

Cleaning up Contaminated Land

Remediation of contaminated land is a little known tax relief that may soon become very relevant to a number of your clients. The reason lies in the regulation 4 of the Control of Asbestos at Work Regulations 2002 (SI 2002/2675), which comes into effect on 21 May 2004. By that date anyone who is responsible for the maintenance or repair of a property that is a workplace must have assessed and be managing any risk posed by asbestos in the building. If the survey discovers asbestos materials that are damaged or are vulnerable to damage during normal occupation of the premises, the building may be considered to be contaminated because the asbestos poses a health risk to the workers. Any such contamination needs to be dealt with by expert contractors, which is likely to be expensive. It is estimated that there may be up to 500,000 buildings in the UK that contain asbestos.

Tax relief for remediation of contaminated land was introduced by section 70, and Schedule 22 of Finance Act 2001. It allows capital costs connected with cleaning up contaminated land to be treated as revenue expenses, and permits 150% of qualifying revenue expenses to be deducted in the profit and loss account. If the company makes a loss after these extra cost deductions it can claim a tax credit. If this all sounds rather familiar, it is because the mechanics of land remediation relief are very similar to those of R&D Tax Credits introduced by Finance Act 2000, Schedule 20. The special land remediation relief rules for Life Assurance businesses are not covered in this article.

What is contaminated land?

Land in this context means any estate, interest or rights over land within the UK. Land also includes buildings. A contamination is the presence of any substance in, on or under the land, that is, or may cause harm to the health of living things, (people, animals, plants), damage to property, offence to human senses or pollution to nearby watercourses. Thus a huge range of polluting items from industrial chemicals to farm slurry could cause contamination, although nuclear sites are specially excluded. A substance is as any natural or artificial substance whether in solid or liquid form, or in the form of gas or vapour, (FA 2001, Schedule 22 para 31).

It should be noted that the Revenue Inspector's manual excludes from the definition of 'substance' any living organisms such as insects or plants. This restriction prevents land remediation relief being claimed for the costs of removing Japanese Knotweed, which has a destructive effect on land and buildings. This plant is resistant to most weed killers and regenerates rapidly from the smallest root fragment. It is illegal to permit the Japanese Knotweed to grow, and any soil contaminated with bits of the plant must be buried at a depth of at least 5 meters in a licensed landfill site.

What costs will qualify?

For expenditure to qualify for land remediation it must be incurred on or after 11 May 2001 in one or more of the following categories:

- employee costs;
- materials directly employed in land remediation; or
- subcontractor fees.

The definition of employee costs is a duplicate of the original R & D Tax Credit rules. Only the wages, pension contributions and class 1 NICs for the workers directly employed by the company qualify, the cost of labour supplied through employment agencies does not. The costs of employees who are not fully engaged on land remediation tasks are apportioned. Although all of the costs of those who spend 80% or more of their time on land remediation can qualify, none of the costs of those who spend less than 20% of their time on land remediation can count. This 20%/ 80% approximation rule was removed from the R & D Tax Credit provisions by 2003 Finance Bill, schedule 31, para 5 but remains in the land remediation rules.

If the claimant company and the subcontractor are connected, the qualifying costs are determined by looking at the subcontractor's profit and loss account. Where the subcontractor is not connected the whole of the subcontractor payment will qualify as long as the expenses relate to relevant land remediation and the costs are not subsidised.

A company will normally only obtain tax relief for the capital cost of clearing up a contamination when the land is sold, but if it elects within two years of the end of its accounting period, it can deduct capital expenses connected with land remediation from profits in the period they are incurred. If the company has not started trading the capital costs are treated as revenue expenses incurred on the first day of trading.

Who can claim?

Land remediation relief can only be claimed by a company that occupies the land for its own trade, or acquires contaminated land for the purposes of its Schedule A business. The Treasury notes to Schedule 22 of the 2001 Finance Bill also refer to the tax relief applying to those who invest or deal in land.

The claimant company must have an interest in the land, but it need not own the freehold. A corporate leaseholder of a building could claim the tax relief, but a managing agent will not be eligible to claim even though he may legally be responsible for carrying out an asbestos assessment.

The claim for land remediation relief must be submitted within two years of the end of the accounting period in which the costs were incurred.

What's the catch?

The land must have been in a contaminated state when it was acquired by the claimant company. So if a piece of land or a building purchased in an uncontaminated state but it becomes defined as contaminated because of say a change in legislation, the land remediation relief will not apply to the current owner. If the land or building is sold to another unconnected company the new owner could claim the land remediation relief. This may be a potential stumbling block for claims connected with asbestos, as the question will be posed as when the building was deemed to have become contaminated due to the presence of asbestos.

The claimant company must not have caused the contamination by anything it has done or omitted to do. So if the company originally used asbestos in construction of the building, or allowed oil to leek into the soil it will not qualify for land remediation relief. To take a more rural example a farmer may be forced to build a larger slurry pit

to prevent the animal effluent from contaminating a river. He will not be able to claim land remediation relief as either the problem has always been there and new regulations have forced him to protect the water source, or it is of his own making by keeping a larger herd.

Qualifying costs include preparatory work such as investigating and assessing land before some action is taken to prevent, minimise, remedy or mitigate the effects of the pollution causing the contamination, (FA 2001, Sch 22, para 4). This would appear to allow companies to claim for the cost assessing their buildings for asbestos contamination as required by the Control of Asbestos at Work Regulations 2002, but as the Revenue's Inspector's manual states:

'Where a company incurs expenditure on preparatory activity but does not go on to carry out relevant land remediation, it cannot claim relief for the preparatory activity.'

So where no asbestos is found, or where asbestos is discovered but it is considered to be safe if left undisturbed, the assessment costs will not qualify for land remediation relief as no remediation work is actually undertaken.

Tax credit

Where the claimant company incurs a trading or Schedule A loss that has been boosted by a claim for land remediation relief it may surrender part of this loss for a tax credit payment equal to the lower of 16% of the land remediation relief and the unrelieved loss. The unrelieved loss is that loss incurred in the current accounting period which cannot be set-off against other profits of the same period, and has not already been used by carrying it back, forward, or surrendering it via a group relief or a consortium claim.

Although the tax credit should be paid directly to the company, in practice the Revenue are likely to first off-set the amount due against any outstanding corporation tax payable by the company. The Revenue also have the right to withhold the tax credit if PAYE or NIC liabilities for the period remain unpaid. As with R & D Tax Credits the Revenue will hang on to the tax credit payment until any enquiry into the company's tax return for the period is closed.

Conclusion

Land remediation relief is only available to companies, which seems a little unfair on partnerships, individuals and trustees who may also have interests in contaminated land or buildings. This could be interpreted as yet another push towards incorporating the entire UK business environment. From now on any adviser who recommends purchasing commercial land or property through a vehicle other than a company will be living fast and loose with his professional indemnity cover.

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