



Neutral Citation: [2024] UKFTT 00460 (TC)

Case Numbers: TC09184

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House, London

Appeal references: TC/2021/01299
TC/2021/15943

VALUE ADDED TAX – whether dip pots supplied as part of a takeaway meal deal are a separate standard rated supply or whether they are part of a single supply – validity of assessment under s 80(4A) Value Added Tax Act 1994 – jurisdiction of the First-tier tribunal to consider arguments based on legitimate expectation in the context of an appeal under s 83(1)(t) Value Added Tax Act 1994 – whether HMRC precluded from recovering tax wrongly credited under s 80 Value Added Tax Act 1994 either on the basis of legitimate expectation or estoppel by convention – appeal dismissed

Heard on: 20-22 March 2024

Judgment date: 3 June 2024

Before

**TRIBUNAL JUDGE ROBIN VOS
CATHERINE FARQUHARSON**

Between

QUEENSCOURT LIMITED

Appellant

and

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS
Respondents**

Representation:

For the Appellant: **CHARLOTTE BROWN** of counsel, instructed by PricewaterhouseCoopers LLP

For the Respondents: **MS HARRY JONES** and **MR MAX SIMPSON** litigators of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. The VAT rules relating to food seem to throw up regular conundrums. The particular issue in this appeal is whether the supply of a dip pot as part of a KFC takeaway meal deal is a separate zero rated supply or whether it is part of a single, standard rated supply of hot food.
2. The appellant, Queenscourt Limited (“Queenscourt”) had, until 2019, accounted for VAT on the basis that the dip pots formed part of a single standard rated supply. However, it then changed its view on this and submitted an error correction notice to reclaim the VAT it considered it had wrongly accounted for between October 2015 and September 2018. After some debate, HMRC agreed to repay the VAT.
3. Queenscourt then submitted a further error correction notice to reclaim VAT which it had accounted for on dip pots comprised in takeaway meal deals between October 2018 and September 2019. This claim was reviewed by a different HMRC officer and was refused on the basis that the dip pots formed part of a single standard rated supply. The officer also considered the previous repayment to have been incorrect and issued assessments (which we will refer to as the recovery assessments) under s 80(4A) Value Added Tax Act 1994 (“VATA”) in order to recover the amount which had been repaid.
4. Queenscourt now appeals both against the decision to refuse the repayment claimed in the second error correction notice and also against the recovery assessment relating to the first error correction notice. Both appeals are primarily on the basis that the supply of the dip pots in these circumstances is a separate zero rated supply.
5. However, Queenscourt says that if it is wrong on this point, the recovery assessments are invalid as there has been no change in circumstances and no new facts have come to light since HMRC agreed to repay the tax. Alternatively, it argues that HMRC are prevented from recovering the tax, either on the basis of legitimate expectation or estoppel by convention, in each case arising as a result of HMRC’s original agreement that that tax should be repaid.
6. It should be noted that, in relation to the question as to whether the supply of the dip pots is standard rated or zero rated, this appeal only deals with the point as a matter of principle. The Tribunal is not being asked to consider the actual amounts of VAT payable or repayable as a result of its decision.
7. These appeals have been designated as lead appeals under Rule 18 of the Tribunal Rules. There are 17 related cases which have been stayed depending the outcome of these appeals. Six of those cases involve companies which form part of the same group as Queenscourt (the QFM Group). The remainder are unrelated.
8. The total amount of tax that is at stake in all of the appeals is little under £3m although of course the outcome of Queenscourt’s appeals may also have a significant impact on future VAT liabilities for all of the appellants in the related appeals and, no doubt, for other taxpayers who find themselves in a similar position. These appeals therefore raise important matters of principle.

APPLICATION FOR PERMISSION TO RELY ON NEW POINTS

9. In its grounds of appeal against the recovery assessment, Queenscourt submitted that the Tribunal had jurisdiction to consider arguments based on legitimate expectation in the context of an appeal under s 83(1)(t) VATA, referring to the decision of the Upper Tribunal in *KSM Henryk Zeman SP Z.o.o. v HMRC* [2021] UKUT 182 (TCC).
10. HMRC did not respond to this or make any reference to the point in its statement of case. However, in their skeleton argument which was filed on 7 March 2024, HMRC

submitted that the Tribunal had no jurisdiction to consider the legitimate expectation point and that *Zeman* was wrongly decided.

11. As a result of this, Queenscourt made an application on 12 March 2024 asking the Tribunal to strike out the relevant parts of HMRC's skeleton argument dealing with jurisdiction or alternatively to bar HMRC from raising this issue. Alternatively, Queenscourt applied for permission to rely on an additional ground of appeal based on estoppel by convention (as explained by the Supreme Court in *Tinkler v HMRC* [2021] UKSC 39) should the Tribunal allow HMRC to rely on the jurisdiction challenge.

12. HMRC's somewhat belated response to this on 19 March 2024 (the day before the hearing) was to apply for permission to defend the appeal so far as it related to legitimate expectation on the basis that the Tribunal has no jurisdiction to consider this point and also to object to Queenscourt being permitted to rely on the new ground of appeal based on estoppel.

13. At the start of the hearing, the Tribunal therefore had to decide whether to give HMRC permission to rely on an argument that the Tribunal has no jurisdiction, in the context of the present appeal, to consider arguments relating to legitimate expectation and, if so, whether to permit Queenscourt to rely on a new ground of appeal based on estoppel by convention.

14. After hearing submissions, from both parties, we gave permission for both of these arguments to be deployed and explained our reasons for doing so. We will therefore only summarise those reasons briefly in this decision notice.

15. There was no real difference between the parties as to the principles which the Tribunal should apply in deciding whether to approve or dismiss the applications.

16. In relation to HMRC's application, HMRC accepted that they were in breach of Rule 25(2) of the Tribunal Rules which requires HMRC's statement of case to set out their position in relation to the case.

17. The Tribunal was therefore being asked to give relief from sanctions and so needed to consider the seriousness of the breach, whether there was a good explanation and whether, in all the circumstances, relief should be granted. The Tribunal also needed to take into account the guidance provided by the High Court in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) as to the principles which should be applied in deciding whether to allow a late amendment to pleadings.

18. Given that Mr Simpson accepted on behalf of HMRC that their failure to comply with Rule 25 of the Tribunal Rules was serious and that there was no good reason for the failure, in essence, what the Tribunal had to decide was whether, taking all of the relevant circumstances into account, it would be in accordance with the overriding objective contained in Rule 2 of the Tribunal Rules (to deal with cases fairly and justly) to allow the applications.

19. This task was greatly assisted by the parties' agreement that, if the Tribunal were to grant permission for both new points to be relied on, each party would be in a position to make submissions in relation to them and that this could be done within the time allocated for the hearing.

20. In relation to HMRC's application to be allowed to rely on arguments relating to the jurisdiction of the Tribunal to consider any legitimate expectation arguments, we noted the importance of both parties dealing with all points which they intend to rely on either in the grounds of appeal or in a statement of case. The authorities are clear that a party should not be ambushed by new arguments being put forward at a late stage.

21. However, the question as to whether the Tribunal has jurisdiction to deal with a particular point is fundamental. As Mr Simpson pointed out, the Court of Appeal made it

clear in *Hoey v HMRC* [2022] EWCA Civ 656 at [132] that a Tribunal cannot confer jurisdiction on itself and that the parties cannot agree to confer jurisdiction on the Tribunal. The Tribunal Rules also make it clear (Rule 8(2)(a)) that the relevant part of the proceedings must be struck out if the Tribunal does not have jurisdiction. This is therefore a very strong indicator in favour of giving permission.

22. In addition, as Mr Simpson observed, the question of jurisdiction is a pure point of law. There is no evidence which needs to be considered by the Tribunal in order to decide the point.

23. There would also be no injustice to Queenscourt in allowing HMRC to deal with the question of jurisdiction as its representatives had indicated prior to the hearing that they were ready and able to make submissions on the point.

24. Therefore, although there had been a serious failure by HMRC for which there is no good explanation, we considered that it would be in the interest of justice to allow HMRC to make submissions in relation to the question of jurisdiction in connection with legitimate expectation.

25. Queenscourt's application to be permitted to rely on a new ground of appeal based on estoppel by convention fell to be considered by reference to the overriding objective and the principles set out in *Quah* relating to late amendments to pleadings. This was more finely balanced than HMRC's application.

26. Although the point could be dealt with in the time allotted for the hearing and Mr Simpson had indicated that HMRC would be able to deal with the point in submissions, HMRC's main objection was that the question as to whether the requirements for estoppel by convention were made out were fact sensitive and that HMRC should be given an opportunity to consider whether they might wish to put forward any additional evidence.

27. Ms Brown's response to this was that no evidence was needed other than the evidence which would already be before the Tribunal, consisting primarily of the relevant documents and correspondence.

28. Having weighed up all of the considerations, we concluded that it would be in the interest of justice to allow Queenscourt to rely on estoppel by convention as an additional ground of appeal. The main considerations were as follows:

(1) the argument had a reasonable prospect of success;

(2) although the ingredients of estoppel by convention are fact sensitive, it is important to note that the burden of proof will be on Queenscourt to show that the requirements are satisfied. It will need to do this based on inferences from the documentary evidence which is available. The absence of any other evidence is more likely to prejudice Queenscourt than HMRC. In any event, it is difficult to see what other evidence HMRC might realistically be able to produce which is relevant to the questions which would need to be determined.

(3) We accept that some further evidence may be needed as to the extent of any detrimental reliance by Queenscourt on any shared common assumption but this can be dealt with relatively easily as part of the evidence which will be given by Dr Patel on behalf of Queenscourt and which can be tested in cross-examination. It is not something in respect of which HMRC might be expected to provide any evidence. Again, it is Queenscourt that would be prejudiced by any shortcomings in this evidence.

(4) We did not therefore consider that there would be any significant prejudice to HMRC in permitting Queenscourt to rely on estoppel by convention and the hearing could still be conducted in a way which was fair to both parties in relation to this point.

(5) Whilst we accept that Queenscourt's wish to rely on the estoppel argument was prompted by HMRC's challenge to the Tribunal's jurisdiction in relation to the legitimate expectation point and that there is therefore some link between the two, we note that there is no reason in principle why Queenscourt could not have raised the estoppel argument in its grounds of appeal given that the appeal to the Tribunal was made on 10 November 2021, several months after the Supreme Court issued its judgment in *Tinkler* on 30 July 2021. We did not consider this to be a significant factor in our decision one way or the other.

29. As a result of allowing these applications, the issues we have to determine are as follows:

(1) Whether the supply of the dip pots as part of a takeaway meal deal is a separate, zero rated supply or whether it is part of a single standard rated supply. If we find that it is part of a single standard rated supply, we also need to consider the other issues set out below which relate only to the recovery assessments.

(2) Whether the recovery assessments have been validly made.

(3) Whether the Tribunal has jurisdiction to consider arguments based on legitimate expectation.

(4) If so, whether HMRC is prevented from recovering the tax in question on the basis that Queenscourt has a legitimate expectation that HMRC will not do so.

(5) If the Tribunal has no jurisdiction to consider arguments based on legitimate expectation or if the appeal based on legitimate expectation fails, whether Queenscourt can show that there is an estoppel by convention which prevents HMRC from relying on the recovery assessments.

THE EVIDENCE AND THE BACKGROUND FACTS

30. The evidence consisted of a relatively modest bundle of documents and correspondence including a witness statement provided by Dr Kishan Patel, a director of the QFM group of companies of which Queenscourt is a member. In addition, at the request of the Tribunal, the parties provided copies of the correspondence passing between them during the period from the date of the first correction notice to the date on which HMRC agreed to repay the VAT which had been claimed as well as copies of various extracts from HMRC's guidance which had been referred to by the parties.

31. Dr Patel also gave oral evidence and was cross-examined. He was a model witness, answering the questions put to him in a straightforward way. His evidence was not seriously challenged by HMRC and we accept it in full.

32. The facts which are relevant to these appeals are not in dispute. Based on the evidence provided to us, we set out the key facts below.

33. Queenscourt is a member of the QFM Group of companies. The Group as a whole operates a number of different restaurant franchises. Queenscourt, however, only operates KFC franchises. Altogether, the Group operates approximately 50 KFC outlets.

34. The menu at the KFC outlets operated by Queenscourt offers items to be purchased individually but also offers various different meal deals which bundle together popular items

at a discounted price. By way of example, the “boneless banquet” includes three boneless mini fillets, a small portion of popcorn chicken, fries and the customer’s choice of a side, drink and a dip pot. In December 2022, the cost of the boneless banquet was £7.99. If the items were all purchased separately, they would cost £12.43.

35. A customer who is purchasing a meal deal is not obliged to receive a dip pot. They are free to say that this is something they do not want, even though it is included in the price. However, even if they decline the dip pot, they may receive one in any event as the packagers do not always take note of the fact that one is not needed. In any event, there is no reduction in the purchase price of the meal deal if the dip pot is declined.

36. Not all of the meal deals include a dip. For example, the “mighty bucket for one” does not do so. Some meal deals also include other cold items such as coleslaw (which is one of the choice of sides), cookies or yoghurts.

37. All items comprised in a meal deal are available to purchase separately. The dips currently cost 40p per pot. The dip pots are larger than the sachets of ordinary sauces such as ketchup which are given out for free.

38. Dip pots are therefore available to be purchased on their own, as part of a meal deal or as part of an order comprising a number of individual items from the menu which do not form part of a meal deal.

39. The dip pots are very popular. Indeed, one of the flavours (KFC’s supercharger sauce) is so popular that it has started being sold in large bottles. In the period between 2017-2023, all of the KFC outlets operated by the QFM Group sold just over 400,000 dip pots which were not part of another transaction. On average, this amounts to approximately 4 dip pots per store per day.

40. Unlike some other fast food outlets where dips are placed in a hole in the box containing the food which the dip accompanies, in the case of KFC, the dip is simply placed in a bag along with the other meal deal items.

41. Until early 2019, Queenscourt treated takeaway meal deals as a single, standard rated supply. However, their view changed on this as they considered that a meal deal could be treated as a multiple supply so that, where appropriate, a component part could be zero rated if that is how they would be treated if they were sold on their own. This included items such as coleslaw, cookies, yoghurts and milkshakes, as well as dip pots.

42. In line with this new approach, Queenscourt submitted an error correction notice on 29 March 2019 (which we refer to as the first error correction notice) claiming repayment of £86,803.84 of overpaid VAT for the VAT period 12/15 to 09/18. This figure included £75,502 relating to dip pots included in takeaway meal deals.

43. Over the next few months, there were several exchanges of correspondence between HMRC and Queenscourt’s agent, PricewaterhouseCoopers (PwC). The correspondence focussed on the calculation of the amounts claimed. HMRC did not raise any queries as to whether the items in respect of which the claims were made could or should be treated as a separate supply.

44. On 17 October 2019, the HMRC officer in question, Mr Trethewey accepted the claim but noted that “this issue may be revisited during any future audit activity of your clients.”

45. Queenscourt submitted a further error correction notice (the second error correction notice) on 22 April 2020 to reclaim VAT on items included in takeaway meal deals during the VAT periods 12/18 to 09/19. The total claim was for £33,867.60 of which £30,936.64 related to dip pots. This claim was dealt with by a different HMRC officer, Mr Hothi.

46. In July 2020, Mr Hothi accepted that cookies and yoghurts could be treated as separate supplies as they could be consumed on their own but considered that dip pots formed part of a single supply alongside the hot food that formed part of the relevant meal deal as, in his view, the dips were ancillary to the supply of the hot food and were simply a means of better enjoying that food. In particular, he took the view that dips could not be consumed on their own and were not therefore an independent supply.

47. Mr Hothi also indicated that HMRC would be reviewing their decision to repay the VAT relating to the dip pots supplied as part of meal deals following the first error correction notice.

48. Mr Hothi's decision was upheld on review with the review conclusion being notified to Queenscourt on 9 December 2020.

49. HMRC issued recovery assessments under s 80(4A) VATA on 16 March 2021 in order to recover the VAT which they considered to have been wrongly repaid following the first error correction notice. However, having been told by PwC that the assessments included the amounts relating to cookies and yoghurts (which were accepted by HMRC as being zero rated), HMRC withdrew these assessments but issued new recovery assessments relating only to the VAT in respect of the dip pots on 11 May 2021.

50. Queenscourt again asked for a review of Mr Hothi's decision and, once more, this was upheld in a review conclusion letter dated 14 July 2021.

51. Dr Patel gave evidence (which, as we have said, we accept) of the impact on the QFM Group of the recovery assessments. In summary, this comprised the following:

(1) The Group had to withdraw from transactions which would have led to the opening of two new outlets. One of these was a Costa Coffee outlet and the other was a KFC outlet. We know that Queenscourt only operates KFC franchises and so the Costa Coffee outlet would not have been a project of Queenscourt.

(2) We were not told whether the proposed KFC outlet would have been operated by Queenscourt. However, we know from the list of cases which are stayed behind these appeals that there are at least three other group companies which operate KFC outlets and, based on the amounts claimed operate at least as many outlets (if not more) than Queenscourt. The opening of a new KFC outlet costs approximately £600,000.

(3) The Group has had to defer the refurbishment of two existing outlets (and the renewal of the corresponding franchise agreements to those outlets) from 2022 to 2023. In order to achieve the deferral, the Group had to agree to allow KFC to grant a franchise to Welcome Break allowing them to open a KFC outlet in the same area as one of the QFM Group's outlets although KFC did grant QFM Group a rebate of £25,000 of its franchise fee in consideration of agreeing to the grant of a franchise by KFC to Welcome Break. The Welcome Break outlet has not yet opened and so (as Dr Patel candidly acknowledged) it is impossible to know what impact this may have on the Group.

(4) One impact of deferring the refurbishment of the two outlets is a reduction in turnover. This is because turnover typically increases by 5%-7% in the year after a refurbishment. The refurbishment of a store typically costs between £100,000-£200,000.

(5) Refurbishments are generally required (and are mandatory) approximately every five years. However, the next refurbishment remains due five years from when the refurbishment of the two stores should have taken place. In practice, this means that

it will now only be four years until the next refurbishment of the two outlets in question.

(6) For the Group overall, cash was a significant problem during this period as a result of the Covid pandemic. Having said that, it was a successful time for the KFC stores as they were only closed for six weeks and were one of the first to be back up and running. The Group did however have to increase its borrowings during the period in question as a result of the energy crisis which in turn had an impact on cash resources due to high interest rates.

SINGLE OR MULTIPLE SUPPLY

52. With that background in mind, we turn now to consider the first of the issues which we have to determine which is whether the supply of the dip pots as part of a takeaway meal deal is part of a single standard rated supply or whether it is a zero rated element of a multiple supply.

Legal principles

53. There was no real difference between the parties as to the principles which we should apply in determining this issue. The disagreement between the parties was as to the way in which those principles should be applied to the facts of these appeals.

54. The issue arises as a supply of takeaway hot food is standard rated whilst a supply of takeaway cold food is zero rated (the combined effect of s 30 and group 1 of schedule 8 VATA including, in particular, note 3 to group 1). Based on this, the sale of a portion of takeaway chicken by one of Queenscourt's KFC outlets (being hot food) is standard rated for VAT purposes whilst the sale of a dip pot (being cold food) is zero rated. The question is whether this remains the case where the two items are purchased together (along with other items) as part of a takeaway meal deal.

55. The case law from the European Court of Justice ("ECJ") makes it clear that, whilst the starting point is that every supply should normally be regarded as distinct and independent, there are circumstances where the supply of more than one item in a single transaction may be treated as a single supply which takes its VAT treatment from whichever part of the supply predominates. That case law has identified two particular situations where a supply which contains one or more elements as part of a single transaction may be treated as a single supply.

56. The first situation was explained by the ECJ in *Card Protection Plan Limited v Customs and Excise Commissioners* (case C-349/96) [1999] STC 270.

57. The background to that case was that CPP provided its customers with protection against financial loss and inconvenience as a result of the loss or theft of credit cards and other items such as car keys and passports. In effect, the supply included both insurance and other more administrative services.

58. The ECJ decided at [30] that:

“There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied.”

59. The second type of situation where there may be a single supply was considered by the ECJ in *Levob Verzekeringen BV v Staatssecretaris van Financiën* (Case C-41/04) [2006] STC 766.

60. In that case, Levob entered into a contract to acquire a standard software package which would then be customised in various ways. The ECJ concluded that, in addition to the situation described by the Court in *Card Protection Plan*, there is a single supply:

“where two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single indivisible economic supply, which it would be artificial to split.”

61. Both parties in these appeals accept that, for the purposes of these appeals, if there is a single supply (which is of course disputed by Queenscourt) it must be on the basis that the supply of the dips as part of the meal deal is ancillary to the supply of other items contained within the meal deal so that it is the principles set out in *Card Protection Plan* rather than *Levob* which are relevant.

62. We were also referred to the decision of the Upper Tribunal in *HMRC v The Honourable Society of Middle Temple* [2013] UKUT 0250 (TCC) in which the Upper Tribunal reviewed both *Card Protection Plan* and *Levob* as well as a number of subsequent decisions of the ECJ and, based on all of those decisions, set out at [60] a number of key principles to be applied in determining whether a particular transaction should be regarded as single composite supply or as several independent supplies. We take into account all of those principles but it is worth highlighting a few of them:

(1) All of the circumstances and the essential features or elements of the transaction must be examined in order to determine whether, from the point of view of a typical consumer, the supplies constitute several distinct principal supplies or a single economic supply.

(2) The fact that different elements of the supply can be supplied separately by a third party is irrelevant.

(3) The ability of the customer to choose whether or not to be supplied with an element is an important factor although it is not decisive and there must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.

(4) Separate invoicing and pricing, if it reflects the interests of the parties, supports the view that the elements are independent supplies, without being decisive. The flip side of this (as explained by the ECJ at [31] in *Card Protection Plan*) is that, if there is a supply of several elements for a single price, the single price may suggest that there is a single supply. However, again, this is not decisive.

63. We should say a little more about two of these principles which were discussed extensively as part of the parties’ submissions. The first is the typical consumer and the second is the relevance of choice.

64. As far as the typical consumer is concerned, the Upper Tribunal in *Middle Temple* noted at [51] that “it is necessary to have regard to the economic reason or purpose of the whole transaction from the point of view of the typical customer”. As was made clear by the Upper Tribunal in *HMRC v The Ice Rink Company Limited* [2019] UKUT 0108 (TCC) at [19] this means a typical recipient of the package of supplies whose characterisation is in dispute – i.e. in this case, a meal deal.

65. In our view, it follows from this that the motivations or purposes of a customer who buys a dip pot on its own or who buys a portion of chicken together with a dip pot but as separate items rather than a meal deal have little relevance to the question as to how a typical consumer of a meal deal would view that transaction.

66. We did not understand Ms Brown to disagree with this but, in her submission, the role of the typical consumer is simply to determine whether there is a link between two or more supplies. Even if a sufficient link is established, she submits that it is still necessary to look at other factors (including, in particular, in this case, the element of choice) in determining whether there is a principal supply and an ancillary supply. This, she says, follows from the observation of the Upper Tribunal in *Ice Rink* at [19] that:

“the ‘typical consumer’ is mentioned in paragraph 29 [of *Card Protection Plan*], not as an arbiter of ... whether one element of a supply is ancillary to another but rather as an aid to identifying precisely what has been supplied and whether that amounts to a single composite supply or several separate supplies.”

67. With respect, this does seem somewhat circular as the very question as to whether one supply is ancillary to another is what ultimately determines whether there is a single composite supply or several separate supplies. It must therefore, in our view, be relevant to consider whether the typical consumer of a meal deal would view the supply of a dip pot as ancillary to the supply of other elements within the meal deal such as the chicken. Having said this, as the Upper Tribunal noted at [46] in *Middle Temple*, ultimately the investigation is “highly fact sensitive” and, as we have set out above, all of the relevant circumstances must be taken into consideration.

68. Turning to the relevance of choice, Queenscourt relies heavily on the fact that there are, as we have explained, three different ways in which a customer may purchase a dip pot. They may do so as part of a meal deal, as a completely separate purchase or as part of a purchase of separate items from the menu such as a portion of chicken and a dip pot (but not as part of a meal deal).

69. The Upper Tribunal’s conclusion in *Middle Temple* at [57] that “the ability of the customer to choose whether or not to be supplied with a particular element of a transaction is an important factor” as long as it is “a genuine freedom to choose which reflects the economic reality of the arrangements between the parties” followed its review of the decision of the ECJ in *BGZ Leasing sp z oo v Dyrektor Izby Scarbowej w Warszawie* (Case C-224/11) [2013] STC 2162. That was a case where a leasing company leased goods to its customers but required them to insure the goods. The leasing company offered insurance which was taken up by many of the lessees. There was however no contractual obligation for them to do so and they could have arranged insurance with a third party.

70. The ECJ concluded at [39-42] both that the insurance and the leasing were not so closely linked that they form a single transaction and also that the insurance was not ancillary to the leasing as the insurance was an end in itself and not only the means to enjoy the lease under the best conditions.

71. In particular the ECJ noted at [43] that the lessee had the option of insuring the goods with a third party which meant that “the requirement for insurance cover cannot, in itself, mean that a supply of insurance by the lessor...is indivisible or ancillary to the supply of the leasing services.”

72. We do however note that, in *BGZ*, the ECJ had already determined that the insurance was not ancillary to the leasing. The ability to choose whether to obtain the insurance from

the lessor or from a third party was relevant only in the sense that this did not mean that the requirement in the leasing contract that the goods had to be insured meant that the insurance was nonetheless indivisible from or ancillary to the leasing.

73. Looked at in this way, the first question therefore is whether one supply is (irrespective of choice) ancillary to another or indivisible from it. If it is not, the lack of choice (or at least the lack of any genuine choice) might still lead to a conclusion that the supply is ancillary to or indivisible from another supply.

74. In support of her submissions about the importance of choice, Ms Brown referred to a number of other cases where this has been considered including *Middle Temple, Field Fisher Waterhouse LLP v HMRC* (Case C-392/11) [2012] BVC 292 (a decision of the ECJ) and *Wheels Private Hire* [2017] UKUT 51 (TCC).

75. However, the common theme which links all of these cases is that there was a service which the customer needed (supplies of water or other services for leased premises in *Field Fisher* and *Middle Temple* and supplies of insurance in *BGZ* and *Wheels*) and the only question, as noted by the Upper Tribunal at [26] was “whether the customer had a choice whether to receive all of the services from the principal supplier or obtain some services optionally from a third party”. The question was not whether the customer wanted to receive the particular element of the supply at all but whether they could realistically receive it from a third party.

76. In these appeals Queenscourt does not suggest that the dips could be obtained from third parties. Indeed, they are only available from KFC outlets. Therefore, whilst the element of choice as to how to obtain the dips from the KFC outlet is no doubt a relevant factor for us to take into account in determining whether the supply of the dips is ancillary to other supplies when received as part of a meal deal, it does not, in our view, assume the same importance as may be the case in circumstances where particular elements of a transaction can realistically be refused by a consumer and obtained elsewhere from a third party.

77. Before moving on to look at all the circumstances in order to determine whether the supply of the dip pots as part of the meal deal is a separate supply or part of a single supply, there is a further threshold legal point which has been raised by Queenscourt and which we must therefore deal with and which is a pure point of law.

78. Ms Brown submits that it is not open to HMRC to argue that the dip pots which form part of the meal deal are part of a single standard rated supply of hot food in circumstances where they accept that other items which may form part of a meal deal such as coleslaw, cookies and yoghurts are separate elements of a multiple supply. In essence, she says that a meal deal must be a single supply in its entirety or, if it is not, each item comprised in the meal deal must be a separate supply.

79. Ms Jones, on behalf of HMRC, however suggests that there is no inconsistency in accepting (as HMRC do) that the meal deal as a whole is not a single supply so that some elements (such as cookies and coleslaw) constitute separate supplies even though two or more of the elements within the meal deal are treated as a single supply on the basis that one is ancillary to the other.

80. Neither party was able to refer us to any authority which sheds light on this question. We therefore approach it from first principles.

81. As we have said, it is clear from the ECJ authorities that the starting point is that every element of a transaction is a separate supply (see for example *Card Protection Plan* at [29]).

82. The ECJ in *Card Protection Plan* however goes on to explain at [30] that, where “one or more elements” constitute the principal service, whilst “one or more elements” form an ancillary service, there will be a single supply.

83. In our view, this indicates that it is perfectly possible for some elements of a single transaction to be principal/ancillary supplies (and therefore a single supply) whilst there may be other elements which (based on the starting point that all elements of a supply are separate) do not form part of that single supply as they are distinct and independent (in the sense that they are not ancillary to another item which is being supplied as part of the transaction or so closely connected with the supply of another item that it would be artificial to split them).

84. We do not consider that there is any conceptual problem with this. Given the starting point that each element of the supply is separate, it must follow that it is necessary to look separately at each element of the supply in order to determine, applying the principles developed by the ECJ in the cases we have referred to, whether that element stands alone or whether it should be treated as part of a single supply along with one or more other elements of the transaction.

85. We acknowledge that the cases we have been referred to envisage that either all elements of the transaction will constitute distinct principal supplies or will alternatively be treated as one single supply (see for example *Levob* at [20] and *Field Fisher* at [18]).

86. However, there is no suggestion in any of those cases that the Court was asked to consider the possibility that two or more elements of a transaction might together form a single supply whilst other elements should be treated as a separate supply. In this context, it is worth noting that the ECJ in *Card Protection Plan* cautioned at [27] that “having regard to the diversity of commercial operations, it is not possible to give exhaustive guidance on how to approach the problem correctly in all cases.”

87. There is also some support in *Field Fisher* for the suggestion that some elements of a single transaction may constitute a single supply whilst other elements may be separate. The court notes at [24] that services supplied in accordance with the provisions of a lease may be ancillary to or indivisible from the leasing but goes on to observe at [25] that there may also be a provision contained in the lease for the inclusion of supplies which are not indivisible from or ancillary to the lease itself and which would not therefore form part of the single supply of the leasing of the property itself.

88. We therefore conclude that there is no reason in principle why two or more elements of a single transaction cannot constitute a single supply whilst, at the same time, other elements of the same transaction may constitute a separate supply.

89. The fact that HMRC accept that some elements of a meal deal are a separate supply does not therefore mean that the dip pots must also form a separate and distinct supply. Instead, it is necessary to consider whether, in the context of a meal deal, the dip pots are ancillary to the supply of one or more of the items of hot food contained in the meal deal. It is to that question which we now turn.

Characterisation of the supply of the dip pots

90. As we have explained, these sorts of cases are highly fact sensitive and it is necessary to consider all of the circumstances. Bearing that in mind, there is little benefit in referring to previous case law other than to determine the principles which should be applied. In particular, the outcome of one case, even if superficially similar, does not provide a reliable guide to the determination which should be made in another case.

91. We mention this as HMRC refer to the decision of the VAT Tribunal in *Domino's Pizza Group Limited* [Lon/02/0527] (decision number: 18010) [2003] Lexis citation 583 in which the VAT Tribunal found that dips sold with various hot dishes at an inclusive price formed part of a single supply as the dips were ancillary to the hot food. However, there were significant differences in the facts including, for example, an acceptance that it was unlikely that the dips would be purchased on their own without food and that the hot food that was sold with the dips for an inclusive price was not available on its own without the dips.

92. On behalf of Queenscourt, Ms Brown submits that the dip pots are not simply a means of better enjoying the hot food but, instead, are an aim in themselves. In support of this she refers to the following evidence:

- (1) The dip pots are larger than the sauce sachets which are provided for free and they are separately identified (and charged for) as additional items on the menus.
- (2) A significant number of dip pots are purchased without other items.
- (3) The demand for certain flavours is so great that KFC has introduced larger bottles for sale as a separate item.
- (4) There is evidence that some people eat KFC dips with products from other providers.

93. Ms Brown also places significant weight on the fact that the typical consumer of a meal deal has a genuine contractual freedom whether or not to include a dip pot in their meal deal as they have a choice whether to buy a dip pot on its own, whether to buy it separately with other food, whether to buy it as part of a meal deal or, indeed, whether to purchase a meal deal that does not include a dip pot. She suggests, for example, that it would be realistic for a customer to opt to purchase the component parts of the meal deal separately but excluding a dip pot.

94. A further point relied on by Ms Brown is that there is no special packaging for the dip pot. For example, the box which contains the chicken does not have a hole in which the dip pot is placed (as was the case in *Domino's*). Instead, the dip pot is simply put separately into a bag along with the other items forming part of the meal deal. She submits that this suggests that, like all the other items in the bag, the dip pot is a separate supply.

95. On the other hand, Ms Jones, who put forward HMRC's case in respect of this aspect of the appeals, submitted that a typical consumer of a meal deal would consider the dip pot as a condiment which was supplied for the better enjoyment of the hot food comprised in the meal deal and not, from the point of view of such consumers, an aim in itself.

96. As far as choice is concerned, Ms Jones submits that choice is irrelevant to the question as to whether one supply is ancillary to another (as opposed to the separate question (which the parties agree is not relevant in this case) as to whether supplies are closely connected that it would be artificial to split them, where choice may be relevant).

97. Ms Jones draws attention to the fact that the meal deal is sold at a single, discounted price and that, as explained by Dr Patel, there is no reduction in this price if a customer ordering a meal deal decides that they do not want the dip. This, she suggests, is indicative of a single supply.

98. Ms Jones also notes that, as a matter of commercial reality, no consumer wanting a meal deal would buy the items separately given that the evidence shows that, to do so, would cost significantly more than ordering the meal deal.

99. She also makes the point that, in previous cases, the element of choice has generally been relevant in circumstances where there may (or may not) have been a genuine ability to receive the supply from a third party and not to receive it in some other way from the same supplier.

100. Looking in more detail at the typical consumer of a meal deal, Ms Jones submits that the aim of the typical consumer is to obtain a chicken dinner. She notes that Dr Patel, in cross-examination, accepted that customers purchased a meal deal in order to get a good deal on a complete meal. In this context, Ms Jones points out that there is nothing in the evidence to suggest that, to a customer purchasing a meal deal, a dip pot has any special significance beyond dipping other items contained in the meal deal in it.

101. The fact that there is some evidence of a cult following in relation to some of the dips is, in Ms Jones's view, therefore irrelevant to the meal deal. In any event, she notes that the scale of separate purchases of dip pots is relatively small, being on average only four dip pots per day per store. She submits that there is therefore no evidence that there is a widespread desire for the dip pots as a separate item. Ms Jones also suggests that the notion that a customer buying a meal deal might keep the dip pot and use it for something else is pure speculation.

102. As far as packaging is concerned, Ms Jones submits that this is not a significant factor in this particular case.

103. Bearing in mind the principles which we have set out above, our view is that the key question is whether, objectively, a typical customer purchasing a meal deal which includes a dip pot is doing so in order to obtain the dip pot as a separate item or whether such a customer would consider the dip pot simply as a means of better enjoying the hot food which is included in the meal deal.

104. We accept that KFC's dips are popular and that some people purchase the dips on their own to enjoy with other food. However, as Ms Jones has pointed out, the scale of this is relatively limited.

105. In any event, it appears to us to be fanciful to suggest that the typical purchaser of a meal deal would purchase a meal deal in order to get the dip to use for something else. A customer who wanted to do that would surely purchase the dip separately. Indeed, when this point was put to Dr Patel by Ms Jones, he agreed that this was the case.

106. The overwhelming likelihood must therefore be that the typical consumer of a meal deal which includes a dip pot considers the dip pot simply as an accompaniment to the hot food and therefore as a means of better enjoying the hot food.

107. There is no evidence that a dip is typically eaten on its own unlike, for example, coleslaw or a cookie. It is therefore difficult to see how the dip pot could be characterised as an aim in itself when purchased as part of a meal deal.

108. We do not consider that the fact that a customer could decline the dip pot affects this analysis. If a customer decides they do not want the dip pot as part of the meal deal, there is no supply of the dip pot and it is therefore neither ancillary to a principal supply nor an aim in itself. We cannot see that this has any bearing on the question as to whether, in circumstances where a dip pot is supplied as part of a meal deal it is, for a typical consumer, an aim in itself or a means of better enjoying the hot food.

109. We do accept that, in theory, a customer who purchases a meal deal does have the option of purchasing all of the constituent elements separately, including the dip pot and that, if they do so the dip pot will be zero rated. However, we accept Ms Jones' submission that,

as a matter of commercial reality, no customer would do this given that it would cost significantly more than purchasing the meal deal. Again, this does not therefore support an argument that the supply of the dip pot when purchased as part of a meal deal is an aim in itself.

110. As the Upper Tribunal noted in *Middle Temple* at [57], there must not only be a genuine contractual freedom to choose but the freedom of choice must reflect the economic reality of the arrangements between the parties. A contractual freedom to choose to purchase items separately in circumstances where such a purchase would be significantly more expensive than buying them together does not, in our view, reflect the economic reality of the arrangements.

111. In any event, we do not consider the ability to choose to purchase a dip from the same KFC outlet but in a different way to be relevant to the question as to whether, from the point of view of the typical consumer of a meal deal, the supply of a dip pot as part of the meal deal is an end in itself or as a means of better enjoying the other items. As noted by the ECJ in *Purple Parking* at [31], “the fact that, in other circumstances, the elements in issue can be or are supplied separately is of no importance, given that that possibility is inherent in the concept of a single composite transaction”.

112. Looking at the other circumstances, we accept that the fact that the meal deal has a single price is not decisive, particularly in circumstances where some elements of the meal deal are accepted to be a separate supply. In reality, this says nothing about the question as to whether the supply of the dip pot is ancillary to the hot food.

113. However, similarly, we do not consider that the way in which the dip and the other items are packaged sheds any significant light on the characterisation of the supplies. If the dip were incorporated in the packaging of the hot food, we can see that this might, depending on the circumstances, provide some support for a conclusion that the dip is ancillary to the hot food. However, it does not follow that, just because the dip is placed separately in a bag together with the other items, it is not ancillary to those other items. It all depends on the circumstances and, in particular, the way in which the dip is viewed through the eyes of the typical consumer.

114. It might, of course, be thought that this conclusion is supported by the use of the term “dip pot”. The typical consumer would surely conclude that the intention is for the hot food to be dipped into the dip pot to make it more enjoyable.

115. Taking into account all of the circumstances, our conclusion is that the supply of a dip pot as part of a meal deal is not, for the typical consumer, an aim in itself but is a means of better enjoying the hot food which is included as part of the meal deal.

116. We therefore now need to go on and to consider Queenscourt’s alternative arguments in relation to the recovery assessment.

THE VALIDITY OF THE RECOVERY ASSESSMENT

117. Section 80 VATA allows a taxpayer to recover overpaid VAT in certain circumstances. If a taxpayer has accounted for output tax which was not due, s 80(1) VATA provides that HMRC “shall be liable to credit the person with that amount”.

118. Section 80(4A) VATA however provides a mechanism for HMRC to recover from the taxpayer an amount which they have repaid under s 80(1). Section 80(4A) provides as follows:

“80(4A) Where –

- (a) an amount has been credited under sub-section (1) or (1a) above to any person at any time on or after 26 May 2005, and
 - (b) the amount so credited exceeded the amount which the Commissioners were liable at that time to credit to that person,
- the Commissioners may, to the best of their judgment, assess the excess credited to that person and notify it to him.”

119. Section 80(4AA) sets out the time limits for a recovery assessment as follows:

“80(4AA) An assessment under sub-section (4A) shall not be made more than two years after the later of –

- (a) the end of the prescribed accounting period in which the amount was credited to the person, and
- (b) the time when evidence of facts sufficient in the opinion of the Commissioners to justify the making of the assessment comes to the knowledge of the Commissioners.”

120. Ms Brown’s submission on behalf of Queenscourt is that, having made a repayment under s 80(1) VATA, HMRC may only make an assessment to recover any part of the amount repaid if there has been a subsequent clarification in the law or where new factual evidence comes to light. Ms Brown suggests that this follows from the fact that an assessment under s 80(4A)(b) can only be made to the extent that the amount credited to the taxpayer by HMRC exceeds the amount which HMRC were liable “at that time” to credit to the taxpayer. Ms Brown argues that, if HMRC had taken a decision that the credit was due, they must have been liable, at the time the decision was taken, to give the credit.

121. However, we reject this submission. As submitted by Mr Simpson, we take the view that the words “liable at that time to credit” must refer to the amount which, objectively, was, in the words of s 80(1)(b) VATA, the “amount that was not output tax due” in accordance with relevant legislation. The fact that a particular HMRC officer may have (wrongly) believed that a credit was due does not mean that HMRC were objectively liable at the time that decision was taken, to give the credit.

122. In support of her submission that there must be some sort of clarification of the law or change in the facts before an assessment under s 80(4A) can be made, Ms Brown draws attention to s 80(4AA)(b) which links the time limit for an assessment to a “time when evidence of the facts sufficient ... to justify the making of the assessment” becomes known by HMRC. Ms Brown argues that this demonstrates that there is a need, at least, for further facts to come to light, before an assessment can be made.

123. However, this ignores the fact that under s 80(4AA)(a), an assessment can in any event be made within two years after the end of the accounting period in which the credit was given. The purpose of s 80(4AA)(b) is effectively to give HMRC more time to make an assessment if they subsequently become aware of facts which were previously unknown to them.

124. Given the clear ability to make a recovery assessment within two years of the end of the relevant accounting period, we do not consider the wording of s 80(4AA)(b) provides any support for the proposition that a recovery assessment can only be made where further facts have come to light or where there has been some sort of clarification in relation to the relevant legal principles as long as the assessment is made within the two year time limit.

125. Our conclusion therefore is that, on the face of it, the assessment is valid as, given our findings in relation to the single/multiple supply point, the output tax which Queenscourt had accounted for in relation to the dip pots was in fact due and so the amount credited by HMRC in response to the first error correction notice was not an amount which HMRC were liable to credit to Queenscourt to the extent that the credit related to the dip pots (rather than cookies and yogurts).

126. As the assessment was made within the two year time limit in s 80(4AA)(a), the fact that this resulted from a mistake by the original HMRC officer who dealt with the first error correction notice does not prevent a valid assessment from being made under s 80(4A) VATA.

127. We now however need to go on to consider whether HMRC are nonetheless prevented from recovering the amount which they have repaid either as a result of legitimate expectation or estoppel.

LEGITIMATE EXPECTATION

Jurisdiction of the Tribunal to consider arguments based on legitimate expectation

128. It is fair to say that, despite the point having been considered in numerous previous decisions (including by the Upper Tribunal and the Court of Appeal), there remains uncertainty as to the circumstances in which the First-tier Tribunal can consider arguments based on public law principles (including legitimate expectation) in the context of an appeal by a taxpayer.

129. Queenscourt's position, based on the decision of the Upper Tribunal in *KSM Henryk Zeman Sp Z.o.o. v HMRC* [2021] UKUT 182 (TCC) is that, in the context of their appeal against the recovery assessments, the Tribunal has jurisdiction to consider whether Queenscourt had a legitimate expectation that HMRC would not issue such assessments.

130. HMRC, on the other hand, say that *Zeman* is not binding on this Tribunal as its findings in relation to the question of jurisdiction were obiter, that it did not take into account all of the relevant authorities in reaching its decision and was therefore decided "per incuriam" and that it was, in any event, incorrectly decided.

131. Before turning to the specifics of the decision in *Zeman*, the authorities on which that decision was based and the authorities which HMRC say were not taken into account, it is helpful to set out three general principles which emerge from the various authorities and in respect of which there is no dispute:

(1) In accordance with s 3(1) of the Tribunals, Courts and Enforcement Act 2007, the First-tier Tribunal may only exercise the functions conferred on it by statute. In particular, it has no general supervisory or judicial review function as this is not something which has been granted to it by statute (see for example *HMRC v Abdul Noor* [2013] UKUT 071 (TCC) at [25 & 29]; *David Beadle v HMRC* [2020] EWCA Civ 562 at [4]).

(2) That does not however mean that the First-tier Tribunal can never consider arguments based on public law (see for example *Noor* at [31] referring to examples given by Sales J in *Oxfam v HMRC* [2009] EWHC 3078 (Ch) at [68]; *Caerdav Limited v HMRC* [2023] UKUT 00179 (TCC) at [152]).

(3) Whether or not the Tribunal has jurisdiction to consider public law arguments such as legitimate expectation is a question of interpreting the relevant statutory provisions (*Noor* at [31]; *Caerdav* at [152/153]; *Beadle* at [46]; *Metropolitan International Schools v HMRC* [2019] EWCA Civ 156 at [1]).

132. Until the decision of the Court of Appeal in *Beadle*, the Courts and Tribunals have, starting with the decision of the Upper Tribunal in *Noor* (which declined to follow the decision of Sales J in *Oxfam*) generally started their task of statutory interpretation from the perspective that, if Parliament had intended the First-tier Tribunal to be able to take into account arguments based on public law, the relevant legislative provisions should be expected to make this clear (*Noor* at [76-78], approved by the Court of Appeal in *Metropolitan International* at [20-21]; *Trustees of the BT Pension Scheme v HMRC* [2015] EWCA Civ 713 at [143].)

133. We come now to the decision of The Court of Appeal in *Beadle*. Mr Beadle had participated in a tax avoidance scheme which involved him becoming a partner in a limited liability partnership. HMRC decided that the tax avoidance scheme did not work and issued the LLP with a closure notice. They also issued the partners, including Mr Beadle with a Partner Payment Notice (“PPN”) requiring him to pay his share of the tax due pending the partnership’s appeal against the closure notice. Mr Beadle failed to pay the tax due under the PPN and was issued with a penalty for this failure.

134. There is no statutory right of appeal against a PPN and, in the context of an appeal against the penalty, Mr Beadle sought to challenge the PPN on public law grounds. It was common ground that Mr Beadle could have challenged the PPN by way of judicial review.

135. The Court of Appeal noted at [38] the general rule (explained in *O’Reilly v Mackman* [1983] 2 AC 237 at [285]) that a person will not generally be allowed to challenge a public law decision other than by means of judicial review (known as the exclusivity principle). The Court however, accepted the submissions made on behalf of Mr Beadle that, by way of exception to the exclusivity principle, there is generally no restriction on a public law challenge being made by way of defence to enforcement action taken by a public authority (referring to the decision of the House of Lords in *Wandsworth LBC v Winder* [1985] 1 AC 461 by way of example).

136. The Court of Appeal went on to observe at [45] that a person’s right to rely on public law arguments in defence to such enforcement action may be excluded by Parliament and that this may be done either by express words or by clear and necessary implication from the relevant statutory scheme construed as a whole and in the light of its context and purpose (referring to *R v Wicks* [1998] AC 92 and *Quietlynn Limited v Plymouth County Council* [1988] 1 QB 114 for this conclusion).

137. The Court of Appeal summarised all of this at [44] as follows:

“I do not doubt that the exclusivity principle derived in *O’Reilly v Mackman* is subject to an important limitation which itself has limits as follows. Where a public body brings enforcement action against a person in a Court or Tribunal (including a Court or Tribunal whose only jurisdiction is statutory) the promotion of the rule of law and fairness means, in general, that person may defend themselves by challenging the validity of the enforcement decision or some antecedent decision on public law grounds, save where the scope for challenging alleged unlawful conduct has been circumscribed by the relevant statutory scheme, which excludes such a challenge. The question accordingly is whether the statutory scheme in question excludes the ability to raise a public law defence in civil (or criminal) proceedings that are dependent on the validity of an underlying administrative act”.

138. As can be seen, the significant development compared to the previous cases we have considered is that, if the matter constitutes enforcement action by the public body, the person against whom that action is taken may rely on public law arguments to defend themselves unless such a right is excluded by the relevant legislation either by express words or by necessary implication. The starting point is therefore not whether the relevant statutory provisions confer an ability on the Court or Tribunal to consider public law arguments but instead is whether the statutory scheme excludes such rights.

139. We should note that, whilst the Court of Appeal in *Beadle* did refer in passing to the decision of Sales J in *Oxfam* in its judgment, there was no reference to the other authorities which we have mentioned. Having said that, the law reports note that the decisions of the Upper Tribunal in *HMRC v Hok* [2012] UKUT 263 (TCC) and *Noor* were referred to in the parties' skeleton arguments along with the decision of the Court of Appeal in *BT Pension Scheme*. It may therefore be inferred that the Court of Appeal in *Beadle* was aware of the views expressed in those cases about the ability of a First-tier Tribunal to consider public law arguments. It does not appear that the decision of the Court of Appeal in *Metropolitan International* (which was made only a year earlier) was however drawn to the attention of the Court of Appeal in *Beadle*.

140. We have spent some time looking at the decision of The Court of Appeal in *Beadle* as it was this decision which formed the basis of the Upper Tribunal's approach in *Zeman*. In that case, *Zeman* had appealed against a VAT assessment on the grounds that it had a legitimate expectation, based on statements made by HMRC, that it would not be assessed to VAT on certain supplies. The Upper Tribunal considered first of all whether *Zeman* had the legitimate expectation which it alleged. It concluded at [19] that it did not, noting at [20]:

“That is sufficient to dispose of this appeal, but we should say something about the more vexed question of whether the FTT had jurisdiction to consider the legitimate expectation argument.”

141. Arguably, it might have been more appropriate to consider first whether the Tribunal had jurisdiction to consider arguments based on legitimate expectation and, only if it did, then to consider whether *Zeman* had the required legitimate expectation. Had the Upper Tribunal done so, no doubt its reasoning in relation to the jurisdiction question would have formed part of the ratio and would be binding on us unless decided “per incuriam”.

142. However, as it is, as the Upper Tribunal had already decided that the appeal failed, its comments in relation to jurisdiction must, in our view, be considered as obiter dicta. Nonetheless, being a decision of the Upper Tribunal and, having addressed the question of jurisdiction at some length, the decision is potentially of significant persuasive authority and we do therefore need to consider whether HMRC's objections have substance.

143. As Ms Brown pointed out, the decision in *Zeman* is also highly relevant to this appeal as the appeal in *Zeman* was, in accordance with s 83(1)(p)(i), “with respect to ... an assessment under s 73(1)”. Section 73(1) VATA provides that HMRC may “assess the amount of VAT due from [the taxpayer] to the best of their judgment”.

144. In this case, the relevant appeal provision is contained in s 83(1)(t) which allows an appeal “with respect to ... an assessment under sub-section 4(A) of [s 80 VATA]”. As we have seen, s 80(4A) provides that where an amount of VAT which has been credited to a taxpayer exceeds the amount which HMRC were liable to credit, HMRC “may, to the best of their judgment, assess the excess credited to that person”. Both the assessing provision and the appeal provision are therefore virtually identical in both cases.

145. Turning to HMRC’s objections, as we have said, Mr Simpson submits that *Zeman* was decided “per incuriam” and that, in any event, it was incorrectly decided.

146. Given that, as we have said, *Zeman* is not binding on us, we consider that it is appropriate to focus on the question as to whether *Zeman* was, in our view, wrongly decided which will, in any event, involve considering the authorities which Mr Simpson says the Upper Tribunal in *Zeman* should have taken into account. Those authorities are *Metropolitan International*, *Hok* and *BT Pension Scheme*. In addition, Mr Simpson suggests that, whilst the Upper Tribunal does refer to the decision in *Noor*, its analysis of that decision is inadequate.

147. Mr Simpson’s main criticism of *Zeman* is that, based on the authority of *Beadle*, its starting point at [70] is that an appellant is entitled to raise public law arguments unless the relevant statutory provisions exclude that right whereas, as we have seen, previous authorities have approached the question of statutory construction on the basis that the First-tier Tribunal has no ability to consider public law arguments unless the relevant statutory provisions clearly confer jurisdiction on the Tribunal to consider such points.

148. We accept that there is some force in this submission. It is clear that the Upper Tribunal in *Zeman* accepted the starting point proposed by the Court of Appeal in *Beadle* and did not refer to the comments made in previous cases including, in particular, *Noor* (which the Upper Tribunal in *Zeman* considered in some detail in connection with other issues), to the effect that Parliament might be expected to use clear words if it intended to confer jurisdiction on the First-tier Tribunal to consider public law arguments given that no general supervisory or judicial review function has been conferred on the First-tier Tribunal (a point accepted by the Upper Tribunal in *Zeman* at [42] and [69]).

149. Given the criticisms made of the decision in *Zeman*, it is perhaps worth referring to the passages in the previous cases referred to by Mr Simpson.

150. *BT Pension Scheme* was not a case about VAT but related to tax credits on dividends. There was a question as to whether the trustees of the pension scheme had been denied the benefit of an extra statutory concession. Whilst making it clear at [141] that the Court was not passing any judgment on the scope of the appeal rights under s 83(1) VATA, the Court of Appeal rejected the suggestion that the approach of Sales J in *Oxfam* should be applied more widely, concluding at [143], based on the provisions of the Tribunals, Courts and Enforcement Act 2007, that “when one of the Tax Tribunals was intended to be able to determine public law claims Parliament made that expressly clear”.

151. In *Noor*, which did relate to VAT, the question was about the amount of input tax which may be credited to a person. The appeal was under s 83(1)(c) VATA.

152. The Upper Tribunal concluded at [30] that there was no provision of VATA (or indeed any other legislation) which confers a general supervisory jurisdiction on the First-tier Tribunal and at [31] that the question as to whether the Tribunal could consider an argument based on legitimate expectation in relation to s 83(1)(c) VATA “comes down to a point of statutory construction”.

153. The reason that the Upper Tribunal in *Noor* rejected the approach of Sales J in *Oxfam* is explained at [76] and is based on the fact that the effect of the approach in *Oxfam* would have been to give the First-tier Tribunal a general supervisory jurisdiction in relation to all matters covered by s 83(1) VATA. The Upper Tribunal then went on to explain why, in their view, this cannot be what Parliament had in mind. The Upper Tribunal made the following points:

- (1) “If parliament had intended to confer this jurisdiction on the VATA Tribunal, we would have expected it to say so clearly” (at [77(a)]);

(2) “In cases where an inferior Tribunal is intended to have a judicial review function, express provision has been made” (at [77(b)]);

(3) “Just as it was inconceivable that the F-tT should be given a judicial review jurisdiction, so [too] it was not plausible, in our view, that parliament, when enacting s 83 VATA 1994, intended to confer a judicial review function on the VAT Tribunal” (at [77(d)]).

154. *Metropolitan International* was dealing with a slightly different point which is whether s 84(10) VATA permitted the Tribunal to consider a legitimate expectation argument. The Court of Appeal rejected this at [21] observing that the consequence of the submissions made on behalf of the taxpayer would be that:

“... legitimate expectation (and, seemingly, other public law) arguments could be raised in the F-tT without any need to satisfy the requirements as to obtaining permission and time limits that govern applications for judicial review... It is highly improbable that Parliament intended this when it enacted what has now become s 84(10).”

155. We accept Mr Simpson’s submission that the starting point in all of these cases was that Parliament cannot be taken to have intended to confer a general supervisory or judicial review jurisdiction on the First-tier Tribunal. Ms Brown accepts this but notes that it was accepted in *Noor* (at [31]) and in *BT Pension Scheme* (at [141-143]) that the question as to whether the Tribunal has jurisdiction to consider public law arguments in relation to any particular appeal depends on the interpretation of the relevant legislation.

156. Ms Brown also notes that the comments in *Noor* at [77] related to the question as to whether the Tribunal had a general supervisory or judicial review function and not to the specific question as to whether public law arguments could be relied on in relation to the specific statutory provision which was relevant in that case (which it then went on to consider).

157. As we have already said (at [131] above), these propositions are common ground. In addition, we have already accepted (at [132] above) that the authorities which Mr Simpson refers to take as their starting point the proposition that the Tribunal does not have jurisdiction to consider public law arguments unless the specific legislation relied on by the taxpayer makes it clear that such a jurisdiction is conferred in the context of the appeal right in question.

158. It does not however follow from this that the Upper Tribunal in *Zeman* reached the wrong conclusion. It clearly considered the decision of the Court of Appeal in *Beadle* to be binding on it and that this therefore required it to approach the question of statutory construction on the basis that *Zeman* could rely on legitimate expectation unless the relevant statutory provisions excluded its ability to do so.

159. In this sense, *Beadle* represents a clear development of the law as far as the approach to be taken to the question of statutory interpretation in this area is concerned, based on a line of cases which, it appears, were not considered in *Hok*, *Noor*, *BT Pension Scheme* or *Metropolitan International*.

160. The question as to whether or not the Tribunal in *Zeman* had jurisdiction to consider the legitimate expectation argument could not therefore be based on general statements about the likelihood (or otherwise) of Parliament conferring a jurisdiction on the Tribunal to consider such points but had to be based on an examination as to whether or not s 83(1)(p) VATA excluded (expressly or by implication) any ability of the Tribunal to consider such points.

161. Other than his general point that the Upper Tribunal in *Zeman* adopted the wrong starting point, Mr Simpson did not put forward any specific reasons why the Upper Tribunal's subsequent analysis of the statutory provisions contained in s 73(1) and s 83(1)(p) VATA should be rejected. Indeed, his only other reason in support of his submission that the Upper Tribunal in *Zeman* came to the wrong conclusion was that it relied on policy reasons in support of its interpretation of the relevant legislation. Mr Simpson submits that this is not a permissible approach to statutory construction, relying on the decision of the Court of Appeal in *Hoey v HMRC* [2022] 1 WLR 4113 at [132].

162. However, in this respect, we accept Ms Brown's submission that the policy reasons mentioned by the Upper Tribunal in *Zeman* at [82-83] did not form part of its reasons for interpreting the legislation in the way that it did. Instead, the points were simply mentioned by way of a cross check to confirm that there were no policy reasons why the conclusion which it had already reached at [75] was wrong.

163. We do not therefore accept Mr Simpson's criticisms of *Zeman* and, although it is not binding on us, it is of significant persuasive authority and we respectfully consider that its approach was correct in the light of the decision of the Court of Appeal in *Beadle*.

164. With this background in mind, we must consider whether, in the context of an appeal under s 83(1)(t) against a recovery assessment made by HMRC under s 80(4A) VATA, the Tribunal has jurisdiction to consider arguments based on legitimate expectation.

165. Like the Upper Tribunal in *Zeman*, we consider the reasoning of the Court of Appeal in *Beadle* which clearly forms part of the ratio of that case (even though the Court of Appeal concluded in that case that the relevant statutory scheme excluded any ability for the Tribunal to consider public law arguments), is binding on us. Whilst Mr Simpson invited us to conclude that *Zeman* was wrongly decided, he did not suggest that *Beadle* was wrongly decided or, more importantly, that the decision was per incuriam.

166. It may be that, in the future, the Court of Appeal will need to grapple with the obvious tensions between the approach to the exercise of the statutory interpretation advocated by *Beadle* and the comments made in earlier decisions of the Court of Appeal such as *BT Pension Scheme* and *Metropolitan International*. But, for the time being, we consider that the First-tier Tribunal (and for that matter any other Tribunal) is required to follow the approach set out in *Beadle* at [44].

167. We note that the Upper Tribunal in *Caerdav* approved the decision of the First-tier Tribunal in *Caerdav* that the starting point in deciding whether the First-tier Tribunal had jurisdiction to consider an argument based on legitimate expectation was to be found in the comments of the Court of Appeal in *Metropolitan International* which the Upper Tribunal summarised at [152] as being that "appeal grounds which concern public law arguments should be pursued in judicial review proceedings rather than before the F-tT". It did however accept that this was only a starting point and that it was necessary to consider the particular legislation in question.

168. Given the submissions on behalf of *Caerdav* which are recorded in paragraphs [145-149], it appears that the Upper Tribunal in *Caerdav* rejected the starting point advocated by *Beadle* and adopted in *Zeman* although it does not expressly say so. Notwithstanding this, and in the absence of any explanation to the contrary in *Caerdav*, we still consider that we are bound by the decision in *Beadle* (which was decided after all the other authorities mentioned by Mr Simpson) and that we should therefore adopt this as our starting point in preference to the suggested starting point at [152] in *Caerdav*.

169. Of course, this only applies where the proceedings in question concern “enforcement action” by HMRC and no doubt the fact that the First-tier Tribunal does not have a general supervisory or judicial review function will be a factor in deciding whether the relevant statutory scheme excludes any jurisdiction to consider public law arguments.

170. It is for example apparent from the analysis in *Zeman* and *Caerdav* that appeals that relate to the amount of a liability or some other mandatory requirement of the tax legislation are likely to exclude by implication any ability for the Tribunal to take into account public law arguments whilst appeals against the exercise by HMRC of some sort of discretion may not exclude such jurisdiction (see *Caerdav* at [154-155], referring to *Zeman* at [52]).

171. Looking first at the question as to whether the appeal in this case constitutes enforcement action, it is clear that the Court of Appeal in *Beadle* considered Mr Beadle’s appeal against the penalty to be enforcement action despite the fact that Mr Beadle was the person who brought the proceedings. In effect, the purpose of the appeal was to defend the liability which HMRC sought to impose.

172. Similarly, in *Zeman*, the Upper Tribunal clearly considered that Zeman’s appeal against the VAT assessment was, in effect, the taxpayer defending enforcement action by HMRC. We accept that the raising of an assessment by HMRC constitutes enforcement action for this purpose and that, in appealing against the assessment, a taxpayer is seeking to defend the enforcement action so that the principles set out in *Beadle* are engaged.

173. As we have explained, the relevant statutory provisions which are relevant to this appeal are materially identical to the statutory provisions considered in *Zeman*. As HMRC have not identified any specific flaw in the Upper Tribunal’s reasoning in *Zeman* other than taking the principles set out in *Beadle* as its starting point, we consider that, although it is not binding on us, we should follow the reasoning of the Upper Tribunal in *Zeman* in determining whether there is anything in the relevant legislation which excludes the jurisdiction of the Tribunal to consider an argument based on legitimate expectation in relation to HMRC’s decision whether or not to make an assessment in accordance with the discretion conferred on it by s 80(4A) VATA which is summarised in paragraphs [69-75] of *Zeman*.

174. We note in particular that, just like the Upper Tribunal in *Noor* (at [88]) the Upper Tribunal in *Zeman* (at [74]) focused on what it considered the subject matter of the relevant appeal provision. In *Noor*, this was the amount of input tax which had to be ascertained by applying the relevant VAT legislation. However, in *Zeman* (and in this case) the subject matter is the assessment itself (not the amount of the assessment) which must, in our view, include HMRC’s decision to make the assessment.

175. Our conclusion therefore is that there is nothing in the statutory scheme of s 80(4A) and s 83(1)(t) VATA which either expressly or implicitly excludes the Tribunal’s jurisdiction to consider public law arguments and, in particular, arguments based on legitimate expectation, in relation to HMRC’s decision to make the recovery assessments.

176. We have to say that we reach our conclusion in relation to this issue with some hesitation. Our own view, in line with the authorities prior to *Beadle* is that, for the reasons explained in those cases, it would be surprising if Parliament intended to confer on the First-tier Tribunal an ability to routinely consider arguments based on public law grounds in the context of appeals under s 83(1) VATA.

177. Indeed, it appears to us that the underlying assumption in *Metropolitan International* (a case dealing with s 84(10) VATA rather than s 83(1) VATA) appears to be that the First-tier Tribunal has no jurisdiction to consider arguments based on legitimate expectation in the

context of s 83(1)(p) as it would otherwise have been unnecessary for the appellant to rely on s 84(10) VATA, although the Court of Appeal did not say this in clear terms.

178. However, as we have explained, we can find nothing in the statutory scheme which is relevant to this appeal which suggests that Parliament intended to exclude the jurisdiction of the Tribunal to entertain arguments based on public law grounds. We were perhaps hindered in that task by the fact that HMRC did not address the detailed analysis of the relevant legislative provisions in their submissions and it may well be that another Tribunal in the future comes to a different conclusion on this point with the benefit of fuller submissions.

179. Nonetheless, based on our conclusions, we must now consider whether Queenscourt did in fact have a legitimate expectation that HMRC would not make the recovery assessments.

Whether Queenscourt had a legitimate expectation

180. The parties were agreed that the principles the Tribunal should apply in determining whether Queenscourt had the required legitimate expectation were those set out by the High Court in *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agencies Limited* [1990] 1 WLR 1545 at [1569].

181. The first requirement is that the taxpayer should put all their cards face upwards on the table. In this case, HMRC accept that, in their error correction notice, Queenscourt did so.

182. The second requirement is that “the ruling or statement relied upon should be clear, unambiguous and devoid of relevant qualification”. In determining this, both parties agree that the Tribunal should consider objectively how the statement or ruling would be interpreted by a reasonable recipient in the context in which it was made.

183. One point of difference between the parties was that HMRC submits that the particular expertise of PwC (to whom the relevant statement or ruling was made) should be taken into account whereas Ms Brown submits that any special expertise possessed by PwC is irrelevant.

184. As we have mentioned, the error correction notice was submitted in March 2019. There was then several rounds of correspondence focusing on the way in which the amount of VAT for which Queenscourt was seeking a credit had been calculated. This culminated in an email to PwC from the HMRC officer, Mr Trethewey dated 17 October 2019 in which he said:

“I can now confirm that the claims have been accepted by HMRC. It is worth noting that this issue may be revisited during any future audit activity of your clients.”

185. Mr Simpson submits on behalf of HMRC that the reference to “this issue” being revisited in the future is a relevant qualification. He further suggests that, even if this might be interpreted as a reference to a potential change of approach in the future (rather than one which might apply to the past) the qualification is ambiguous and therefore the requirement that the statement is unambiguous is not met.

186. We reject these submissions. In our view, given the correspondence which had previously passed between PwC and HMRC which, as we have said, related only to the calculation of the amounts which were claimed and not to the wider issue as to whether the supply of the relevant items as part of a takeaway meal deal should be zero rated or standard rated, any reasonable recipient of the email would have interpreted the reference to the issue potentially being revisited during any future audit activity as being a reference to the way in which the amounts claimed were calculated and not to the question as to whether the relevant items could be treated as a separate supply and therefore zero rated. This is reinforced by the

use of the words “audit activity” which more naturally refer to detailed calculations and apportionments than decisions in relation to points of principle.

187. This conclusion is not affected by any special expertise which PwC may have in relation to the underlying question as to whether the supplies in question should be zero rated or not given the clear implication that the qualification related only to calculation and apportionment and not to that specific issue.

188. Given what we have said, we do not consider the qualification to be ambiguous and so the question as to whether this results in the statement not satisfying the requirement set out in *MFK* does not arise. However, in our view, it is in any event a two stage test. The first question is whether the statement or ruling is clear and unambiguous (which in this case it is). The second question is then whether there is any relevant qualification.

189. We accept that there may be a relevant qualification if the qualification is itself ambiguous and one possible interpretation amounts to a relevant qualification. However, for the reasons we have explained, we do not consider that the qualification in this case can be interpreted as a suggestion that HMRC may retrospectively decide that the dip pots are in fact part of a single supply and cannot therefore be zero rated.

190. Mr Simpson also submits that the relevant context for the ruling given by HMRC includes the fact that there is a two year time limit for making a recovery assessment (s 80(4AA(a)) VATA). He suggests that, on this basis, the reference to the issue potentially being revisited during future audit activity must have been understood as a reference to the fact that HMRC may change their mind at some point within that two year window.

191. We do not accept this. Given the background to the statement made, the possibility of HMRC making a recovery assessment on the basis that they had changed their view on whether or not the relevant items could be zero rated would simply not be on PwC’s radar. There is certainly no basis for thinking that a reasonable recipient of the email would have made a connection between the statement made and the two year time limit for making any such assessment.

192. The final requirement is that it would not be fair to depart from the clear and unambiguous ruling. There is no requirement that the person to whom the ruling is given has relied on it to their detriment (see *re Finucane* [2019] UKSC 7 at [62]).

193. Although the Court in *MFK* considered that conduct equivalent to a breach of contract or breach of representation would be sufficiently unfair to prevent any public body departing from a clear and unambiguous statement, it is clear that the law has moved on. Both parties agree that Queenscourt can only rely on legitimate expectation if HMRC’s conduct is “conspicuously” unfair or “so outrageously unfair that it should not be allowed to stand” (see *R v Inland Revenue Commissioners ex parte Unilever Plc* [1996] STC 681 at [697]).

194. In the context of tax, some guidance on the approach to unfairness was given by the Court of Appeal in *HMRC v Hely Hutchinson* [2017] EWCA Civ 1075. The question in that case was whether HMRC could resile from previously published guidance.

195. The Court of Appeal notes at [37] that part of the context is that the law imposes on HMRC a duty to collect tax and that taxpayers must expect to pay the right amount of tax, referring at [40] to the comment in *MFK* at [1569] that “the taxpayer’s only legitimate expectation is, *prima facie*, that he will be taxed according to statute not concessions or a wrong view of the law”.

196. The Court of Appeal in *Hely Hutchinson* also referred to the observation of the Court of Appeal in *Samarkand Film Partnership No 3 v HMRC* [2017] STC 926 at [115] that:

“Experience shows that the cases where such a claim has succeeded, at any rate in the field of taxation, are relatively few and far between. This is in my view hardly surprising. There is a strong public interest in the imposition of taxation in accordance with the law, and so that no individual taxpayer, or group of taxpayers, is unfairly advantaged at the expense of other taxpayers”.

197. It is also apparent that the correction of a mistake by HMRC is not, on its own, sufficient to reach the necessary threshold of unfairness. As the Court of Appeal noted in *Hely Hutchinson* at [48], a decision-maker “is not bound, and is not entitled, to follow a previous decision that he considered erroneous”.

198. In effect, the Tribunal must conduct a balancing exercise. In this context, the Supreme Court in *Finucane* referred at [56] with approval to the guidance given by the Court of Appeal in *R v Northern East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [57] that, “once the legitimacy of the expectation is established, the Court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy”.

199. Based on this, we accept Mr Simpson’s submission that it is necessary for the Tribunal to consider the extent and nature of any detriment which may have been caused to Queenscourt as a result of its reliance on the ruling made by HMRC and weigh this in the balance in determining whether there is a sufficient element of unfairness that it would be wrong for HMRC to be able to depart from their ruling.

200. Although, as we have noted, detrimental reliance is not a requirement, Queenscourt does not suggest that there is anything else which would reach the required level of unfairness in order to enable a defence based on legitimate expectation to succeed other than the fact that Queenscourt has had to repay the VAT which it thought it had successfully reclaimed.

201. Given the comments of the Court of Appeal in *MFK* (see paragraph [195] above), the repayment of the tax wrongly refunded by HMRC cannot in our view on its own be sufficient to render it unfair for HMRC seek to correct their error. We therefore need to look at the alleged detriment to Queenscourt.

202. As we have mentioned, the detriment identified by Dr Patel is the fact that the Group had to pull out of deals to open a new Costa Coffee outlet and a new KFC outlet and also had to defer the refurbishment of two KFC stores.

203. The evidence relating to the extent of the detriment suffered by Queenscourt itself is however sketchy. This was not addressed by Queenscourt in its grounds of appeal nor by Dr Patel in his witness statement. The only evidence we have is Dr Patel’s oral evidence at the hearing. We do not know for example whether any of the KFC outlets in question were operated (or in the case of the new outlet, was to be operated) by Queenscourt as opposed to other Group members. In addition, we do not know the extent of any actual financial cost or loss to Queenscourt as a result of these events.

204. In addition, it was unclear to what extent other circumstances such as Covid, increasing energy costs and increasing interest on borrowings (all of which were mentioned by Dr Patel as issues affecting the Group) impacted on the decisions which were made in relation to the projects which Dr Patel identified.

205. One thing we do know from Dr Patel’s evidence is that the opening of a new KFC outlet costs around £600,000 and that the remodelling of a KFC store costs between £100,000-£200,000. The three KFC related projects Dr Patel referred to in his evidence

would therefore have cost something close to £1 million in total. When compared with the recovery assessments relating to Queenscourt which totalled £75,000, it seems to us more likely than not that these projects must have been affected not only by HMRC's recovery assessments but by other factors impacting on the Group's cashflow as well.

206. Even if the recovery assessments relating to other group companies are also taken into account, the total is still only approximately £400,000 and so it again seems likely that other external factors impacting the Group's cashflow must also have been involved in the relevant decisions.

207. As we say, even if it were accepted that the cancellation or deferral of these projects resulted from HMRC's recovery assessments, there is little evidence as to the extent of any detriment. There is, for example, no evidence as to what return on its investment Queenscourt might have received if it had been able to open a new KFC outlet.

208. Similarly, although Dr Patel gave evidence that there was typically a 5%-7% increase in turnover following the remodelling of a KFC store, there was no evidence as to what the typical turnover for a store might be nor, indeed, what impact this might or might not have on the profitability of any given store.

209. There are two other factors which Queenscourt relies on in terms of detriment. The first relates to the deferral of the remodelling of the two KFC outlets. These should have been remodelled in 2022 but this was deferred until 2023. As we have explained, the franchise agreement with KFC requires stores to be remodelled on a regular basis. As we understand it, the requirement in relation to these outlets is that they are remodelled every five years. In relation to this, Dr Patel's evidence was that, although the remodelling only took place in 2023, as it should have occurred in 2022, the next remodelling will still have to take place in 2027.

210. However, we cannot see that this gives rise to any additional detriment over and above the impact of the deferral which we have considered above as, had the deferral not taken place, the outlets would have had to have been remodelled in 2027 in any event. There was certainly no evidence as to any specific detriment that might be caused.

211. The second point is also linked to the deferral of the remodelling of the two KFC outlets and the associated need for the franchise agreement with KFC in respect of those outlets to be renewed. Dr Patel's evidence is that, in order to get KFC to agree to the deferral of the remodelling of the stores and the renewal of the relevant franchise agreements, the Group had to agree that KFC would be able to grant a franchise to Welcome Break to open another KFC outlet in the same area as the Group was operating. The Group did however receive a rebate of £25,000 on its franchise fee in recognition of this.

212. Again, the problem is that we have no evidence as to the extent of any detriment which might be caused to Queenscourt (or the wider Group) as a result of this. Part of the reason for this is that the new Welcome Break franchise has not yet opened and so there is not yet any impact on Queenscourt or the wider Group.

213. However, in addition, we were provided with no evidence about the proposed Welcome Break franchise and the capacity for it to have an impact in the future on any outlets operated by the Group. We do not, for example, know how close it is to any outlet operated by the Group, whether it is in a motorway service station or on a high street or whether there is any likelihood that a customer who would previously have made a purchase from one of the Group's outlets might in the future make a purchase from the new Welcome Break franchise instead.

214. Our conclusion therefore is that, based on the evidence available to us, whilst Queenscourt may have suffered some detriment to its business as a result of having to repay the VAT which had been reclaimed, it has not shown that there has been, or is likely to be, any serious detriment to it which results solely or primarily from HMRC making the recovery assessments.

215. Against this must be balanced HMRC's duty to collect the right amount of tax. If HMRC's error were not corrected, Queenscourt would be put in a better position than other taxpayers in respect of whom HMRC had applied the law correctly. As noted above, the Court of Appeal in *Samarkand* considered that there was a strong public interest in ensuring that no individual taxpayer is unfairly advantaged at the expense of other taxpayers.

216. In addition, in our view, Queenscourt must also bear some responsibility for HMRC's mistake. On reviewing the error correction notice which led to HMRC accepting the first claim, it is apparent that, although this refers to over-declared output VAT on sales of zero rated products when sold as part of a meal deal, it does not refer in terms to the question as to whether the meal deal should be treated as a single standard rated supply or whether it could be treated as a multiple supply.

217. Whilst Queenscourt cannot be criticised for not doing HMRC's job for them, given the existence of HMRC guidance referring to the *Domino's* case where dips supplied with hot food were treated as part of a single standard rated supply which, given PWC's expertise, they would no doubt have been aware of, it is hard for Queenscourt to say that it is conspicuously unfair for HMRC to recognise its mistake and to apply the law correctly despite its original acceptance of the claim.

218. Overall, taking all these factors into account, we do not consider that any detriment which may have been suffered by Queenscourt is sufficient to enable us to say that HMRC's decision is so outrageously unfair that it should not be allowed to stand.

219. We should mention one additional point raised by Mr Simpson on behalf of HMRC. He suggests that, if HMRC cannot correct their mistake and make a recovery assessment, s 80(4A) VATA would have no purpose. However, we do not accept this. HMRC can always make a recovery assessment. They are only prevented from doing so if they have made a clear, unambiguous and unqualified statement in circumstances where it would be sufficiently unfair for them to depart from that statement. As in this case, there will no doubt be many other cases where that high threshold of unfairness is not reached.

ESTOPPEL

220. As we have rejected Queenscourt's case based on legitimate expectation, we must now consider its alternative submissions based on estoppel. The type of estoppel relied on by Queenscourt is known as estoppel by convention.

221. The principles relevant to this were set out by the Supreme Court in *Tinkler v HMRC* [2021] UKSC 39 after an exhaustive review of the relevant authorities. The Supreme Court approved at [45] the principles set out by Briggs J (as he then was) in *HMRC v Benchdollar Limited* [2009] EWHC 1310 (Ch) at [52] subject to one refinement subsequently referred to by Briggs J in *Stena Line Limited v Merchant Navy Ratings Pension Fund Trustees Limited* [2010] EWHC 1805 (Ch) at [137] and by the Court of Appeal in *Blindley Heath Investments Limited v Bass* [2015] EWCA Civ 1023 at [92].

222. The relevant principles can be summarised as follows:

- (1) There must be an expressly shared common assumption between the parties.

(2) The sharing of the common assumption must include words or conduct from which the necessary sharing or assent to the assumption can properly be inferred.

(3) The expression of the common assumption by the party alleged to be estopped (in this case HMRC) must be such that they may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that they expect the other party to rely on it.

(4) The person alleging the estoppel (Queenscourt) must in fact have relied upon the common assumption, to a sufficient extent, rather than relying upon their own independent view of the matter.

(5) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.

(6) Some detriment must thereby have been suffered by the person alleging the estoppel (Queenscourt) or some benefit must thereby have been conferred upon the person alleged to be estopped sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

223. It should be noted that, in the Supreme Court, no question as to the jurisdiction of the Tribunal to consider arguments based on estoppel by convention were raised, despite the principle apparently being relied on by Mr Tinkler at all levels of his appeal. Similarly, the question of jurisdiction was not raised in *Cattrell v HMRC* [2024] UKFTT 00067 (TC), a subsequent case heard by the First-tier Tribunal which dealt with an argument based on estoppel by convention.

224. In this case, HMRC did not make any submissions to the effect that the Tribunal did not have jurisdiction to consider arguments based on estoppel by convention. We have not therefore considered this point in any detail although record that, bearing in mind the statutory framework which we have already discussed in the context of legitimate expectation, we do not see any obvious reason why the Tribunal would not have jurisdiction to consider arguments based on estoppel by convention in the context of an appeal against a recovery assessment, particularly given that this does not fall into the category of public law arguments.

225. Ms Brown submits that, as a result of the error correction notice and the subsequent acceptance by HMRC of the claim, the first four requirements set out above are satisfied as:

(1) these documents show that there was a common assumption (that the dip pots sold as part of a takeaway meal deal could be treated as a separate supply and therefore zero rated);

(2) HMRC's acceptance of the claim clearly showed their agreement to the assumption and their assumption of responsibility for Queenscourt's reliance on that assumption; and

(3) the fact that Queenscourt did rely on the assumption is demonstrated by the second error correction notice making a further claim for repayment of VAT.

226. Mr Simpson's only response to this was to repeat the points which he had made as to why there was no clear, unambiguous and unqualified statement made by HMRC for the purposes of legitimate expectation. Given that we have rejected these points, we accept Ms Brown's submission that there was an expressly shared common assumption between Queenscourt and HMRC that the dip pots would be zero rated, that HMRC bore some responsibility for, and agreed to, the assumption and that Queenscourt relied on it.

227. The problem faced by Queenscourt, however, is the requirement that the reliance must have occurred “in connection with some subsequent mutual dealings between the parties” and that some detriment must “thereby” have been suffered by Queenscourt.

228. As we have said, the reliance identified by Ms Brown is the giving of the second error correction notice seeking a further repayment of VAT. However, the detriment which she relies on is the impact on the Group’s business which we have already described in our discussion of the legitimate expectation arguments.

229. Based on Dr Patel’s own evidence, the various elements of detriment which he describes resulted not from the refusal of the claims contained in the second error correction notice but from the making of the recovery assessments requiring repayment of the credits which HMRC had given in response to the first error correction notice.

230. Our conclusion therefore is that the final requirement for Queenscourt to be able to rely on estoppel by convention has not been satisfied. Although there was reliance on the common assumption in connection with subsequent mutual dealings between Queenscourt and HMRC, represented by the second error correction notice, no detriment has been shown to have been suffered by Queenscourt as a result of that reliance.

CONCLUSION

231. For the reasons we have explained, the appeal is dismissed.

232. The supply of dip pots as part of a takeaway meal deal is part of a single standard rated supply of the hot food and dips.

233. Whilst the Tribunal does have jurisdiction to consider arguments based on legitimate expectation in the context of an appeal under s 83(1)(t) VATA against a recovery assessment made under s 8A(4A) VATA, it is not in this case sufficiently unfair for HMRC to resile from their initial acceptance of the claim made in the first error correction notice and to apply the correct tax treatment.

234. HMRC are not estopped from making or relying on their recovery assessments as there has been no detrimental reliance on the original position taken by HMRC in connection with any subsequent mutual dealings.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

235. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**ROBIN VOS
TRIBUNAL JUDGE**

Release date: 03rd JUNE 2024