

Will you be better off under the new brownfield incentives regime?

It is difficult not to be cynical when the Treasury promises “revenue neutrality” when change is afoot. But when it comes to brownfield incentives and its proposals for a “modified” and “better targeted” land remediation relief regime in particular, there is a justifiable reason to be sceptical, says **Ben de Waal**, partner at **Davis Langdon LLP**.

The headlines look good – “New incentives to help develop derelict land” – but it is not until you look into the detail that you realise that without careful planning the proposals are likely to represent a net flow of funds out of this sector at the very time that the industry needs it most.

Land Remediation Relief was introduced alongside the Finance Act 2001 to incentivise the remediation of contaminated land. Any qualifying land remediation expenditure incurred after 11 May 2001 attracts an additional 50% tax relief over and above the 100% relief already received in calculating taxable profit. This means that a development company would pay less tax when they sold their land, with the benefit equating to 15% of the cost of any qualifying expenditure, or 14% from April 2008, when corporation tax rates dropped to 28%.

This original legislation remains in force until 1 April 2009, after which the new rules come into effect. Whether you will be better off or not will not only depend on the features of your particular site and the remediation strategy employed; you will also now need to consider the interest in land that you hold and the way that you arrived at the purchase price for the land if purchased from a polluter. So, what’s in, what’s out and what can you do to make sure you don’t lose out under the new regime?

What’s in?

From 1 April 2009 there will be an increase in the scope of costs that qualify for LRR where they are incurred on long-term derelict land. The list includes costs that the Treasury believe to be primarily responsible for causing dereliction (see figure 1) but

while there is provision for the list to be extended, the additional condition for the site to have remained derelict since 1998 is likely to render this relief redundant in all but a handful of cases. Unless lobbying yields a change in view on this date it seems that only a handful of sites will actually be capable of benefiting from the extended relief.

The other positive change is the fact that Japanese knotweed removal and treatment costs will now qualify for the relief under the existing legislation, thereby allowing companies to make retrospective claims for any costs incurred since May 2001 (provided all other entitlement conditions are met). In a climate where cash is all important, this does represent a very good opportunity to claim some tax back from HMRC and should be given serious consideration.

What’s out?

There are a number of changes and modifications proposed aimed primarily at raising funds to pay for the extended relief outlined, but also to bring the regime into line with its original intentions.

The ability to claim landfill tax exemption expired on 30 November 2008, however, lobbying continues to try and persuade the Treasury to reintroduce exemption for asbestos removal on the grounds that there is no foreseeable on-site treatment.

The Treasury anticipates savings of around £40m per year, but at project level it equates to an additional cost of £40 per tonne from April 2009 (£48/t from April 2010) if adopting “dig and dump” to landfill as the remediation strategy. Furthermore, no LRR will be allowed on Landfill Tax costs



after 1 April 2009.

Natural substances will no longer be deemed to be “contaminating substances” in the new legislation except for arsenic, radon and Japanese knotweed. In particular water and air are cited as two “substances” that will not be considered as triggers for a claim. So, out goes any potential for claims relating to flood prevention costs and mine shaft grouting and capping costs.

The Treasury intends to disallow the consequential costs of remediation as part of their plan to reinforce the alleged original aims of the legislation. The potential impact of this is that only costs directly linked to the remediation strategy will attract the relief, not the cost of any consequential works.

It is expected that claims going forward will be reduced on average by 15-20% as a result of this condition alone, offering significant additional savings to HMRC and further reinforcing the fact that the proposals are not revenue neutral.

From 1 April there will be a requirement to acquire a “major interest” in the land in order to benefit from the tax relief. A major interest includes a freehold or leasehold interest of more than seven years unexpired. At a time when the traditional holding of



Who can claim?

House builders
Property developers
Property investors
Owner occupiers

Who can't claim?

Private individuals
Non-resident companies
Polluters
Non-taxpayers

Fig. 1: Additional costs allowed on qualifying derelict sites

- Removal of post tensioned concrete heavyweight construction
- Removal of building foundations and machine bases
- Removal of reinforced concrete pile caps
- Removal of reinforced concrete basements
- Below ground demolition of underground services
- Relevant preliminary costs and professional fees

large land banks is being reviewed by some housebuilders, it will become increasingly important to ensure that you do not compromise your ability to claim the relief by not obtaining sufficient interest in land.

Further anti-avoidance rules are being introduced to prevent polluters from benefiting from the relief. If the polluter retains an interest in land after sale, or if the relief is factored into the purchase price, then relief will be denied.

Finally, when the new legislation comes in, only on-site treatment of Japanese knotweed will be allowed, although there will be a relaxation in the rule requiring the knotweed to be present on site when bought. So ongoing treatment will be allowed even if it only surfaces after purchase.

Planning Pointers

Given the market conditions, it's unlikely that the availability of tax relief or the additional cost of landfill tax will by

themselves determine the viability of land development. However, they remain two potentially significant influencing factors and should therefore be managed appropriately, especially where contamination is a significant proportion of the total site

abnormals, or where public sector participation is envisaged either through grant funding or through partnering arrangements. A prudent approach could consider the following points.

1. The remediation strategy

should be tested to ensure that the optimum time/ cost solution is presented for tendering, considering the availability of landfill tax exemption (through previously registered applications) and the tax relief that might be available. Early contractor involvement should be encouraged, provided specialist independent cost management is maintained.

2. Where there are no on-site remediation options then the cost of soil hospitals and cluster sites should be explored as alternatives to landfill, especially when considering the sharp rises in landfill tax.

3. Maximise the tax benefits under the current (pre-April 09) regime by reviewing historic expenditure to extract any previously unclaimed relief to fund future projects. This not only relates to Japanese knotweed costs but also any other unclaimed costs, going back by up to six years after the remediated land was sold.

4. Convert losses into cash by using tax credit provisions in the LRR legislation. With losses becoming a greater feature of corporate life, losses can be surrendered in exchange for a 16% tax credit on the lesser of current year losses, and 150% of the qualifying land remediation costs.

5. When purchasing land from a polluter, beware of undertaking to pass on additional consideration in lieu of tax relief benefits on your own development costs. If HMRC have any reason to believe that the price takes into consideration the benefit of LRR then the relief will be denied.

6. With local authorities and regional development agencies controlling a large proportion of contaminated and derelict land in the UK (the focus of the government's brownfield incentives), they will inevitably also be involved in delivering some of the projects themselves, either through direct project funding, partnership or grant funding. Not being able to benefit directly from the relief themselves, there is a danger that the relief gets lost if not considered early on. In particular:

- Consider carefully the vehicle used to develop land jointly with the private sector. The tax transparency of partnerships means there are opportunities to share certain costs between members, unlike in company structures, so the full benefit of tax relief can flow through to the member most able to benefit, while protecting the non-tax paying benefits of the public sector partner.

- Where grant funding is envisaged, make sure the terms of the grant consider the impact that the grant funding will have on the ability of the recipient to also claim LRR. Apportioning the grant towards costs that do not qualify for LRR will allow the project to benefit from both sources of funding.

- If the public sector undertakes qualifying remediation works themselves, the LRR benefit will be lost. Ask whether funding a private sector partner is a more LRR friendly alternative to direct project funding.

- Be aware of the LRR potential on portfolio sites. The tax relief is likely to gain greater prominence in the investment decision going forward, and "marketing" the availability of the relief on sites earmarked for private sector partnering will enhance its attractiveness.

It is unlikely that the new regime will deliver the Government's envisaged increase in contaminated and derelict land development (especially given the current market conditions) but there are further last minute amendments being proposed by industry lobbyists aimed at short term measures to stimulate the development of land in readiness for an upturn in demand. These include a temporary increase in the LRR rate to 250% and acceleration in the timing of the relief to align more closely to project cash flows.

Ben de Waal
Partner
Davis Langdon LLP