

## Brownfield Briefing

### Introduction

With the closure of yet another consultation into the amendments to the land remediation tax relief legislation, are we now closer to understanding the additional benefits this will deliver for those who build on contaminated or derelict land, and is the industry ready to embrace it?

Whilst the industry applauds HM Revenue and Customs' (HMRCs) continued commitment to brownfield land through a 150 percent tax relief on qualifying costs from a company's corporation tax bill, we must also factor in the impact that the increased duty in the form of landfill tax will have on the overall viability of development; is this another "stealth tax?" It is not just a case of land remediation relief (LRR) being enhanced as a result of the changes, indeed the actual scope for making a claim will be lessened and the newly introduced derelict land tax relief is so restrictive in its qualification criteria that it will only apply in a minority of cases.

Taking the new derelict land tax relief first, HMRC has acknowledged that costs associated with the demolition of historic structures and grubbing up of redundant services and plant bases, not just contamination, present a major barrier to the redevelopment of brownfield sites. As such, HMRC has indicated that such costs will be eligible for tax relief; a full list of qualifying activities has already been published and will be enacted through secondary legislation. However, the site must have been "derelict" since 1 April 1998, which the claimant must be able to demonstrate either through listing on the National Land Use Database (NLUD), or by other means. Where the land is not recorded on the NLUD, it will put the onus on the taxpayer to demonstrate that dereliction utilising HMRC's guidelines as assessment criteria. As a result of the restrictive qualification criteria, we would suggest that only a handful of sites are likely to be eligible and therefore, it is unlikely that the new tax relief will be sufficient to divert strategy away from the easier to develop greenfield sites.

We cannot discuss the modified land remediation tax relief regime without looking at the withdrawal of landfill tax exemption on 30 November 2008. The previous exemption from paying landfill tax on contaminated material disposed of to tip as part of a remediation program did not incentivise the use of sustainable remediation techniques. There were, and still are, many instances where it is simply not possible to treat contaminants and the only option is to landfill. Where this is the case, the new legislation prevents the landfill tax element of any disposal from forming part of a claim for tax relief. This has two main implications. Firstly, the development viability of smaller, inner-city sites is likely to suffer as a result of the additional financial burden. Secondly, any contractor's tenders

and valuations for works that involve disposal to tip must separately identify the landfill tax element of the works — a further layer of disclosure from contractors and more administration for both the taxpayer and contractor.

There are a number of notable changes to the existing LRR legislation. These include a number of anti-avoidance restrictions and a new condition whereby the taxpayer must acquire a "major interest" in the land to be eligible to make a claim for tax relief amongst others. A significant interest is defined as a freehold, or long leasehold with no less than seven years unexpired. With an increase in the number of joint venture projects and structures to minimise land banking, this could potentially restrict the ability for a developer to claim tax relief. This would be particularly so in the case of the Health Care Administration's (HCA) "Brown for Green" initiative, as the developer would never take ownership of the land that it remediates. An added complication occurs where the polluter retains the head interest — an example being land acquired under a long leasehold from a local authority — as the developer is prevented from claiming LRR due to the polluter still retaining an interest in the remediated land.

HMRC has recognised that developers frequently enter into agreement with the polluter of a number of sites, whereby the price paid for the land can be "topped up" as a result of increased profits to the developer. Perhaps a bit misguided, HMRC appears to be proceeding on the basis that these payments are generated from the developer's tax relief, rather than commercial considerations, and as a result, prevents the developer from claiming tax relief on qualifying works. We look forward to further clarification on these issues in HMRC's response to the consultation.

Natural substances, including air and water, have been specifically excluded from qualifying for tax relief. Practically, this means that it will no longer be possible to claim on flood mitigation works or mineshaft treatment works. Arsenic, radon and Japanese Knotweed were specifically excluded from this clause, therefore qualifying for tax relief. Through the recent consultation, HMRC has sought to restrict the extent to which consequential costs should qualify for tax relief, with only direct remediation works now being deemed eligible, representing a significant shift in policy.

It is not all doom and gloom, however. After many years of wrangling, HMRC has finally conceded that costs associated with Japanese Knotweed should qualify for LRR and this is to be applied retrospectively to cover expenditure incurred since 11 May 2001, which presents a window of opportunity for companies to generate tax repayments from earlier years, assuming all other entitlement conditions are met. Going forward, however, HMRC has recognised that there are now many sustainable options for dealing with Japanese Knotweed, other than the once favoured dig and dump method.

As a result, for expenditure incurred from April 2009 onwards, only on-site treatment costs will qualify for tax relief — any off-site disposal costs will be disallowed.

A brief overview of the amendments to the legislation may seem very downbeat; however, we should not lose sight of the fact that there is still a continued commitment to the development of brownfield sites and incentivising developers for taking on these challenges. Yes, some changes were required to move the sustainable agenda forward and in the whole, we are still left with a valuable source of tax relief (or tax credit) during these troubled economic times. Early indications suggest that the amendments will result in a drop of 15-20 percent in claimable cost. Only if your site qualifies for the extended derelict land relief, are you likely to be better off, but the structure of land and joint venture deals will need much more care and planning to ensure that the ability to claim tax relief is not compromised.

In summary, once the guidance notes have been approved, we will at least have a greater certainty over the application of the relief. However, whether it is embraced by developers as intended, or finds its way into some of the HCA-sponsored initiatives, only time will tell.

For further advice concerning any of the issues raised, please contact one of our key individuals detailed below or alternatively call our helpline on 0800 526262. Information on other property tax related topics can also be found on our website at <http://bankingtaxfinance.davislangdon.com>.

Ben de Waal  
Director  
+44 (0)7980 234759  
ben.dewaal@  
davislangdon.com

Hilary Allen  
Associate  
+44 (0)7894 838996  
hilary.allen@  
davislangdon.com

Robert Jones  
Associate  
+44 (0)7980 236441  
robert.jones@  
davislangdon.com