Building on brownfield incentives

Indirect Tax | Large Corporate

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Ben de Waal sets out the case for operational clarity and modernisation of the land remediation relief legislation to address the current bias towards greenfield development

Key Points

What is the issue?

Land remediation relief was first introduced in 2001 to encourage the development of brownfield (previously developed) land. Unprecedented demand for housing is now pushing housing development onto larger, often easier to develop, greenfield sites with many brownfield sites being overlooked.

What does it mean for me?

The CIOT's Property Taxes Committee has been considering the HMRC manual dealing with land remediation relief with the aim of addressing areas of uncertainty in the application of the current relief.

What can I take away?

The case for change and a refocus on this relief is strong. An active brownfield development sector can support a well-managed greenfield development policy in helping the country to hit its housing and employment land development targets.

Land remediation relief was first introduced in 2001 to encourage the development of brownfield (previously developed) land at a time when there was a much stronger pro-brownfield narrative coming out of government. There were tighter planning laws, and the National Brownfield Strategy had introduced a commitment to build over 60% of new housing on brownfield sites. The relief was subsequently amended in 2009 to remedy some seemingly unintended consequences of the 2001 version and to extend the scope of qualifying costs to derelict sites.

Twenty years on, we find ourselves in a place where unprecedented demand for housing is pushing housing development onto larger, often easier to develop, greenfield sites with many brownfield sites being overlooked, despite evidence suggesting they could contribute over one million new homes. The green vs brown argument is complex, but the reality is that many brownfield sites with planning permission remain undeveloped due to viability issues. The much heralded Local Authority Brownfield Register initiative has failed to deliver its targeted ambition for 90% of registered sites to have planning permission for housing by 2020.

With corporation tax rates set to rise to 25% and the likely introduction of the residential property developer tax, there will be an inevitable refocus on reliefs to help mitigate the increased tax burden. Refreshed guidance and modernisation of the legislation would generate greater certainty and help to meet the future demands of the market.

Modifications to the relief were first proposed in 2015 by the Environmental Industries Commission and Home Builders Federation with further representations being made to address concerns about additionality and deadweight (www.tfigroup.co.uk/about-us and then click + Our Lobbying). The recommendations were, and remain:

- to bring the tax relief 'above the line' to operate in a similar way to the Research and Development Expenditure Credit (RDEC);
- to increase the general rate from 150% to 175%;
- to increase the rate for sites of over 25 dwellings to 200% if completed within 24 months of planning permission being granted; and
- to change the qualifying date for derelict sites using the Treasury Order powers within the current legislation.

Brexit and the Covid-19 pandemic then hit but as the Build Back Stronger agenda gathered momentum so did the calls for land remediation relief modifications. The Construction Leadership Council raised the issue in its pre-Budget letter to Rishi Sunak and the Environmental Industries Commission reiterated the points in its soon to be published Brownfield First report.

In a timely move, the CIOT's Property Taxes Committee has also been considering the HMRC manual dealing with land remediation relief (CIRD60000 Corporate Intangibles Research and Development Manual: Remediation of Contaminated Land) with the aim of addressing areas of uncertainty.

Some of the practical uncertainties, or apparent barriers to claiming the relief that appear to be outside the policy intent, are set out below.

Polluter retains an interest in the land

A not uncommon situation can arise where a company or public body sells a new long leasehold interest in land to a housebuilder or developer.

Where the owner of the freehold reversion is the polluter, the developer would be denied the relief because of their relevant connection to the polluter through the polluter's retained interest in land (Corporation Tax Act (CTA) 2009 s 1150).

The concept of a 999 year peppercorn lease as being an effective disposal of the property (notwithstanding the reversionary interest) has been accepted in other taxes. The grant of a lease can be a disposal of the relevant property for the purposes of a VAT transfer of a going concern if the reversionary interest retained is worth less than 1% of the property transferred.

Is there an argument, therefore, to apply this principle and clearly state that a reversionary freehold interest does not amount to a retained interest in land?

Exclusions: air and water

The definition of 'contaminated land' for land remediation relief purposes is unique to this legislation and represents a departure from the definition of contaminated land for planning purposes. Whilst the Environmental Protection

Act 1990 for planning requires the presence of harmful 'substances' for land to be deemed contaminated, the land remediation relief legislation only requires the presence of 'something', albeit that the 'something' must be from an industrial (anthropogenic) activity and any risk of harm cannot be due to the presence of air, water or living organisms.

The manual provides an example for the water and living organism exclusion tests, but no reference is made to the relevance or intention behind the air exclusion test. In practice, HMRC does not allow claims for mine shaft grouting (in which underlying voids are backfilled to solidify the ground for construction). This is a major cost required to develop land in former mining areas, the very areas targeted for 'levelling up' the UK economy. It is assumed that this exclusion is for cost reasons, given the not unsubstantial costs claimed under the 2001 version of the relief.

There is essentially a dual purpose to grouting: to remove a risk of explosion due to the build-up of gases; and to remove the risk of subsidence or building collapse by filling the air void. The former is not sufficient on its own to justify claiming the relief because the developer would fall foul of Condition B in CTA 2009 s 1144: they would still have to do the grouting even if the gas risk were not present and hence would fail on the air test.

This is a complex area and guidance is needed to avoid companies relying on the receipt of relief only to see it denied under a potential enquiry. Preferably, this exclusion should be removed all together.

Derelict land

The government was keen to encourage the development of derelict sites and extended the 150% relief to a very prescriptive list of treatment costs in the CTA 2009 modified legislation.

One of the conditions is that to claim the relief, the site must have been derelict (unused) from the earlier of 1 April 1998 or the date of acquisition by the claimant company. At the time of enactment, a site would only have to have been derelict for the preceding 11 years; due to the passage of time, however, a company can now only benefit from this relief if the site has lain derelict for 23 years. This has rendered the derelict land relief almost obsolete and is unlikely to be contributing anywhere near the amount of £30 million to £40 million per annum originally estimated by HM Treasury.

There is currently an unused provision in CTA 2009 s 1149 3A(b) that allows for this date to be changed through a Treasury Order. It seems entirely logical and consistent with the intention of the legislation to either change the date to 1 April 2010 (to restore the original 11 year position), or to make it a relative date by requiring a site to be derelict for 10 years prior to the date of acquisition.

Subsidised expenditure

There is a common misconception that a purchase price agreed with reference to the remediation costs represents a subsidy for the purposes of claiming land remediation relief, and therefore denies relief. The reason for this is that it is not uncommon practice to agree the open market value of a contaminated site with reference to the open market value of a clean site less the estimated cost of remediation, which in turn is treated by some as a subsidy.

This is not expenditure that is ‘otherwise met directly or indirectly by a person other than the company’ (CTA 2009 s 1177(1)(b)); rather, it is a mechanism for arriving at the open market value of the site in its contaminated state. The second example in the CIRD manuals correctly confirms no subsidy exists where the site is acquired in a contaminated state. Given the prevalence of this misconception, however, an

additional note to address the point would certainly help to provide clarity.

Capital expenditure and capital allowances

The CIRD manuals do helpfully alert potential claimants to the restrictions that could apply where expenditure qualifies for land remediation relief, as well as certain types of capital allowances. However, further clarification and examples are perhaps needed regarding the interaction with the new structures and buildings allowance (SBAs).

The new SBA legislation is not included in the list of allowances in CIRD60085. The presence of relief under the land remediation relief legislation denies the ability to claim SBAs.

Care is certainly required in this area, especially given that parts of a building’s substructure and other structures within the ground can also contain qualifying land remediation relief expenditure.

In summary

The case for change and a refocus on this relief is strong. There is no reason why an active brownfield development sector cannot support a well-managed greenfield development policy in helping the country to hit its housing and employment land development targets.

The chancellor has already been willing to use tax incentives to promote short term policy objectives with the recent time limited introduction of the super-deduction and enhanced allowances for plant and machinery and integral features investment. Maybe now is also the time to give brownfield development a timely boost and in doing so help drive the green recovery.