Analysis

Land remediation tax relief: ten years on

Speed read

Land remediation tax relief (LRTR) gives between 50% and 150% relief to UK corporation taxpayers on their costs in remediating contaminated or long-term derelict sites. Taxpayers annually claim £30m of LRTR, but could or should it be more? Ten years on, does tax policy modify behaviour to drive housing growth and regeneration? Housing is a complex issue with no quick fixes, but LRTR provides a valuable contribution (up to 28.50% of remediation costs) to help bring polluted or brownfield sites back into economic use. However, the dereliction criteria needs rebasing to enable the rules to stay relevant and effective.

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Typical estimates for UK housing need suggest that between 200,000 and 300,000 new houses should be built each year to address the country's shortage. The Campaign to Protect Rural England's report *State of brownfield 2018* found that some 1.1m brownfield plots exist across the local planning authorities (LPAs) in England. Whilst 33% have planning permission, too many LPAs still consider 'green belt' development, before exhausting the options to repurpose brownfield sites.

To address the myopia within the real estate sector, the government introduced land remediation tax relief (LRTR) via FA 2001 s 70. This made redevelopment potentially more economically viable by reducing the cost of decontamination, levelling the 'playing field' with 'green belt' sites from May 2001. Later, under the auspices of the tax law rewrite project, it became CTA 2009 Part 14 and was extended to include the remediation of long-term dereliction, effective from April 2009. Ten years on, is LRTR still delivering the regeneration of our towns, cities and former industrial sites?

In 2011, the Office of Tax Simplification (OTS) recommended the abolition of the relief, criticising LRTR as 'not considered to influence behaviour' and 'not a cost effective method of achieving the policy rationale'. OTS quoted 2007/08 figures showing that the average claim was some £33,600 and that 1,190 claims were made, totalling £40m.

The government decided not to implement the OTS recommendation and LRTR prevailed. The latest minor tax relief estimated cost figures from HMRC show the total 2018/19 figures as being only £30m (with 1,300 claims making the average claim £23,000). The statistics may not portray a 'typical' position, however, as the marketplace is rather 'polarised'. Many claims are less than £15,000, while a small number of very significant claims are in the hundreds of thousands, or even millions.

We believe that LRTR does contribute a significant boost to regeneration, albeit many more claims could be possible. Some clients are not capturing the data effectively from their construction projects, such that the availability of LRTR is not being fully considered, while their advisers may have little or no awareness, let alone experience, of presenting and negotiating LRTR claims with HMRC.

Time locked?

A company is entitled to relief if the land has been in a derelict state since 1 April 1998 (or the date on which a major interest in the land was acquired, if earlier) (FA 2009 s 1147(3)(b) (i)). This qualifying date has remained unchanged since its introduction, making it increasingly difficult to prove that the site has not been in economic use since this date, and thus to validate 'dereliction claims'. We have had a number of recent projects that have simply failed as we cannot evidence, with any reliability, the use (or non-use) of the land throughout the full 21 years, despite perhaps being able to prove this for 15 to 19 years. It would be helpful if this date were 'refreshed' periodically, perhaps to April 2008, thereby reinstating the eleven-year period that first applied.

Basic criteria

LRTR gives either 50% or 150% relief against qualifying land remediation expenditure (QLRE) incurred in the remediation of brownfield sites within the UK and is offset against corporation tax. The taxpayer must not be the polluter, or connected or associated in anyway with them. This can be an issue on joint venture projects or leasehold sites where the freeholder may wish to redevelop their old manufacturing site. Developers and property traders (incurring revenue expenditure) can already claim their base costs as an allowable business expense, and thus LRTR is given at 50% of their QLRE. Owners holding as capital (investors or owner occupiers) receive 150% relief.

The relief is not available to individuals nor partnerships. However, a company that is a member of a partnership can make a claim in respect of its share of the partnership's land remediation expenditure provided it satisfies the relevant conditions.

To be eligible as QLRE there are six key conditions set out under CTA 2009 s 1144 that must be met by the expenditure, which must:

- be incurred on land in a contaminated (s 1145) or derelict state (s 1145A);
- not be necessary, other than because of the contamination or dereliction;
- be incurred upon the relevant remediation of contamination (s 1146) or dereliction (s 1146A);
- be incurred on the costs of staff, materials or subcontracted works (at 'arm's length');
- not be otherwise subsidised by grants or third parties (s 1177); and
- not be incurred on landfill tax.

LRTR will also become accessible to non-resident landlords from April 2020 following the change in tax treatment, when their UK property incomes will be chargeable to corporation tax and not income tax.

Furthermore, if this deduction generates a qualifying land remediation loss (QLRL) within the relevant accounting period, the company may surrender the loss in exchange for tax credit equal to 16% of the land remediation loss surrendered. (The LRTR loss surrender rate is not as yet subject to reduction, following the reduction in CT rates.) If a

company claims a tax credit, HMRC can either pay the credit to the company or offset it against outstanding tax liabilities, if any.

By virtue of s 1178A, a taxpayer is required to hold a 'major land interest' which is defined as freehold or leasehold with a minimum term of seven years unexpired. This was updated in the 2009 rewrite to prevent the 'abusive' practice of granting short leases to a third party that would then decontaminate the site and gain the tax relief, before the lease expired and reverted to the freeholder – which may have been the original polluter.

Contaminated land

The established approach to environmental risk assessment involves the concept of contaminant-pathway-receptor, whereby a pathway can only be identified if it is capable of exposing an identified receptor to an identified pollutant. Unless all three elements of a pollutant linkage are identified, the land cannot be considered contaminated. According to the Environment Agency, 'hazard to human health' is the most common determining factor in the categorisation of contaminated land.

Whilst the wide definitions of 'harm' and 'substances' in the initial 2001 legislation enabled a very wide array of pollutants to qualify, the tightened 2009 rules restrict LRTR predominantly to contamination derived from previous 'industrial activity'. Additionally, the legislators matched the stricter wording of the environmental definitions of 'relevant harm' and the 'serious possibility' of relevant harm to land and/or controlled waters.

Essentially, land is considered to be in a contaminated state due to a substance in, on or under the land; and includes materials such as hydrocarbons, metals and metalloids, asbestos and a limited number of exempted 'natural' contaminants – radon, arsenic, arsenic compounds and onsite treatment of Japanese knotweed.

Relevant harm is defined under s 1145(4) as:

- the death of living organisms or significant injury or damage to living organisms;
- significant pollution of controlled waters;
- a significant adverse impact on the ecosystem; and
- structural or other significant damage to buildings or other structures of interference with buildings or to other structures that significantly compromise their use.

Derelict land

To be eligible for LRTR, derelict land must not be in or have been in productive use since 1 April 1998, plus the land must not be able to be put into productive use without the removal of buildings or other structures. If the site is registered on the national land use database, this can be accepted as an indicator of qualifying long term dereliction, assuming the dates are appropriate. However, the biggest issue is that land rarely sits idle for 21 years. We regularly see the economic use of sites awaiting planning permission or whilst development finance is being sought, e.g. for car boot sales or lorry/car parking, which breaches s 1145A(a).

Relevant dereliction remediation, as set out in SI 2009/2037, includes the removal of the following types of prior construction, together with any associated fees:

- post-tensioned concrete heavyweight construction;
- building foundations and machinery bases;
- reinforced concrete pile caps and basements; and
- redundant services (electricity, gas, water and telecoms) located below the ground.

There are no restrictions as to the prior use of the site. Qualifying expenditure can include the relevant site investigation; i.e. the costs of establishing what redundant structures may be present on the site and the cost of removing these structures, as listed above.

However, for both contamination and dereliction, there is no relief unless remediation work is actually carried out, beyond any site investigation.

Remediation options

Potential remediation solutions depend upon the intended end use and the environmental challenges created by contaminants present. The most common generally fall into three categories:

- **Removal**: After determining the extent of pollution, the area of contamination would be excavated, the soil tested to assess the full extent of contamination, and the polluted material removed off-site to a licensed tip. The land would then be back filled with non-contaminated soil. Developers loved 'dig and dump' as it was quick and absolute. However, due to regular and significant increases in landfill tax, there has been a shift towards treatment and containment where possible.
- **Containment**: This is most suited to limited areas of contamination or where removal may be difficult or unduly expensive, containment encases the contaminants in situ. The nature of the contaminants will dictate the form of the barrier. Whilst reducing the need for cart away (mitigating landfill tax costs), the disadvantage of this approach is that ultimately the contaminants remain on site and may therefore require further attention in the future. Insurance cover may now also be possible (or required) to address any future remediation requirements
- **Treatment**: This approach depends on the contaminants present and the intended future use of the site. Science has also driven new ever-advancing technologies in bio-remediation, relying upon the use of micro-organisms which are naturally present (or introduced) to the contaminated land and the spoil treated in order to accelerate a natural bio-degradation process.

Whatever the method of remediation, all tend to be very expensive and challenge the considered economic viability of any given regeneration sites. LRTR helps mitigate these project risks to accelerate the redevelopment of brownfield sites, which in turn will help nurture an area's economic renaissance, growth and new employment opportunities.

HMRC's approach

As one might expect with a tax relief on up to 150% of the expenditure incurred, HMRC is forever vigilant of any taxpayers straying from the permitted aspects of LRTR. We regularly see challenges on preliminaries and professional fees, where it is necessary to prove these were additional to the 'normal project works' and specifically associated to remediation works. However, the majority of issues we see are mostly down to poorly prepared claims, including ineligible costs through naivety (or possibly laziness) of the taxpayer or occasionally their advisers in not seeking out breakdowns of larger lump sum project costs that actually involve a mix of qualifying and non-qualify works. A careful, thorough analysis of project costs leads to optimised tax savings.

Given HMRC's penchant for applying penalties, it is more important than ever that clients and their advisers are able to demonstrate reasonable care in preparation of all aspects their computations. The complacent should consider reviewing *Clarke v Iliffes Booth Bennett* [2004] EWHC 1731 (Ch) or *Mehjoo v Harben Barker* [2014] EWCA Civ 358. ■