and 2008 to 2011, with the exception of taxes owed on a few dump trucks." (Doc. No. 131-4, Depew Decl. ¶ 48).

Sometime in the 2013 to 2014 time-frame, however, the IRS apparently began backing away from Revenue Ruling 91-17. There followed a hiatus in glider truck industry audits, as well as a cessation of private letter rulings on the application of the safe harbor to glider tractor sales. *(See id.* ¶¶ 9-10). Then

came IRS Notice 2017-5 that "provide[d] interim definitions of the terms 'chassis' and 'body' for purposes of § 4051(a)(1) and for purposes of applying the safe harbor provision in § 4052(f)(1)." Interim Guidance, 2017-5 I.R.B. 779 (2017). Among other things, the Notice provided that the safe harbor provision only applies to a § 4051(a)(1) article that "has been previously taxed" (id.), instead of the words selected by Congress of being simply taxable.

This is not the first time the Court has addressed equitable estoppel in this case. In the context of the Government's motion to dismiss before the two cases were consolidated, the Court noted that, while a litigant has a tough row to hoe in attempting to estop the Government, Fitzgerald stated a plausible claim. Now that the matter is being reviewed on summary judgment, the Court is convinced that the question of equitable estoppel is for the jury because the core facts supporting it have not changed.

In its earlier ruling, the Court set out the law governing equitable estoppel against the Government:

> "'Estoppel is an equitable doctrine which a court may invoke to avoid injustice in particular cases.'" *Michigan Exp., Inc. v. United States,* 374 F.3d 424, 427 (6th Cir. 2004) (quoting *Fisher v. Peters,* 249 F.3d 433, 444 (6th Cir. 2001)). "'[T]he traditional elements of equitable estoppel are: (1) misrepresentation by the party against whom estoppel is asserted; (2) reasonable reliance on the misrepresentation by the party asserting estoppel; and (3) detriment to the party asserting estoppel.'" *Id.* (quoting *LaBonte v. United States,* 233 F.3d 1049,

> 1053 (7th Cir. 2000)). Because, as [the Supreme Court] confirmed, the government may not be estopped on the same terms as other litigants, "'[a] party attempting to estop the government bears a 'very heavy burden' in sustaining its argument.'" *Id.* (quoting *Fisher,* 249 F.3d at 444). "At a minimum, the party must demonstrate some 'affirmative misconduct' by the government," which is "more than mere negligence" and requires an intentional act "that either intentionally or recklessly misleads the claimant." *Id.*

Fitzgerald I, 391 F. Supp. at 799. Fitzgerald has more than demonstrated the minimum evidence for a jury to determine whether it was intentionally or recklessly misled by the Government.

In its opening brief, the Government spends pages trying to explain why, "on closer inspection," Fitzgerald could not rely on "the substance or outcomes" for "exams for 1996-1997, 2005-2006, and 2008-2011" to support "an exemption from tax in 2012-2017." (Doc. No. 129 at 16). All things being equal, why couldn't a jury find that Fitzgerald relied on those audits? After all, a jury could reasonably conclude that it's a bit much to ask a taxpayer to revisit an issue when it has repeatedly been given the thumbs-up audit after audit, after audit.

Attempting to avoid a jury deciding the question, the Government submits there are many reasons why Fitzgerald should not have relied on the earlier audits. For example, the Government states the entity audited in 1996 and 1997 was not the same as that audited in later years. (Doc. No. 129 at 16). Maybe so, but Fitzgerald asserts the change was

simply the result of an administrative dissolution by the State of Tennessee with a new but substantially similar entity immediately replacing it. (Doc. No. 131 at 5).

The Government also generally complains that Fitzgerald has not shown that its business year-in and year-out was the same and therefore reliance on earlier rulings is misplaced. It also complains that "[e]ither plaintiff made a misrepresentation to influence the outcome of the earlier audits or the facts materially changed between the earlier audits and the years at issue in the suit." (Doc No. 129 at 21). However, whether Fitzgerald or the Government lied then, is lying now, or not at all is quint-essentially a jury factual question.

The Government further argues that "[n]ot only did plaintiff decline to seek a private letter ruling," Fitzgerald "made a conscious choice not to seek a ruling because it was concerned it would have to live with an unfavorable determination." *(Id.* at 20). The last half of that argument about Fitzgerald being concerned is an argument for the jury, and the first half ignores DePew's declaration that he was informed by IRS counsel that no revenue rulings were being issued by the IRS on the subject of glider kits. (Doc. No. 131-3, DePew Decl. ¶¶ 7-10).

"Equitable estoppel is a mixed question of law and fact and must be submitted to the jury when an evidentiary dispute exists regarding its application." *Berhad v. Advanced Polymer Coatings, Inc.,* 652 F. App'x 316, 325 (6th Cir. 2016); *see also, Kosakow v. New Rochelle*

Radiology Assocs., P.C., 274 F.3d 706, 725 (2d Cir. 2001) (stating under federal law that "[w]hether

equitable estoppel applies in a given case is ultimately a question of fact"). In other words, "[w]here an allegation of estoppel raises factual questions on which reasonable minds might disagree, the questions must be resolved at trial by the trier of fact," but "where the facts are not in dispute or are beyond dispute, the existence of estoppel is a question of law." *J.C. Wyckoff & Assocs. v. Standard Fire Ins. Co.,* 936 F.2d 1474, 1493 (6th Cir. 1991) (internal citations omitted). A fact-driven jury question exists on the application of equitable estoppel.[2]

IV.

Next, the Government moves for summary judgment on Fitzgerald's APA claims. "The APA allows judicial review for persons 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action,' and defines 'agency'" as "'each authority of the Government of the United States[.]'" *Sw. Williamson Cnty. Cmty. Ass'n, Inc. v. Slater,* 173 F.3d 1033, 1035 (6th Cir. 1999) (quoting 5 U.S.C. §§ 701(b)(1), 702).

Fitzgerald first alleges that it was harmed when the IRS issued Notice 2017-5, "where for the very first time the IRS informed taxpayers that certain specified components must be retained from a worn or wrecked highway tractor in order for the § 4052(f)(1) safe harbor provision to apply when repairing the tractor." (Doc. No. 36, Am. Cmpl. ¶ 138). It claims "[t]he rule set forth in Notice 2017-5

[2] To the extent that equitable estoppel is more properly a question for the Court, Rule 39 provides that "in an action not triable of right by a jury, the court, on motion or on its own: (1) may try any issue with an advisory jury[.]" Fed. R. Civ. P. 39(c)(1).

effectively prevents application of the safe harbor rule to worn or wrecked tractors that are rebuilt using glider kits despite the fact that § 4052(f)(1) specifically provides that wrecked tractors may be repaired without triggering the excise tax as long as the safe harbor bright-line math test is met, regardless of what parts or pieces of the tractor are retained." *(Id.* ¶ 156). Fitzgerald also contends "[t]he new rule announced in Notice 2017-5, without explanation, treats similarly situated taxpayers differently depending on what parts and pieces were retained from the original highway tractor, discriminating against taxpayers like FTPS who, in reliance on Rev. Rul. 91-27, Rev. Rul. 63-210 and the clear language of § 4052(f)(1), used glider kits to repair worn or wrecked tractors." *(Id.* ¶ 171).

Ordinarily, the APA requires an agency to provide notice of proposed rulemaking and a period of public comment before the promulgation of a new regulation. 5 U.S.C. § 553. However, the APA specifically provides that the notice and comment requirements do not apply:

> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
>
> (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

Id. § (b).

"The distinction between rules or statements which are subject to the notice and comment requirements

of § 553 and rules or statements which are exempt from those procedures is notoriously "hazy," *Orengo Caraballo v. Reich,* 11 F.3d 186, 194–95 (D.C. Cir. 1993), if not "enshrouded in considerable smog," *Noel v. Chapman,* 508 F.2d 1023, 1030 (2d Cir.1975). Indeed, in *Perez v. Mortg. Bankers Ass'n,* the Supreme Court noted that "[t]he term 'interpretative rule,' or 'interpretive rule,' is not further defined by the APA, and its precise meaning is the source of much scholarly and judicial debate." 575 U.S. 92, 97 (2015). Choosing not to "wade into that debate" the Supreme Court in *Perez* nevertheless noted that "it suffices to say that the critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Id.* (quoting *Shalala v. Guernsey Memorial Hospital,* 514 U.S. 87, 99 (1995). "The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules. But that convenience comes at a price: Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'" *Id.*

"As *Perez* makes clear, the APA 'permit[s] agencies to promulgate freely [interpretive] rules—whether or not they are consistent with earlier interpretations" of the agency's regulations. *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta,* 785 F.3d 710, 713 (D.C. Cir. 2015) (quoting *Perez,* 572 U.S. at 103). "Such agency interpretations and policy statements do not 'amend' the regulations to which they refer [because as] noted in *Perez,* '[o]ne would not normally say that a court 'amends' a statute when it interprets its text. So too can an agency 'interpret' a regulation without 'effectively amend[ing]' the underlying source

of law." *Id.* Simply put, "the Court [in *Perez]* held that the APA does not require an agency to provide notice and comment in amending an interpretive rule, even if the new rule deviates significantly from its predecessor." *California Communities Against Toxics v. Env't Prot. Agency,* 934 F.3d 627, 635 (D.C. Cir. 2019)

Even though, "[s]omewhere along a spectrum, a rule transitions from being interpretive to being legislative," *New Hampshire Hosp. Ass'n v. Azar,* 887 F.3d 62, 70 (1st Cir. 2018), Notice 2017-5 does not make that transition. Published on February 6, 2017, the Notice is titled "Interim Guidance and Request for Comments on Definitions of Chassis and Body; Retail Excise Tax on Heavy Trucks, Repairs, Trailers, and Tractors." Notice 2017-5 (ITS NOT), 2017-6 I.R.B. 779, 2017 WL 189911. True to its title, it purports to define "chassis" and "body" for purposes of Section 4051 and the safe harbor provision under Section 4052. It also provided for a period of notice and comment, which apparently has since closed. Nowhere does it impose any consequence on a taxpayer that chooses not to follow it, nor does it impose an obligation on the taxpayer.[3] Instead, it states the IRS's opinion. Indeed, the Government asserts it is not relying on Notice 2017-5 in this case. (Doc. No. 129 at 27).

At best, Fitzgerald's APA complaint may be premature. "A 'complaint under the APA for review of an agency action is a civil action within the meaning

[3] To the extent Fitzgerald argues that it is required by Notice 2017 to keeps the parts and pieces it replaces, the Court does not find that directly mandated by the Notice with some sort of penalty for failure to retain the parts. Besides, under *Schneider* the parts and pieces test is not the correct test that will be applied by the jury.

of 28 U.S.C. § 2401(a) . . . governed by a six-year statute of limitations . . . [that] begins to run from the time of 'final agency action.'" *Friends of Tims Ford v. Tennessee Valley Auth.,* 585 F.3d 955, 964 (6th Cir. 2009) (internal citations omitted). "In determining what constitutes final agency action, "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.'" *Id.* Here, and regardless of what the Government may say about not relying on Notice 2017-5, a jury will decided whether the glider kits manufactured by Fitzgerald during the relevant period met the safe harbor provision of the statute, not whether it met any notice that the IRS may have developed since then.

V.

Finally, the Government argues that Fitzgerald is liable for penalties for failing to: timely file quarterly returns; pay taxes due; and submit accurate returns. These arguments go beyond what was allowed when the Court granted the Government leave to file a partial motion for summary judgment on specific topics. Regardless, the motion is subject to denial because a jury question exists on whether Fitzgerald was liable for paying the excise tax in the first place.

When denying Fitzgerald's Motion for Partial Summary Judgment more than 2 1/2 years ago, the Court observed that sometimes it is best to settle a case "when the winds of uncertain[ty] swirl about" and it is even more prudent when the wind "may actually be howling." *Fitzgerald II,* 2020 WL 12893862 at *3. The swirling and howling winds, apparently, fell on deaf ears. Now, with the Government's motion for summary judgment denied

in most respects, the Court could observe that sustained gale-force winds are a'blowin. It refrains from making that observation because it has given up on the wind/settlement metaphor and the parties' ability to exercise the common sense and good judgment necessary to settle their dispute. Instead, the Court accepts as a given that the hurricane will make landfall at 9:00 a.m. in Cookeville, Tennessee when jury selections begin.

On the basis of the foregoing, an appropriate Order will be entered denying the Government's Motion for Partial Summary Judgment, except with respect to Fitzgerald's APA claims.

/s/ Waverly D. Crenshaw, Jr.
Waverly D. Crenshaw, Jr.
Chief United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

No. 2:20-cv-00026

FITZGERALD TRUCK PARTS AND SALES, LLC,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the Government's Revised Motion for Summary Judgment (Doc. No. 128) is **GRANTED IN PART** and **DENIED IN PART**. The Motion is **GRANTED** with respect to Fitzgerald Truck Parts and Sales, LLC's claims under the Administrative Procedure Act, and those claims are hereby **DISMISSED**. In all other respects, the Government's Motion is **DENIED**.

IT IS SO ORDERED.

/s/ Waverly D. Crenshaw, Jr.
Waverly D. Crenshaw, Jr.
Chief United States District Judge