APPROVED **[2026] IEHC 619**
NO REDACTION NEEDED

THE HIGH COURT
JUDICIAL REVIEW

[2024 No. 1321 JR]

BETWEEN

SPORTSDIRECT.COM RETAIL LIMITED

APPLICANT

AND

THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Mr Justice David Keane delivered on 11 September 2026

Introduction

1. The applicant, SportsDirect.com Retail Limited ('*SDR*'), seeks to quash a decision of the respondent, the Revenue Commissioners ('*Revenue*'), to conduct a Level 2 Revenue Compliance Intervention ('*the audit*'), scheduled to commence on 12 November 2024, into the Value Added Tax ('*VAT*') liability, if any, of SDR for the period from 1 November 2010 to 30 April 2013, which decision was notified to SDR by Revenue in a series of letters between 23 August and 11 October 2024.

2. In essence, SDR contends that it is entitled to seek judicial review at this stage of the taxation process, and that it is entitled to the relief it seeks because it should not have to submit to a VAT audit for the period concerned where there cannot now be a valid

estimation or assessment of VAT payable for that period, either because Revenue cannot bring any such estimation or assessment as it may raise within the 'fraud or neglect' exception under s. 113(2) of the Value Added Tax Consolidation Act 2010, as amended ('the 2010 Act') to the four-year limitation period for making such an estimation or assessment that otherwise applies under s. 113(1) of the 2010 Act, or because – even if Revenue can do so – that exception must in any event be disapplied as inconsistent with the applicable principles of European Union law.

3. In response, Revenue submits (in broad summary) that the present application for judicial review should be refused because it is premature and because, even if that were not so, there is no basis upon which the court can be satisfied that any such VAT estimation or assessment as may issue on foot of the results of the audit at issue could not come within the s. 113(2) 'fraud or neglect' exception to the four-year time limit, and no basis to conclude that the exception concerned is inconsistent with the applicable principles of European Union law.

Procedural history

4. SDR filed a statement of grounds on 23 October 2024, seeking as a primary relief an order of *certiorari* quashing Revenue's decision to commence the audit. That statement is grounded on an affidavit of Robert Palmer, company secretary of Frasers Group plc, the parent company of SDR, sworn on 23 October 2024 ('*the first Palmer affidavit*'), later supplemented by an affidavit of SDR's solicitor, Joanne Cooney, sworn on 16 January 2026 ('*the Cooney affidavit*'). Leave was granted to seek that relief, amongst others, on 24 February 2025, in circumstances where, I am given to understand, Revenue had already provided an undertaking that it would not seek to proceed with the audit, pending the resolution of the application.

5. A statement of opposition was filed on 8 May 2025, grounded on the verifying affidavit of Mary Giffney, a principal officer of Revenue, sworn on the same date ('*the first Giffney affidavit*'). Mr Palmer swore a replying affidavit on 30 June 2025 ('*the second Palmer affidavit*'). Ms Giffney swore a further affidavit on 22 September 2025 ('*the second Giffney affidavit*') and, in turn, Mr Palmer swore a further affidavit on 23 October 2025 ('*the third Palmer affidavit*').

Background

6. SDR is a UK-headquartered retailer of sports and fitness footwear, clothing and equipment. In 2010, it established an online presence at SportsDirect.com, which sold to customers in the UK and abroad, including customers elsewhere in the EU and, hence, customers in Ireland.

7. Intra-EU distance sales under the common system of VAT are, and were at all material times, governed by Articles 32 and 33 of Council Directive 2006/112/EC on the common system of value added tax ('*the Principal VAT Directive*'). In broad outline, Article 32 provides that where goods are dispatched or transported by the supplier, the place of supply shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer begins, whereas Article 33 provides in material part, by way of derogation, that *the place of supply of goods dispatched or transported by or on behalf of the supplier from a Member State other than that in which dispatch or transport of the goods ends shall be deemed to be the place where the goods are located at the time when dispatch or transport to the* [*non-VAT registered and non-VAT liable*] *customer ends*.

8. On 18 January 2010, SDR wrote to Her Majesty's Revenue and Customs ('*HMRC*'), the official tax, payment and customs authority for the UK government, to inform it of the structure it intended to implement for distance sales with effect from 1 February 2010, whereby a separate company, Etail Services Limited ('*Etail*') would perform fulfilment services where overseas customers chose to have the goods they had purchased delivered rather than to collect the goods themselves from SDR's warehouse in the UK. In those circumstances, SDR expressed the view, in effect, that the derogation under Article 33 of the Principal VAT Directive would not apply, as the goods concerned would not be dispatched or transported 'by or on behalf of' SDR, so that, under the basic rule in Article 32, the UK would be the place of supply, as the place from which the dispatch of the goods would begin. SDR concluded that letter by requesting confirmation from HMRC that it would treat all such supplies as subject to VAT in the UK.

9. SDR acknowledges that the arrangement concerned, and the tax treatment contended for, had the administrative advantage of simplifying its VAT obligations, as it would only have to register and account for VAT in one EU country, the UK.

10. HMRC responded by letter dated 10 March 2010, stating in material part that, if as SDR said, it (SDR) would only be responsible for the supply of the goods and the customer was to contract with a third party – Etail – for delivery of the goods, then that would not constitute distance selling, before continuing:

> 'In this case, [SDR] is not supplying and delivering; the delivery is undertaken by [Etail]. It therefore follows that [SDR's] supplies of goods under these arrangements will be subject to UK VAT at the appropriate rate. However, you ought to contact the other authorities concerned to discuss the set up and

confirm that they are satisfied that the supplies do not take place within their jurisdictions.'

11. SDR did not follow the advice of HMRC to contact Revenue to discuss that set up and to confirm that Revenue was satisfied that the relevant supplies would not take place within Ireland.

12. On 22 January 2015, SDR wrote to HMRC stating, in material part:

> 'SDR's view remains that this is a correct application of both the letter and the spirit of the law. SDR's interpretation has not been challenged by any tax authority in any EU member state, and SDR is not aware of any case law or other law which contradicts it. Nevertheless, SDR is conscious that a tax authority in another EU member state could possibly take a different view, as the interpretation of Articles 31-34 of the Principal VAT Directive may not be consistent across all EU member states. SDR also notes that UK taxpayers can reclaim VAT that they have overpaid in the past 4 years, but that the period for the tax authorities in other EU member states to raise assessment varies considerably. Therefore, unless SDR makes protective claims to HMRC, it could later be assessed by a tax authority in another EU member state and be unable under the time limits in the [UK] VAT Act 1994 to reclaim UK VAT from HMRC.'

13. In that letter, SDR went on to make a contingent or 'protective' claim – in the form of an 'error correction notice' – for a specific sum paid in VAT for specific periods, calculated by analysing its sales to non-UK EU customers during those periods, requesting that HMRC not issue a decision on that claim or notice 'unless and until

SDR indicates to you that a tax authority in an EU member state is challenging the treatment of SDR's supplies to EU customers in the relevant period.'

14. SDR had not contacted Revenue in the interim concerning the relevant supplies to customers in Ireland, so that the absence of any challenge by Revenue to SDR's tax treatment of its supplies has to be viewed in that context. In a letter of acknowledgment dated 9 February 2015, HMRC again recommended 'that the arrangements made by you be discussed with other EU authorities concerned.' SDR did not follow that recommendation.

15. Coincidentally, Revenue wrote to SDR on 22 January 2015 – the same date that SDR wrote to HMRC. In its letter, Revenue stated that it had noted from SDR's website that SDR was engaged in the online sale of sports goods to customers in Ireland and had noted from SDR's invoices that it was applying UK VAT to those sales. Revenue requested details of all such sales into Ireland. Revenue noted that, according to SDR's website, its deliveries of overseas sales were carried out by its 'overseas delivery partner' Etail. Revenue drew SDR's attention to the provisions of Article 33 of the Principal VAT Directive, transposed into Irish law by s. 30 of the 2010 Act. The letter concluded by noting that its contents did not prejudice SDR's right to make an 'Unprompted Qualifying Disclosure' under its Code of Practice for Revenue Auditors, before requesting a response no later than 19 February 2015. SDR sent a holding reply on 19 February 2015 but did not furnish a substantive reply.

16. On 28 September 2015, SDR wrote to HMRC to inform it of changes made to its online sales model, whereby, with effect from 20 February 2015, sales to non-UK EU customers had begun to be made by SDI (Brook EU) Limited ('*SDI EU*') (which later

became Runnel Limited (‘*Runnel*’), rather than SDR, and, where those customers chose to have the goods they had purchased delivered rather than to collect the goods themselves from the UK warehouse, that delivery service was now being provided by Barlin Delivery Limited (‘*Barlin*’), rather than Etail. Barlin was described as a separate third-party delivery company. SDR sought ‘reconfirmation’ from HMRC that it would treat all such supplies as subject to UK VAT.

17. HMRC replied by letter dated 14 January 2016, noting in material part that SDR had previously explained that the purpose of the relevant arrangements was to avoid the requirement to register and account for VAT on sales to consumers in other member states, before continuing:

> ‘Our view on these arrangements and the correct interpretation of Article 33 and 34 of the Principal VAT Directive and of [our] own implementing provisions has been developing over time. The purported effect of the arrangements appeared contrary to the purpose of the above provisions, which were introduced in order to maintain the ‘destination’ principle of taxation within the single market and prevent distortions of competition arising from differences between national VAT rates. In other words, that domestic operators would suffer unfairly if competitors were able to sell into the same market using lower rates of VAT.
>
> As HMRC was not in a position to determine whether other Member States would take the same view, we referred the matter to the EU VAT Committee. Whilst this referral was in progress it was necessary to ensure that the issue did not give rise to either double-taxation or non-taxation, contrary to the principle of the effective operation of the EU VAT system.’

18. The letter then identified the applicable implementing provisions under UK law – and HMRC policy – on place of supply for UK retailers using such arrangements, before continuing:

> 'Where in a case involving arrangements of the kind in question, it was determined by the destination State that a UK retailer's distance sales are liable to VAT in the Member State under the Member State's corresponding provisions HMRC would agree that the place of supply is determined by [the destination principle as implemented in UK law]. Until that determination was made in the relevant Member State, HMRC continued to expect UK VAT to be accounted for in accordance with [the basic principle as implemented in UK law].
>
> To this end you will recall that my predecessor advised in his letter of 11 March 2010 that you confirm with the tax authorities in the relevant destination member states whether or not they agree with your analysis concerning the place of supply and this advice has been reiterated to you on several occasions since then both verbally and in correspondence.'

19. In fact, the EU VAT Committee (an advisory body established under Article 398 of the Principal VAT Directive to promote the uniform application of VAT rules across EU member states through the provision of non-binding practical guidance) had already issued a working paper and, subsequently, adopted guidelines. As Advocate General Sharpston later explained in her Opinion in Case C-276/18 *KrakVet Marek Batko sp. K*, ECLI:EU:C:2020:81 (at paras. 33-38):

> '*Working paper of the VAT Committee*

33. On 5 May 2015 the VAT Committee issued Working Paper No 855 on the application of VAT provisions in relation to distance selling ('the Working Paper').

34. Section 2 of the Working Paper explains that the tax administrations in Belgium and the United Kingdom had 'noticed that some business arrangements have been put in place in view of splitting the supply of the goods from their transport and delivery with a view to avoid accounting [for] and paying VAT in the Member State of destination of the goods'.

35. In Section 3 of the Working Paper, the Commission argued that the text of Article 33(1) of the VAT Directive was capable of bearing either a literal or a broader interpretation, inasmuch as it could be read as covering only situations in which the supplier was directly involved in arranging the transportation, or as also encompassing situations in which the supplier's involvement was merely indirect.

36. The Commission argued that the literal interpretation 'has the advantage of being very straightforward when looking strictly at the legal situation and at the contractual relationships but it also implies that it would be quite easy to circumvent'. The Commission suggested that such circumvention 'could be dealt with in the light of the "abuse of law" test' as established by the Court in [Case C-244/02, *Halifax*, EU:C:2006:121] which would include consideration of 'whether the arrangements lead to a result against the purpose of the VAT Directive rules; and whether the arrangements have as their main purpose to lead to that result, and any other "economic" reasons are non-existent or residual'. The Commission further referred in that regard to the Court's ruling in Part Service.

37. As regards the broader interpretation, the Commission argued that ‘for the application of the distance selling rules, not only the contractual arrangements between the supplier, the transporter and the customer have to be taken into account but also, and more importantly, the economic reality’. Further, the Commission argued that in a statement to the minutes agreed when Directive 91/680/EEC 10 (which introduced provisions on distance selling) was adopted, 11 the Council and the Commission made clear that ‘the special arrangements for distance selling will apply in all cases where the goods are dispatched or transported, either indirectly or directly, by the supplier or on his behalf’.

38. Against that background, the Working Paper invited delegations ‘to express their views on the questions raised by the United Kingdom and Belgium, and on the observations made by the Commission services. They are in particular requested to give their opinion on the two approaches examined’.

Guidelines of the VAT Committee

39. At its 104th meeting held on 4-5 June 2015, the VAT Committee adopted guidelines on distance selling, which state that ‘the VAT Committee almost unanimously agrees that, for the purposes of Article 33 of the VAT Directive, goods shall be considered to have been “dispatched or transported by or on behalf of the supplier” in any cases where the supplier intervenes directly or indirectly in the transport or dispatch of the goods’.

40. The guidelines go on to state that ‘the VAT Committee unanimously agrees that the supplier shall be regarded as having intervened indirectly in the transport or dispatch of the goods in any of the following cases: … iii) where the supplier invoices and collects the transport fees from the customer and

> further remits them to a third party that will arrange the dispatch or transport of the goods'.
>
> 41. Finally, the guidelines state that 'the VAT Committee further agrees almost unanimously that in other cases of intervention, in particular where the supplier actively promotes the delivery services of a third party to the customer, puts the customer and the third party in contact and provides to the third party the information needed for the delivery of the goods, he shall likewise be regarded as having intervened indirectly in the transport or dispatch of the goods'.
>
> (footnotes omitted)

20. As I understand subsequent developments in the UK, which are merely part of the background narrative for the purpose of these proceedings, SDR and SDI EU appealed what each characterised as the 'decision' in HMRC's letter of 14 January 2016 on whether UK VAT was chargeable on supplies made by them to non-UK EU consumers. HMRC sought to have that appeal struck out on the basis that it had merely reserved its decision on the UK VAT treatment of the relevant supplies until the VAT treatment of those supplies had been decided in the other Member States concerned. The First-Tier Tribunal refused to strike out the appeal in a decision given on 10 October 2016, noting that the parties may wish to consider seeking a preliminary reference to the Court of Justice of the European Union ('*CJEU*') under Article 267 on the Treaty on the Functioning of the European Union ('*TFEU*') on the proper interpretation of Article 32 and 33 of the Principal VAT Directive. The Upper Tribunal upheld the decision not to strike out the appeal, albeit on different grounds, in a decision of 17 July 2017, while refusing, as premature, the application of SDR

and SDI EU for a preliminary reference to the CJEU, as it was dealing with the issue of jurisdiction to entertain the appeal, rather than the merits of the appeal.

21. Meanwhile, on 23 November 2016, Revenue wrote again to SDR, noting that it had not received a substantive reply to its letter of 22 January 2015 or reminder of 5 March 2015. Revenue requested SDR to provide it with the level of turnover, by company, for each of the calendar years 2013, 2014, 2015 and – to date – in 2016, for goods sold by SDR and delivered in Ireland. Revenue invited SDR to review its VAT liability on those distance sales to Ireland and consider making a qualifying disclosure. Revenue required a reply by 14 December 2016, threatening to compulsorily register the companies involved, to raise VAT assessments, and to notify Revenue audits (which last step would have the effect of ending the right to make an unprompted qualifying disclosure) in default.

22. Through its UK solicitors, SDR responded by letter dated 16 February 2017. This appears to have been SDR's first substantive engagement with Revenue. SDR set out its position on the arrangements it had put in place and on the construction of Articles 32 and 33 of the Principal VAT Directive it was contending for, before continuing:

> 'The arrangements described above were set out in correspondence to HMRC at their time and HMRC confirmed their view that the place of supply for VAT purposes would be the UK. We are aware that [the] EU VAT Committee has recently issued a non-binding opinion which advocates an expansive interpretation of Article 33, however the words of Article 33 do not support such an interpretation. We note further that there is no judicial support in the jurisprudence of the CJEU for the view expressed by the Committee.'

23. The letter went on to state:

> 'Although no distance sales [for VAT purposes] have been made into the Republic of Ireland and VAT has been correctly accounted for in the UK we have attempted to prepare the information you have requested. In the time available to us we have been able to extract information in respect of the sales made to individuals who were resident in Ireland for 2013 and 2014. Those figures are attached. If you require the detailed background information to these figures (which are very considerable) please let us know and we will set up a secure method for you to review them.'

24. The letter did not disclose that HMRC had advised SDR to contact the other Member State revenue authorities to obtain confirmation that each was satisfied that the relevant supplies were not taking place within its jurisdiction. The letter concluded by proposing that, if necessary, the parties attempt to agree a mechanism to test the position in law.

25. After a holding response, Revenue wrote in reply on 24 May 2017. Revenue disagreed with SDR's interpretation of Article 33 of the Principal VAT Directive, observing that, while there was no jurisprudence of the CJEU on the issue either way, it was settled law that the commercial reality of transactions dictates the appropriate VAT treatment of them, adding that, in its view, the arrangements concerned were in breach of the EU law special principle prohibiting the abuse of EU law, being a structure designed to lead to a result against the purpose of the rules under the Principal VAT Directive. Revenue then cited a reference in the decision of the UK

First-Tier Tribunal to the advice that HMRC had given to SDR 'to contact the authorities concerned to discuss the set up and confirm that they are satisfied that the supplies do not take place within their jurisdictions', before noting that Revenue had no record of any such contact. The letter concluded by indicating that arrangements would be made to raise VAT assessments as the appropriate way of permitting the position in law to be tested, unless SDR was willing to concede that Revenue's interpretation was correct, in which case an unprompted qualifying disclosure could still be made and Revenue would provide whatever information it could to assist in finalising the appropriate refund of UK VAT from HMRC.

26. Revenue then served a notice of assessment of VAT payable, dated 7 June 2017, on SDR for the three periods: 1 May to 31 December 2013; 1 January to 31 December 2014; and 1 January to 28 February 2015 ('*the 2013-2015 SDR assessments*'), and a notice of assessment of VAT payable, also dated 7 June 2017, on SDI EU (later Runnel) for the three periods: 1 January to 31 December 2015; 1 January to 31 December 2016; and 1 January to 30 April 2017 ('*the 2015-2017 SDI EU assessments*').

27. Each of those companies appealed each of those assessments to the Tax Appeals Commission ('*TAC*') in each instance on the ground, among others, that Revenue's interpretation of s. 30 of the 2010 Act, transposing Article 33 of the Principal VAT Directive, was incorrect and that the 'abuse of rights' doctrine under EU law did not apply because the aim of the relevant arrangements was not to obtain a tax advantage. In 2018, each of those appeals was later stayed to await the outcome of the preliminary reference in Case C-276/18, *KrakVet Marek Batko sp. k.,* ECLI:EU:C:2020:485 ('*KrakVet*').

28. The CJEU gave judgment in *KrakVet* on 18 June 2020, ruling (at para. 82) that Article 33 of the Principal VAT Directive must be interpreted as meaning that, when goods sold by a supplier established in one Member State to purchasers residing in another Member State are delivered to those purchasers by a company recommended by that supplier, but with which the purchasers are free to enter into a contract for the purpose of that delivery, those goods must be regarded as dispatched or transported 'by or on behalf of the supplier' where the role of that supplier is predominant in terms of initiating and organising the essential stages of the dispatch or transport of those goods, which it is for the referring court to ascertain, taking account of all the facts of the dispute in the main proceedings. On the other hand, the CJEU went on to rule (at para. 96) that it is not necessary to find that transactions by which goods sold by a supplier are delivered to purchasers by a company recommended by that supplier constitute an infringement of the law when, on the one hand, there is a connection between the supplier and that company, in the sense that, irrespective of that delivery, the company takes charge of some of the supplier's logistical needs, but, on the other hand, the purchasers remain free to make use of another company or personally collect the goods, since those circumstances are not liable to affect the finding that the supplier and the transport company recommended by it are independent companies which engage, on their own behalf, in genuine economic activities and, consequently, those transactions cannot be classified as abusive.

29. Following the judgment in *KrakVet*, SDR applied to HMRC for refunds of the VAT that it had paid on supplies to purchasers in other EU member states (presumably on the basis of an acceptance that those supplies were captured by the first proposition in *KrakVet* just cited). On 20 October 2022, HMRC made a spontaneous exchange of

information with Revenue under Article 16 of Council Regulation 904/2010/EU on administrative cooperation and combatting fraud in the field of VAT (‘*Regulation 904/2010/EU*’), from which exchange Revenue learned for the first time that, on dates between 1 December 2021 and 29 July 2022, SDR had obtained a full refund from HMRC of the VAT it had paid on supplies to Irish customers for the period between November 2010 and April 2015. By way of background and additional information, that document stated in material part:

> ‘[SDR] made supplies of sports equipment, sports wear and leisure wear to non-VAT registered customers and exceeded the EU Distance Selling Threshold.
>
> [SDR] chose to account for the VAT on these sales in the UK as opposed to registering for VAT in your jurisdiction.
>
> As a result of the ECJ KrakVet decision [SDR] accept[s] that there was a liability to register for VAT in [its] customers’ Member State.
>
> A claim was made to HMRC to refund the UK VAT that has been paid in respect of EU Distance Sales and HMRC has refunded the relevant UK£ VAT incorrectly declared and paid to HMRC.
>
> The VAT due on those EU distance sales is properly due in your jurisdiction.
>
> [SDR] accept[s] that there is a liability to retrospectively register for VAT in your jurisdiction.
>
> A spreadsheet detailing the value of goods sold and UK VAT declared and paid by [SDR] per quarter is provided separately.
>
> Audit checks have been undertaken by HMRC on the information provided by [SDR] and we are satisfied that the information is correct.’

30. According to the information provided by HMRC, the total value of SDR's sales to customers in Ireland during the period between 1 November 2010 and 30 April 2013 was approximately £7 million and HMRC repaid VAT of approximately £1.1 million on those sales to SDR.

31. On 16 March 2023, Revenue made a request for more detailed information from HMRC, pursuant to Article 7 of Regulation 904/2010/EU, specifically concerning any correspondence between SDR and HMRC in which SDR argued or accepted that VAT was not due to HMRC on the relevant distance sales and should be refunded to SDR.

32. From HMRC's response of 12 May 2023, the following emerged. On 6 October 2020, SDR's UK legal advisers had written to HMRC seeking a refund of the VAT it had paid on distance sales to customers in other EU member states between November 2010 and April 2015. In doing so, it submitted sales data broken down by reference to each of four countries (including Ireland) and sales period, before stating:

> 'SDR met the VAT registration threshold for [those countries] during all the periods relevant to this matter. Accordingly, SDR is entitled to a refund of all of the VAT it accounted for in the UK in respect of those sales.
>
> …
>
> In the case of [those countries] HMRC will be aware that we/our clients are already in contact with the local tax authorities in those jurisdictions in respect of this matter. Accordingly, we will make contact with those tax authorities directly in order to regularise the position.'

33. Further, on 29 October 2020, SDR's UK legal advisers had written again to HMRC, stating in material part:

> '[O]ur client wishes to deal with the repayment claims as part of the same process as settling our client's affairs in EU member states in the hope that, consistently with the jurisdiction-by-jurisdiction approach that we are adopting, we can deal with both sides of the equation (*i.e.* payment to EU member states and repayment from HMRC) at the same time: this is important to ensuring the minimum disruption.'

34. On or about 19 May 2023, Revenue wrote to HMRC, seeking permission to use the information disclosed for the purpose of SDR's pending TAC appeal. HMRC granted that permission on or about 8 August 2023.

35. The appeals before the TAC were fixed for hearing on 4 March 2024. Revenue decided not to open a compliance intervention into SDR's VAT liability for the periods between 1 November 2010 and 30 April 2013, pending the conclusion of the SDR appeal against the 2013-2015 SDR assessments.

36. Shortly before the date fixed for those appeals, SDR withdrew its appeal against the 2013-2015 SDR assessments. The SDI EU appeal against the 2015-2017 SDI EU assessments proceeded on that date and a decision is awaited. Separately, on 15 August 2023, SDR had issued plenary proceedings challenging Revenue's imposition of, or failure to abate, interest and penalties on the 2013-2015 assessments. Those proceedings are still pending.

The decision under challenge

37. Against that background, Revenue wrote to SDR on 23 August 2024, attaching a copy of its earlier letter to SDR, dated 24 July 2024. The parties are in dispute about whether SDR received the July letter when it was originally sent but they agree that nothing turns on the point because SDR does not dispute that it did receive the August letter with a copy of the July letter attached.

38. In material part, the letter of 24 July 2024, states as follows:

> '**Notification of Revenue Level 2 Compliance Intervention - Audit**
>
> I wish to notify you that you have been selected by Revenue for an Audit. This is a Level 2 Compliance Intervention. For full details on Revenue Compliance Interventions please refer to the *Code of Practice for Revenue Compliance Interventions* (the Code) which is available at www.revenue.ie
>
> **Scope of Audit** VAT
>
> **Period for Audit** 1st November 2010 to 30th April 2013
>
> **Date and Time of Audit** 21/08/2024 at 11.00am
>
> A Revenue caseworker will call to your place of business and will show their identity.
>
> To facilitate this Audit, please advise by return of the following,
>
> 1. The location in Ireland where the books and records will be made available for inspection.
> 2. The identity of the Agent who should be copied on this Audit Notification letter.
>
> The Audit may include an examination using electronic techniques. This may include an examination of records held on and processed by computer systems

> and/or a review of the system processes and controls in place. Data downloads may be required to ensure the accuracy of returns submitted. A preliminary meeting to discuss your electronic records may be required and, if so, I will contact you.
>
> This letter represents an inquiry for the purposes of section 116/116A of [the 2010 Act]. I refer you to Chapter 2 of the Code if you wish to make a qualifying Disclosure.
>
> Issues may arise during the Audit that will require the caseworker to extend the intervention to include a wider audit of your tax affairs. If this proves necessary, you will be formally advised in writing.
>
> Revenue recognises that this Audit may cause a degree of inconvenience for you. If for good and sufficient reason, the date and time of the audit is not suitable please contact me without delay so that an alternative date can be arranged.'

39. Correspondence then ensued between the parties concerning the adequacy of the notice period given and the period that should be allowed to enable SDR to take appropriate legal advice on the proposed audit, which culminated in a letter of 11 October 2024 from Revenue to SDR legal representatives informing them that the audit would proceed on 12 November 2024.

40. Revenue's decision to commence that audit into SDR's VAT liability in Ireland for the period between 1 November 2010 and 30 April 2013 is the decision that SDR now challenges in these proceedings, which commenced when papers were filed on 23 October 2024.

<u>The legal and administrative background</u>

41. Revenue's *Code of Practice for Revenue Compliance Interventions* (May 2022) ('*the Code of Practice*') states, in its introduction, that it sets out a Compliance Intervention Framework intended to provide a consistent graduated response to taxpayer behaviour, ranging from extensive opportunities to voluntarily correct mistakes up to the pursuit of criminal sanctions for cases of serious fraud or evasion.

42. Paragraph 1.1. explains:

> 'The intervention levels (Level 1, Level 2, Level 3) in the Compliance Intervention Framework reflect [Revenue's] graduated response to risk and taxpayer behaviour and provide taxpayers with a mechanism and incentive to address any tax non-compliance issues voluntarily.'

43. The summary contained in the table captioned 'Overview of Compliance Framework Levels' identifies the following objectives: at Level 1 to support compliance; at Level 2 to challenge non-compliance; and, at Level 3 to tackle high-risk cases and practices.

44. Paragraph 1.3.2 states, in material part:

> 'Notification of a Level 2 intervention will issue to taxpayers (and agents where relevant) in all cases. Following receipt of such a notification and prior to the commencement of the inquiry, the taxpayer will have the opportunity to address areas of default or non-compliance through the making of a prompted qualifying disclosure and through full cooperation with the intervention.'

45. Section 116 of the 2010 Act provides, at subsection (1), that ‘qualifying disclosure’, in relation to a penalty for deliberately or carelessly failing to make a VAT return, means a disclosure that Revenue is satisfied is a disclosure of complete information in relation to, and full particulars of, all matters occasioning a liability to tax that gives rise to that penalty.

46. The same sub-section provides that ‘prompted qualifying disclosure’:

> ‘in relation to a person, means a qualifying disclosure that has been made to [Revenue] in the period between–
>
> (a) the date on which a person is notified by a Revenue officer of the date on which an investigation or inquiry into any matter occasioning a liability to tax of that person will start, and
>
> (b) the date that the investigation or inquiry starts.’

47. Section 116A applies the same definitions to any disclosure made, act done or omission made after the date of commencement of the Finance Act 2021 (which inserted that new section).

48. At paragraph 1.3.4, the Code of Practice states, in material part:

> ‘The notification letter issued in respect of an Audit will confirm that the intervention will be considered to have started 28 days after the date of the letter, unless otherwise agreed….
>
> As and from the date of issue of a letter of “Notification of a Level 2 Compliance Intervention” (that is the date shown on the letter) to the taxpayer and agent, the opportunity to make an ‘unprompted qualifying disclosure’ is

> no longer available. The taxpayer can however make a 'prompted qualifying disclosure' before the … audit starts…
>
> Once the intervention begins or is deemed to have commenced the entitlement to avail of a 'prompted qualifying disclosure' is no longer available.'

49. Section 108(2) of the 2010 Act empowers an authorised officer of Revenue, to exercise a range of powers, including a power to require the production of books, records, accounts or other documents relating to the business concerned, and s. 108(4) imposes a duty on an accountable person, on request to furnish that officer, in respect of a specified period, information including: the name and address of each of his customers; and the total consideration payable in respect of supplies of goods and services made by him or her to each such customer and the tax thereon.

50. That, in broad outline, is the administrative and legislative background against which a Level 2 Compliance Intervention may take place and against which a notification of such an intervention may issue to a taxpayer (and agent where relevant). As I understand the position, there is no statutory entitlement to appeal against such a notification or against the intended exercise by an authorised officer of any of the powers conferred under s. 108 of the 2010 Act.

51. Sections 110 and 111 of the 2010 Act confer upon the Revenue a power to serve a notice of an estimate of VAT payable by an accountable person or a notice of an assessment of VAT payable by an accountable person, respectively. Where either such notice is served, there is a statutory right of appeal to the Appeal Commissioners under s. 949I of the Taxes Consolidation Act 1997, as amended ('the TCA 1997'), from which further appeals on a point of law are available - to the High Court under s.

949AP; thereafter, to the Court of Appeal under s. 949AS; and after that, potentially, to the Supreme Court.

52. Section 113 of the 2010 Act deals with time limits. In broad summary and in material part, it provides as follows.

53. Under s. 113(1), an estimation or assessment of VAT may be made at any time *no later than four years* after the end of the earliest taxable period to which the estimate or assessment relates.

54. Under s. 113(2), in a case in which *any form of fraud or neglect has been committed* by or on behalf of any person in connection with or in relation to tax, an estimate or assessment may be made *at any time for any period* for which, by reason of the fraud or neglect, tax would otherwise be lost to the Exchequer.

55. Under the same subsection, 'neglect' is defined to mean *negligence or a failure to give any notice, to furnish particulars, to make any return* or to produce or furnish any other relevant document under the 2010 Act or regulations.

56. It is these provisions in s. 113 of the 2010 Act that are at the heart of SDR's challenge to Revenue's decision to commence a Level 2 Compliance Intervention.

Is the application premature?

57. Revenue raises a preliminary objection that the issues SDR seeks to raise on the proper interpretation or application of s. 113 of the 2010 Act and, accordingly, on whether Revenue would be entitled to serve a notice of an estimate or assessment of VAT payable under s. 110 or s. 111 of the 2010 Act, respectively, are wholly

premature where the only step that Revenue has taken is to notify SDR of an intended VAT audit.

58. Revenue pleads that this is so because, among other reasons, the decision to conduct an audit has no effect on SDR's legal position or rights. In the alternative, SDR has not established sufficient interest in, or *locus standi* to maintain, any of the grounds upon which it relies in support of the relief it seeks.

59. SDR argues that it is entitled to seek judicial review of the decision to conduct a VAT audit because that is the only effective remedy available to it in the absence of a statutory right to appeal that decision under the 2010 Act (or any other legislation), a right that SDR contends would be available to it in respect of an equivalent decision to make an inquiry (or conduct an audit) under the TCA 1997. SDR further argues that it is entitled to do so on the authority of the decision of Barr J in *Google Ireland Ltd v Data Protection Commissioner* [2024] IEHC 577, (Unreported, High Court, 11 October 2024) ('*Google*'), distinguishing the decision of the Supreme Court in *Rowland v An Post* [2017] 1 IR 355, (O'Donnell, Clarke and MacMenamin JJ) ('*Rowland*').

60. Revenue argues that this case is governed by the principles confirmed in *Rowland*, and that the decision in *Google* is distinguishable.

61. Both sides accept that the principles identified in *Rowland* in the context of injunction proceedings are equally applicable to judicial review proceedings, as confirmed by the Court of Appeal in *Murphy v Commissioner of An Garda Síochána* [2023] IECA 92, (Unreported, Court of Appeal, 24 April 2023) ('*Murphy*').

62. Accordingly, it is to those decisions, and the principles underlying them, that I now turn.

63. *Rowland* addressed the standard by reference to which a court should intervene, whether by injunction, declaration or any other means to halt an ongoing disciplinary, or other similar, process to address an alleged breach of fair procedures. The Supreme Court pointed out that in many cases the proper approach of a court called upon to consider the validity of such a process is to consider the entirety of it to determine whether, taken as a whole, the ultimate conclusion can be sustained having regard to the principles of constitutional justice. Decision-makers have a considerable margin of appreciation in the conduct of such processes, and many errors of procedure can be corrected before the process concludes. For those reasons, in a great many cases it will be premature for a court to reach any conclusion on the process until it has concluded. However, there will be a limited number of cases where the conduct of the process to date has been such that it will already be clear that it has gone irremediably wrong, so that it should be stopped to save all concerned from continuing fruitless participation in it where any adverse conclusion is almost certain to be quashed. That will only occur when the court is satisfied that the process has gone wrong; that there is nothing that can be done to rectify it; and that it is, thus, more or less inevitable that any adverse conclusion ultimately reached will be unsustainable in law.

64. In *Murphy*, the Court of Appeal found that the *Rowland* principles apply to judicial review proceedings as they do to injunction proceedings, and that they apply to public law proceedings as they do to private law proceedings. In reaching the former

conclusion, the Court of Appeal had regard to the earlier decision of the same court in *Habte v Minister for Justice and Equality & Ors* [2021] 3 IR 627 ('*Habte*').

65. In *Habte*, Murray J addressed the issue of prematurity in judicial review proceedings in its broadest context, rather than solely in the specific context of intervention in an ongoing process that is alleged to have gone irremediably wrong on fair procedures grounds. As the Court of Appeal observed in *Murphy*, in holding in *Habte* (at 678, para. 136) that the *Rowland* principles did not apply to the Minister's proposal to revoke the applicant's certificate of naturalisation because the relevant inquiry process had not yet started, much less gone irremediably wrong, Murray J was clearly acknowledging that, in an appropriate case, those principles are capable of applying to a process of that type.

66. On the broader issue of prematurity in judicial review proceedings more generally, Murray J's analysis was as follows (at 675-6):

> '**[129]** I agree with the observation of the learned trial Judge (at para. 61) that it is not, in general, appropriate to grant Judicial Review directed to a mere proposal or, as he later put it (at para. 62), *'the decision to initiate a procedure is not liable to judicial review in the same way as the outcome of the procedure'.* Usually, as Humphreys J. observed (at para. 62) judicial review is directed to an act that must affect some legally enforceable right of an applicant. He expressed the view that a decision to initiate a process is only exceptionally in that category.
>
> **[130]** Cutting across that inquiry in the case of [a] multi-stage decision making process, is the related question of whether an applicant for judicial review has available to him or her an alternative remedy: even if there is a 'decision'

made that is in theory amenable to judicial review, the Court may refuse to accede to an application for that relief where there exists an alternative remedy. Where a process is initiated by a decision amenable to judicial review, with an entitlement thereafter for an affected person to make representations in advance of the final determination of that process, there is available to that person another remedy which, in an appropriate case, may be held to debar him or her from obtaining relief by way of Judicial Review. It may also be said that the proceedings are premature. However, it is important to keep all of these issues distinct. Prematurity and the availability of an alternative remedy, while they may often overlap, are not always the same thing. A case may be premature because there is at the time of the institution of the proceedings no properly developed factual context in which the Court can adjudicate on the issues presented by the case, without there necessarily being any adequate alternative remedy available (see Lewis, *Judicial Remedies in Public Law*, 5th Ed. (London, 2015) at paras 12.05 to 12.016, pp. 414-420). Both of these issues usually present questions for the discretion vested in the Court in determining whether to grant a remedy by way of judicial review. The question of whether there is a 'decision', in contrast, goes to whether judicial review is available at all.

[131] In this case, I do not think it can be said that the formation by the Minister of an intention for the purposes of section 19(2) of the Act is other than a decision capable of giving rise to judicial review. The trial Judge clearly adopted the same position, insofar as he held that it could be reviewed on the basis of improper purposes, or where it was clearly *ultra vires.* The action is taken under statute and brings the applicant into an arena where she must either engage with an inquiry, undertake the process of making representations directly to the Minister, or risk revocation of her naturalisation (and see Lewis *Judicial Remedies in Public Law* (5th Ed., Sweet & Maxwell, 2015) at para. 4-020). Similar characteristics have been held to render interlocutory orders in the course of various inquiry processes to be reviewed (see in particular *Borges v. Fitness to Practice Committee of the Medical Council* [2004] 1 IR 103, at p. 110). The critical questions that do present themselves relate to whether some or all of the grounds on which the applicant seeks such review arise at this point in time, whether the Court's discretion is properly applied now to enable review to take place given that there is a statutory process available to her in the course of which she can make her case prior to a final decision and (in the event that the answer to the preceding two questions is in the affirmative) whether she has made out any basis for relief.

67. Having analysed the naturalisation certificate revocation procedure under s. 19 of the Irish Nationality and Citizenship Act 1956, as amended, Murray J addressed the discretion of the court to refuse relief by judicial review in such circumstances (at 682):

> '**[144]** The starting point in the application of the discretion of the Court to refuse relief by way of Judicial Review at the instance of an applicant who has available to him or her an alternative remedy, is that such relief should be refused unless that remedy is not in fact adequate or there is a particular exigency in the interests of justice which requires otherwise (*Byrne v. Minister for Defence* [2019] IECA 338 at para. 62). Thus, the requirement to exhaust such remedies represents the default position, where there is such a

remedy. Those cases in which review is permitted in that circumstance being *'exceptional to the general rule' (EMI Records (Ireland) Ltd. v. Data Protection Commissioner* [2013] 2 IR 669 at paras. 36, 41 and 42).

[145] It follows that the onus is on the party seeking relief by way of Judicial Review to establish either that the alternative remedy is not adequate, or that there is a particular exigency which renders it unjust that it should have to be exhausted. This requirement may be met where the ground of challenge includes a case based on fair procedures: in that circumstance an appeal or review of a procedurally unfair process may not reinstate the applicant to the position he would have been in had the process been conducted regularly in the first instance (*Stefan v. Minister for Justice* [2001] 4 IR 203). Review might also be enabled notwithstanding the existence of an alternative remedy where the issue is jurisdictional (*Leng v. Minister for Justice* [2015] IEHC 681 at para. 36) or where the case presents a net issue of law so that judicial review is particularly appropriate, or where there is a legitimate basis for perceiving an unfairness in forcing the applicant to proceed within the statutory scheme (*Tomlinson v. Criminal Injuries Compensation Tribunal* [2005] 1 ILRM 394, at pp. 399 to 400). At the same time, it is clear that where an issue is heavily dependent on a factual assessment, the presumption in favour of requiring the applicant to exhaust the statutory process, is particularly strong (see *Nova Colour Graphic Supplies Ltd. v. Employment Appeals Tribunal* [1987] IR 426).'

68. I conclude that it is these wider principles on prematurity and the availability of an alternative remedy, as they inform the exercise of the discretion of the court to refuse an application for judicial review, that I must first consider.

69. Like *Habte*, this is not a case that turns on the narrower question of whether the *Rowland* principles apply to an ongoing process that may, or may not, have gone irremediably wrong through a breach of fair procedures.

70. Moreover, it is instructive to view the facts at issue in *Google* through the lens of the wider principles of judicial review. In that case, the Data Protection Commission had made a decision to handle six separate complaints of breach of the data protection rights of six different data subjects, brought on behalf of each by a different consumer agency, against Google Ireland Limited ('*Google*') as the alleged data processor, pursuant to the relevant provisions of the Data Protection Act 2018, as amended, and Regulation (EU) 2016/679, commonly known as the General Data Protection Regulation (or 'GDPR').

71. Barr J noted (at para. 91) that, as a matter of law:

> 'When a complaint has been lodged by a consumer agency acting on behalf of a data subject, the following criteria must be met: that personal data of the complainant has been processed by the person, or entity, against whom the complaint is made, in a manner that the data subject considers infringes GDPR 2016, or DPA 2018; that the complainant has mandated the consumer agency to act on their behalf in bringing the complaint; and that the consumer agency meets the criteria for a representative body as set down in Art. 80(1) of GDPR 2016.'

72. Barr J later concluded (at para. 122) that Google was correct in its essential submission that the criteria for an admissible complaint should have been established to the satisfaction of the respondent, before it decided to commence the inquiry into the merits of the complaints.

73. The facts at issue in *Google* are, thus, a classic example of a decision to commence a process that is nonetheless amenable to judicial review as one that was *ultra vires* the Commission, rather than as a decision capable of falling with the *Rowland* principles exception for a breach of fair procedures that has caused an ongoing process to go irremediably wrong. The case of *Ivers v Garda Commissioner* [2022] IECA 206, (Unreported, Court of Appeal (Barniville P, Noonan and Binchy JJ) 18 August 2022) provides another good example of the same thing. In that case, the Court of Appeal quashed a decision of the Garda Commissioner to initiate the procedure for the summary dismissal of a Garda under s. 14 of the Garda Síochána Act 2005, as amended. The Court of Appeal rejected the argument that, as the s. 14 process had just commenced, the application for judicial review was premature under the *Rowland* principles, but found instead that the commencement of the s. 14 procedure was *ultra vires* the Garda Commissioner since, properly construed, that section could only be invoked where there was no genuine dispute about the facts of the misconduct at issue whereas there was a genuine dispute about those facts in that case.

74. I have already pointed out that, in seeking to permanently restrain a proposed audit that may or may not lead to a VAT estimate or assessment, which – should it occur – may or may not be one raised outside the limitation period contained in s. 113 of the 2010 Act, SDR is not raising any issue about whether an ongoing procedure has gone

irremediably wrong on fair procedures grounds and, so, is not raising any issue capable of being captured by the *Rowland* principles.

75. Nor is SDR raising any issue about the jurisdiction or *vires* of Revenue to embark on the proposed audit.

76. The issue that SDR raises on the proposed audit is that of futility. SDR argues that, if the conduct of the proposed audit is followed by service of an estimate or assessment of VAT payable for the period from 1 November 2010 to 30 April 2013 in reliance upon s. 113(2) of the 2010 Act on the basis that some form of fraud or neglect has been committed and if SDR can irrefutably establish either that no such fraud or neglect has been committed or that s. 113(2) must be disapplied as in breach of EU law, then it should not have to wait to do so in an appeal to the TAC against that assessment but, instead, should be permitted to do so now in the guise of an application to permanently restrain an otherwise lawful, but potentially futile, audit, given the irrecoverable expenditure of time and resources that engagement with that audit would entail.

77. I pause here to note that I am by no means persuaded that engagement with a Revenue VAT audit of SDR's supplies to Irish-resident customers in the period between 1 November 2010 and 30 April 2013 would be as daunting or onerous a prospect as SDR suggests. The fact that the period concerned is approximately a decade and a half ago must be balanced against the fact that, between October 2020 and July 2022, SDR was clearly able to engage with HMRC in seeking and obtaining a full refund of the VAT it had paid on its supplies to Irish customers for the period between November 2010 and April 2015.

78. In written and oral submissions on the application, SDR sought to raise two further grounds of challenge to the lawfulness of any VAT assessment there may be for the period between 1 November 2010 and 30 April 2013.

79. First, they argue that it would amount to a breach of the rule in *Henderson v Henderson* (1843) 3 Hare 100, which provides that where a given matter becomes the subject of litigation in – and of adjudication by – a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject in litigation in respect of matters which might have been brought forward as part of the subject in contest, but which were not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. As I understand SDR's argument in that regard, it is that any future VAT assessment there may be for the 2010-2013 period should have been raised in conjunction with the earlier 2013-2015 SDR assessments (or, at any rate, some time ago), and – in application of the rule in *Henderson v Henderson* or some related principle – should not now be permitted.

80. Revenue responds that SDR included nothing in its statement of grounds concerning the application of the rule in *Henderson v Henderson* or any related principle and, accordingly, was never given leave to challenge the audit proposal on any such ground. Without prejudice to that submission, Revenue argues that the rule has no application in the circumstances of this case.

81. Second, in the course of the hearing before me, counsel for SDR referred to a number of cases on the doctrine of legitimate expectation as a principle of EU law, acknowledging that SDR had not sought leave to rely on any such ground to impugn

the lawfulness of any 2010-2013 VAT assessment but suggesting, as I understand the argument, that the relevant doctrine should inform the court's approach to SDR's contention that there could have been no 'neglect' on its part in connection with, or in relation to, VAT for the relevant period. In response, Revenue emphasises – as SDR concedes – that no leave was granted to argue that ground and submits that, in any event, there is no basis on the facts presented for any legitimate expectation on the part of SDR that Revenue would not seek to recover VAT on SDR's supplies to Irish-resident customers during the period at issue.

82. As part of its argument in opposition to the application, Revenue submits that the Court should exercise its discretion to refuse it on the ground that a more appropriate alternative remedy is available in the form of a statutory right of appeal to TAC against a VAT estimate or assessment, should that – as-yet hypothetical – VAT estimate or assessment come to pass.

83. In response to that argument, SDR points out that there is no statutory appeal against a decision by Revenue to commence a VAT audit and, so, it has no available alternative to the present application as an appropriate remedy. In seeking to emphasise the significance of that apparent lacuna, SDR contends that, if the proposed audit related instead to any of the taxes covered by the TCA 1997 for the period from 1 November 2010 to 30 April 2013, it would have an appeal under s. 959AJ of that Act against that inquiry on the ground that it does not come within the exception under s. 959Z(4)(b) to the 4-year limitation period under s. 959Z(3) that arises where a Revenue officer has reasonable grounds for believing that any form of fraud or neglect has been committed.

84. In that regard, I am satisfied that SDR's contention is incorrect. That is because I accept Revenue's submission that the 4-year limitation period under s. 959Z(3) is one that prohibits a Revenue officer from conducting any such inquiry 'at any time after the period of 4 years *commencing at the end of the chargeable period in which the chargeable person has delivered a return for the chargeable period.*' For the avoidance of doubt, s. 959Z(4)(a) of the TCA 1997 provides that a Revenue officer can conduct any such inquiry at any time in the circumstances provided for by, among other provisions, s. 959AC(2)(a), which is when a chargeable person fails to deliver a return. Section 959AJ(1) of the TCA 1997 does provide for a right of appeal against an enquiry made or action taken by a Revenue officer under s. 959Z for a chargeable period after the expiry of the period referred to in subsection (3) of [s. 959Z] but, once again, it is important to note that the period concerned is one of 4 years '*commencing at the end of the chargeable period in which the chargeable person has delivered a return for the chargeable period*'.

85. As SDR does not dispute that it did not deliver a VAT return on its supplies to Irish-resident customers during the period from 1 November 2010 to 30 April 2013, it is clear that SDR would not have had any right of appeal to the TAC under s. 959AJ of the TCA 1997 if the proposed audit concerned any of the relevant taxes covered by that Act, rather than VAT.

86. On the other hand, I am by no means certain that SDR has available to it an appropriate alternative remedy in the form of an appeal to the TAC against an, as yet hypothetical, VAT estimate or assessment, should one be raised.

87. In *Lee v Revenue Commissioners* [2022] 1 IR 389 ('*Lee*'), the Court of Appeal considered the scope of the jurisdiction of the Appeal Commissioners on an appeal against an income tax assessment under the provisions of the TCA 1997 in force at the material time. In giving judgment for the Court, Murray J concluded (at 419):

> '**[78]** The jurisdiction of the Appeal Commissioners and of the Circuit Court under those provisions of the TCA in force at the time of the events giving rise to these proceedings and relevant to this appeal (ss. 933, 934 and 942) is limited to determining whether an assessment correctly charges the relevant taxpayer in accordance with the relevant provisions of the TCA. That means that the Commissioners are restricted to inquiring into, and making findings as to, those issues of fact and law that are relevant to the statutory charge to tax. Their essential function is to look at the facts and statutes and see if the assessment has been properly prepared in accordance with those statutes. They may make findings of fact and law that are incidental to that inquiry. Noting the possibility that other provisions of the TCA may confer a broader jurisdiction and the requirements that may arise under European Law in a particular case, they do not in an appeal of the kind in issue in this case enjoy the jurisdiction to make findings in relation to matters that are not directly relevant to that remit, and do not accordingly have the power to adjudicate upon whether a liability the subject of an assessment has been compromised, or whether Revenue are precluded by legitimate expectation or estoppel from enforcing such a liability by assessment, or whether Revenue have acted in connection with the issuing or formulation of the assessment in a manner that would, if adjudicated upon by the High Court in proceedings seeking Judicial Review of that assessment, render it invalid.'

88. However, in reaching that conclusion, the Court of Appeal had regard, amongst other authorities, to its own earlier decision in *Stanley v Revenue Commissioners* [2019] 2 IR 218 ('*Stanley*'). That appeal arose in the context of a challenge to a notice for assessment for capital acquisitions tax, interest and penalties. The assessment was issued outside the four-year limitation period under s. 49 of the Capital Acquisitions Tax Consolidation Act 2003 ('CATC 2003') in reliance upon the exception under that section where Revenue has reasonable grounds to believe that any fraud or neglect has been committed in connection with, or in relation to, the relevant return. The taxpayer had made a return, but Revenue contended that there had been an act of 'neglect' in that a tax credit had been wrongly claimed in it. The taxpayer brought both an application for judicial review and an appeal to the Appeal Commissioners challenging that assessment. The High Court found that the Appeal Commissioners had jurisdiction to determine whether the time limit under the section could be lawfully disapplied.

89. The Court of Appeal overturned that conclusion. Peart J (Finlay Geoghegan and Hogan JJ concurring) explained (at 232):

> '**[34]** The jurisdiction of the Appeal Commissioners to determine appeals against assessments of tax does not, in my view, extend to determining whether or not the notice of assessment of tax which is the subject of the appeal to them is a lawful notice or whether it is unlawful by reason of being issued ultra vires the Revenue's statutory powers.
>
> **[35]** A lawful assessment is a pre-requisite to the exercise by the Appeal Commissioners of their powers to hear and determine an appeal against an assessment. As the appellant has submitted, it is only where the notice is a

> valid notice of assessment that the issues of quantum of tax fall to be determined by the Appeal Commissioners on appeal. Where, as in this case, the issue raised is one of law and, specifically, of statutory interpretation as to the lawfulness of an assessment as opposed to the quantum of tax so assessed, the appellant was perfectly entitled to seek to have that issue determined by way of the present judicial review proceedings.'

90. In commenting on the passage in *Lee* (at 412), Murray J noted that, in contrast to the equivalent provision in s. 49 of the CATC 2003, s. 955(3) of the TCA 1997 expressly provides for an appeal against an assessment to tax on the basis that the time limit for raising the assessment has expired, before commenting that it was hard not to think that the conclusion of the Court in *Stanley* was heavily influenced by the absence of a similar express power in the CATC 2003. I do not think there is any similar express power (to appeal specifically against the disapplication of a time-limit for raising an assessment) under the 2010 Act.

91. However, as the issue of the scope of the VAT assessment appeal provision under s. 111(2) of the 2010 Act was not argued before me, I should not express any concluded view upon it for the purpose of the present judgment. Suffice it to say that, should a VAT assessment for the period between 1 November 2010 and 30 April 2013 be raised after the proposed audit in reliance upon the 'fraud or neglect' exception to the 4-year limitation period under s. 113 of the 2010 Act, there is plainly room for argument about whether an appeal properly lies to the Appeal Commissioners to challenge that assertion.

92. Against the background of these facts and arguments as I have endeavoured to summarise them, I have come to the following firm conclusion.

93. In my view, this case is one in which the court should exercise its discretion to refuse the application for judicial review on the ground that it is premature because there is no properly developed factual context in which the Court can adjudicate on the issues presented.

94. In identifying the existence of a discretion on this ground in *Habte*, Murray J referred to the relevant commentary in Lewis, *Judicial Remedies in Public Law*, 5th Ed. (Sweet & Maxwell, 2015) at paras 12.05 to 12.016, pp. 414-420. In the equivalent section of the most recent edition of that text, 7th Ed. (Sweet & Maxwell, 2026), the author states (at para. 12.014, p. 422) that the courts have indicated that they will not generally consider cases which are brought prematurely because the relevant legal or factual events to which the claim relates have not yet occurred at the time that the claim is brought.

95. One of the cases cited in that text as authority for that proposition is the decision of Dyson J in the Queen's Bench Division of the High Court of England and Wales in *R v Inland Revenue Commissioners, ex parte Bishopp* [1999] STC 531 ('*IRC, ex p. Bishopp*'), in which the court declined to engage in a judicial review of a refusal by the Inland Revenue to give pre-transaction clearance to a proposed transaction because, amongst other reasons, the facts were hypothetical at that stage and the transaction might not proceed in any event. The present application is based to a significant extent on hypotheticals or predictions in the face of several outstanding questions, including (although perhaps not limited to) the following. What will the result of the proposed audit be? Will there be an estimate or assessment of VAT

payable for the relevant period and, if so, in what amount and on what basis will it be contended to fall within the time limit under s. 113(2) of the 2010 Act? What will the specific evidence relied on in support of any such contention be? Would an appeal challenging the correctness of any such contention properly lie to the Appeal Commissioners under s. 111(2) of the 2010 Act? Paying appropriate regard to all of those existing uncertainties, I conclude that there is no properly developed factual context in which the Court can adjudicate on the issues presented in advance of any VAT estimate or assessment there may be.

96. In that context, it is important to acknowledge that in both *Facebook Ireland Ltd v Data Protection Commissioner* [2021] IEHC 336, (Unreported, High Court (Barniville J), 14 May 2021) (‘*Facebook*’) (at para. 130) and *Google* (at para. 117) the High Court was satisfied that the decision of the Data Protection Commission to commence an inquiry into a suspected infringement of the GDPR by reference to the powers conferred on the Commission, and the obligations imposed on a controller or processor, for the purpose of such inquiries, was a decision with legal consequences, so that it could not be said that an application for judicial review did not lie in such circumstances.

97. In the same way, I accept that a notification of a VAT audit is capable of having legal consequences for any person the subject of such an audit, including SDR, given the powers that may be exercised in that regard by an authorised officer of the Revenue Commissioners under ss. 108 and 108A of the 2010 Act.

98. However, it is important to remember that the legal infirmity contended for in both *Facebook* and *Google* attached to the inquiry it had been decided to commence, whereas the legal infirmity contended for in this case is one that SDR claims attaches

to the, as yet, hypothetical, VAT estimate or assessment that may (or may not) follow the audit that Revenue has decided to commence and is not one that attaches to that audit. The problem for SDR is not that a decision to conduct an audit is not one capable of giving rise to judicial review in appropriate circumstances but, rather, that an application for judicial review of such a decision, predicated on the asserted legal infirmity of an, as yet, hypothetical, VAT estimate or assessment that may (or may not) follow, is plainly premature.

99. For the same reason, I do not think that there is any reality to the argument advanced on behalf of SDR that, should it fail to challenge the proposed audit, it might be held to have acquiesced in the process to the extent that it would be precluded from raising the unlawfulness of any subsequent VAT estimate or assessment there may be. In *Google*, the obvious risk was that a failure to challenge the commencement of an investigation based on complaints not shown to be admissible might lead to a finding that Google had acquiesced in the exercise by the DPC of a jurisdiction to investigate those complaints that it would not otherwise have had. For my part, I cannot see how any risk of a finding of acquiescence in a later unlawful VAT estimate or assessment could be said to attach to a failure to challenge an earlier lawful audit.

100. Similarly, to the extent that the issue can be reformulated as one of ripeness or *locus standi,* I should say that I do not view the position of SDR as analogous to that of a person who, having been charged with an offence, is facing trial and who is, thus, in imminent danger of conviction (so that it is not then necessary to wait for the axe to fall before seeking relief). Rather, it seems to me that SDR's position is analogous to that of a person who seeks to halt an investigation into an offence by reference to

arguments he intends to make about the jurisdiction of the trial court if he is later charged.

101. For those reasons, I refuse to grant relief by judicial review.

The substantive issue

102. The only remaining question is whether, in case I am mistaken in the conclusion I have reached that the application must be refused as premature, I should go on to express my view on the substantive issues raised, which I have identified as those directed to the lawfulness of any VAT estimate or assessment that may be raised for the period from 1 November 2010 to 30 April 2013 in reliance on the 'fraud or neglect' exception to the 4-year limitation period otherwise applicable.

103. Dyson J addressed precisely the same question in *IRC ex p. Bishopp* (at 549), concluding that it is wrong in principle for the court to give an applicant the answer which it has held he or she is not entitled to receive. There, I think, Dyson J had in mind the finding he had made that it was wrong in principle for the court to entertain challenges to pre-transaction opinions of the UK Revenue because of the inhibiting effect that might have on the availability of that useful facility, rather than the finding he had also made that the application should be refused as premature, being based to a significant extent on hypothetical facts. The latter finding, which is the one I have made in this case, impels me to conclude, not that it is wrong in principle to address the substantive issue (lest I have fallen into error on the preliminary one), but that it is undesirable (and, to some extent, impossible in practice) to do so when the relevant legal or factual events to which the claim of unlawfulness relates have not yet occurred.

Conclusion

104. As this judgment is being delivered electronically, the parties should correspond with each other forthwith on the appropriate form of order to be made, including as to costs. In default of agreement, the parties will have two weeks within which to furnish brief written submissions of not more than 1,000 words on the terms of the final order and on costs and any other matters that may arise.

105. The matter will be listed for mention at 10.30 hours on Thursday, 24 September 2026 for the purpose of making final orders.

Appearances
Martin Hayden SC with Eoin O'Shea BL, instructed by Eversheds Sutherland (Ireland) LLP, Solicitors, for the applicant.
Noel Travers SC with Shelley Horan SC, instructed by the Revenue Solicitor, for the respondent.