

Buried treasure?

Alun Oliver discusses the practical issues in optimising a claim for land remediation tax relief that can give tax relief at up to 150% of the costs of cleaning up brownfield sites or undertaking major regeneration projects.

Now more than 20 years old, land remediation tax relief (LRTR) was initially part of the Finance Act 2001 and introduced to help make brownfield sites more affordable and boost the UK housing supply to, or beyond, the long-standing government target of 300,000 new homes a year.

The housing crisis stubbornly remains a key challenge for government with only 216,490 net additional dwellings between April 2019 and March 2020 (10 March 2022 DLUHC Housing Supply). No doubt not helped by the additional financial impacts of section 106 agreements, community infrastructure levy (CIL), residential property developer tax, building safety levy and excessive planning delays exacerbated by Covid-19, residential developers might rightly feel unfairly targeted.

Valuable tax savings

Land remediation tax relief offers either 50% or 150% relief against qualifying land remediation expenditure (QLRE) incurred on brownfield site remediation in the UK and is offset against corporation tax. The taxpayer cannot be the polluter, neither can it be connected or associated with the polluter in any way. This can be an issue on joint venture projects or leasehold sites where the freeholder may still want

Key points

- Land remediation tax relief offers either 50% or 150% relief against qualifying expenditure incurred on brownfield site remediation.
- The taxpayer cannot be the polluter or connected with the polluter.
- It is essential to obtain detailed project records setting out the nature of works undertaken as well as where, across the site.
- The contaminated land must not have been in economic use since April 1998.
- Relief cannot include expenditure eligible for capital allowances or that could be expensed as repairs and maintenance.
- HMRC may impose penalties on claims it considers to be abusive or misleading.



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to benefit from a share in the redevelopment profits at say, a former industrial site.

Often overlooked, many taxpayers are blissfully unaware of the tax relief available – to offset their costs of carrying out eligible remediation works – be it on removal of asbestos, or the treatment or containment of other pollutants in, on or under the land. These include substances such as hydrocarbons, metals and metalloids and a limited number of naturally occurring contaminants such as radon, arsenic, arsenic compounds and Japanese knotweed.

We undertake significant numbers of LRTR claims each year – across a wide range of project types. Our experience is that the majority of claims are less than £35,000 but there are a few large claims in the hundreds of thousands, or occasionally millions of pounds, as site circumstances dictate. Overall, we believe that many taxpayers are not claiming the tax relief available and so paying more tax than necessary.

As part of HMRC's tax law rewrite project, the LRTR legislation was redrafted, and the Treasury took the opportunity to tighten definitions to limit some abuses as well as extending the rules (since April 2009) to include remediation of long-term derelict land (CTA 2009, Pt 14).

In 2011, the Office of Tax Simplification (OTS) recommended the abolition of LRTR as it felt the relief was not working as intended, citing that it was 'not considered to influence behaviour' and 'not a cost-effective method of achieving the policy rationale'. The government ultimately chose not to follow the OTS suggestion so LRTR remains available today as an important fiscal incentive to tackle brownfield sites.

The recent change in the tax status for non-resident landlords – who have been within the scope of UK corporation tax since April 2020 – should result in increasing levels of claims that were previously unavailable against income tax as offshore investors. Covid-19 has also affected and slowed some projects.

Following the March 2021 budget statement, there will be additional savings available for corporations with taxable

HMRC LRTR claims actual and estimated

Five year cost estimates (figures given £m)

	2017-18	2018-19	2019-20	2020-21 estimated	2021-22 estimated	No of claimants	Year	Average claim £
Land remediation tax relief	35	40	40	40	40	1,800	2019-20	22,222

Source: HMRC, December 2021 – Non-structural reliefs cost and estimates – CT – NS5

profits in excess of £250,000 a year from April 2023, when the main corporation tax rate is due to increase to 25%. This might see the annual claim total exceed £50m in 2023-24, depending on the blend of claims between taxpayers under the main or smaller company rates for corporation tax.

Additionally, if this deduction generates a qualifying land remediation loss in the relevant accounting period, the company may surrender their loss in exchange for tax credit equal to 16% of that amount. If a company claims a tax credit, HMRC can either pay it the credit or offset it against outstanding tax liabilities, if applicable.

Buried treasure

Not only can the pollutants be buried on site, usually due to years of industrial activity when contamination was not understood or fully considered, but the relevant project data can often be buried within the client's records.

For larger corporate groups there is also a 'disconnect' between the regional/project team – tasked with managing the project profitably – and the head office team that is seeking to maximise tax savings. To optimise a LRTR claim, it is essential to obtain detailed project records setting out the nature of works undertaken as well as where, across the site, particularly if localised hotspots are an issue and all of the associated costs.

Tenacity, ingenuity, and attention to detail are important traits for a property taxation surveyor to ferret out the underlying cost data to help substantiate any claim. Too often, bland invoices or part extracts from the accounting software – with short narratives, are provided. These often have blank lines with little or no coherent reference to the detailed package or subcontract works undertaken. So obtaining the co-operation of the commercial manager or project quantity surveyor and/or environmental engineer will markedly improve the quality of data retrieved and in turn enhance the tax claim – ensuring all available qualifying expenditure is captured and coded within the claim report – delivering significant tax savings to the developer.

Because of the effort to capture robust claims, some taxpayers or their advisers consider it uneconomic to claim. Many more have little or no awareness, let alone experience of presenting and negotiating claims with HMRC. As a result, some firms will be paying more tax than necessary and missing out on these important fiscal incentives.

In reality, we regularly find that data captured within the client's ledger system – however sophisticated – rarely achieves an optimised claim for LRTR. Many residential developers use the COINS software, which does not necessarily capture all of the granular details from its default codes. Any system

approach is a balance between reasonable code lists (we have seen some with thousands of different codes, most of which never get used), training and accepting loss of relief – as codification is never perfect.

Some people are adamant that artificial intelligence (AI) systems can now solve this – albeit most are glorified word searches. A property tax surveyor would review all the available data and cross-compare to the remediation strategy, variations/site instructions, agreed final account and associated professional fees, to analyse a claim fully and optimise the tax savings.

“ If a company claims a tax credit, HMRC can either pay it the credit or offset it against outstanding tax liabilities.”

Long-term derelict land

Under condition B of CTA 2009, s 1147(3)(b)(i), land remediation tax relief was extended to tackle long-term dereliction, targeting regeneration of 'problem' brownfield sites. However, the qualifying date has remained static since its first introduction – 1 April 1998 – which makes it increasingly difficult, year after year to validate claims for any given site(s). Demonstrating that land has not been in economic use since this fixed date is effectively having to prove a negative (non-use) over longer and longer periods.

Our experience is that very few sites can prove no economic use over the last 24 years – with many landowners allowing occasional car parking, boot sales or other intermittent use. Given the importance of regenerating these difficult sites and boosting economic activity across the country – so called levelling-up – we believe that for LRTR to remain effective it is essential that the operative date be updated under s 1147(3A) – the available mechanism through a statutory instrument – to re-calibrate periodically the timescale from which it is necessary to prove dis-use.

The Corporation Tax (Land Remediation Relief) Order SI 2009/2037 explains that remediation of long-term dereliction covers the removal of the following types of prior construction, together with any associated fees:

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

Developer

Qualifying land remediation expenditure (QLRE)	£250,000
Trading profits	£600,000
QLRE included in above	(£0)*
Less LRTR as 50% of QLRE	(£125,000)
Taxable profits	<u>£475,000</u>
Tax saving (assuming 19% tax rate)	£23,750
Equivalent to 9.5% of QLRE	

*Total tax savings still potentially £71,250, as QLRE allowable deduction in assessing trading profits.

There are no restrictions as to the prior use of the site. Qualifying expenditure can include the costs of establishing what redundant structures may be present as well as the cost of removing these. However, there is no relief for either contamination or dereliction unless remediation work is actually carried out, following any such site investigation.

How LRTR works in practice

Developers and property traders incurring revenue expenditure are already allowed their base costs as a business expense, and thus LRTR is given at 50% of their QLRE. Investors or owner-occupiers, incurring capital expenditure, meanwhile obtain 150% relief as shown in *Developer* and *Owner/investor election for capital deduction*.

The relief is not available to individuals or partnerships subject to income tax, or to charities, pension funds or other non-taxpayers. However, a company that is a member of a partnership can make a claim in respect of its share of land remediation expenditure, provided it satisfies the other relevant criteria. LRTR cannot include expenditure eligible for capital allowances or that could be expensed as repairs and maintenance, hence careful analysis is required for multifaceted projects.

There are six key conditions, A to F, under CTA 2009, s 1144 that the expenditure must meet for QLRE:

Owner/investor election for capital deduction

Qualifying land remediation expenditure (QLRE)	£250,000
Trading profits	£600,000
Less LRTR as 150% of QLRE	(£375,000)
Taxable profits	£225,000
Tax saving (assuming 19% tax rate)	£71,250
Equivalent to 28.5% of QLRE	

- **Condition A** – it is expenditure on land all or part of which is in a contaminated or derelict state
- **Condition B** – is that it would not have been incurred if the land were not contaminated or derelict
- **Condition C** – is that the expenditure is on relevant remediation of contamination or dereliction
- **Condition D** – is expenditure on staff and materials or contracted or subcontracted works at arm's-length
- **Condition E** – is that expenditure is not otherwise subsidised by grants or third parties
- **Condition F** – restricts that no relief is given for landfill tax costs.

The taxpayer must hold a 'major land interest', defined under CTA 2009, s 1178A, as a freehold, a heritable title or a leasehold with a minimum term of seven years unexpired, if they are to make a valid claim for LRTR.

While the original wording meant that a wide array of substances qualified as pollutants, the much tighter CTA 2009 legislation restricted LRTR predominantly to sites contaminated by previous industrial activity. It also ensured project criteria were more consistent with environmental laws. Relevant harm, for example, is defined under s 1145(4) as:

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

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According to the Environment Agency, the most common determining factor in the categorisation of contaminated land is due to the risks impacting human health.

Subsidies or grants

Developers often acquire contaminated land sites at a purchase price which may also reference the anticipated cost of remediation. However, we regularly see that some tax advisers treat this ‘adjustment’ to the purchase price as a grant or subsidy from the vendor to tackle the necessary remediation works and thus deny the taxpayer LRTR. This is not correct. The ‘open market value’ of the land in its contaminated state is the agreed price – however calculated – by unconnected parties and does not breach condition E. It is not the case, however, where there is a specific contribution to remediation works, in addition to the purchase price, such as £30,000 contribution/payment towards asbestos removal.

So, suppose the vendor sells land worth £2m for £1.8m to reflect the remediation works, the developer will qualify for LRTR. But if the developer pays the full market value – £2m – and the vendor then gives them a grant of £200,000 to pay for the remediation works, there will be no relief.

Thus, it is important the parties (and their respective advisers) are clear on the agreement reached.

Remediation options

Potential remediation strategies depend on the intended end use and the specific environmental challenges faced because of the contaminants present and are often cost benefit driven; although increasingly environmental, sustainable and governance (ESG) matters will also influence the decision of large corporates.

The three options are:

- treatment;
- containment; or
- removal.

Treatment approaches will depend on the contaminants present, the intended future use for the site and other risk factors such as nearby rivers. Additionally, rapid advances in science has led to a proliferation of new bioremediation and other treatment techniques.

Bioremediation relies upon the use of bacteria, fungi, plants or micro-organisms that are naturally present in or introduced into the contaminated land (or spoil heaps) to accelerate natural degradation processes, enabling on-site containment, or significantly reducing the quantum of hazardous material to be removed from site and reducing landfill.

Containment keeps the pollutants on site but separates or encapsulates it to block any ‘pathway’ to a ‘receptor’ (owners and occupants) where significant harm might result. This route also minimises offsite removal and disposal, again mitigating landfill – it may still require further attention in future. However, increasingly it is now possible to purchase insurance cover against any residual risk of future remediation requirements. The nature of the intended uses, as well as the contaminants, will determine the barrier(s) used; examples include impermeable geotextiles or gas membranes, capping layers of sand, gravel or concrete, or bentonite clay.

Lastly, dig and dump – removes the problem material from site – once and for all. It can be quick and absolute, but expensive. This is not least because of landfill tax – since 1 April 2022, £98.60 per tonne for standard waste and £3.15 per tonne for non-hazardous material. Note that Japanese knotweed is only eligible for LRTR, where treated on site.

Whatever method of remediation is used, all tend to be expensive, and potentially challenge the economic viability of any given regeneration project. LRTR helps to mitigate these costs, accelerating redevelopment of such brownfield sites and offsetting the cost disadvantages over ‘green field’ sites. In turn, this can nurture an area’s economic renaissance – fostering new employment opportunities and/or providing much needed new homes.

“ Careful, thorough and timely analysis of the relevant project costs typically optimises the available tax savings.”

Scrutiny, care and penalties

Unsurprisingly, with up to 150% relief available, HMRC is vigilant about taxpayers making LRTR claims. Most issues arise as a result of poorly prepared claims. For example, non-qualifying costs included by not seeking more detailed breakdowns of lump-sum project costs that involve a mixture of qualifying and non-qualifying expenditure. Careful, thorough and timely analysis of the relevant project costs typically optimises the available tax savings.

Furthermore, HMRC can seek to impose significant penalties if it considers any claim is abusive or deliberately misleading. So it is very important that clients and their tax advisers can demonstrate reasonable care in preparing their tax computations to counter any HMRC enquiry.

Our experience is that the time and effort to prepare a comprehensive LRTR claim is always worthwhile – both for the money it will save the business, and the longer-term benefits for the community in which the site is located, being brought back into productive use, boosting growth, employment and prosperity. ●

Author details

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