



## Land Remediation Relief – The Polluter Cannot Claim

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In *Tax*

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In this environment-conscious world we live in and care for, land remediation is a key issue, especially as it can come with tax relief!

We therefore look at a recent Court of Appeal case which helps with direction. The case is *Northern Gas Networks Ltd v Commissioners for HMRC* [2022] EWCA Civ 910 [tinyurl.com/TX-NorthernGas](https://www.tinyurl.com/TX-NorthernGas). Northern Gas Networks Ltd (NGN) owns and operates a regional UK gas distribution network, consisting of 37,000 kilometres of pipeline, which it acquired from its former parent company ([/companies/running-the-business/5026-groups-at-a-glance](#)) via a hive-down in 2005.

### Polluted land – the facts of the case

The gas pipeline, being largely of iron construction, is liable to corrode or fracture over time. Such a problem presents the risk of harm from escaping or exploding gas and the Health and Safety Executive statutorily requires such pipelines within 30 metres of a building to be replaced or improved over a 30-year period, which is reassuring.

The pipes in this case that made up the gas distribution network were laid underneath various pieces of land, some privately owned (including by NGN as owners) and some publicly owned. NGN obtained certain rights to locate and access those pipes on land owned by others. Neither NGN, its former parent nor any company connected (/companies/running-the-business/2875-control-definitions-for-taxes) with them, had originally laid the iron pipes. Over three accounting periods, NGN claimed Land Remediation Relief (LRR) on expenditure relating to the replacement or lining of pipes totalling over £100m. HMRC disallowed the LRR claim.

## Who polluted the land?

The case fell under the old 2001 legislation, which many considered less stringent. NGN operated a gas network through iron pipes, which were not installed by anyone connected to NGN Ltd. The pipes were leaky, so NGN Ltd was required to replace them with plastic ones. NGN Ltd sought LRR on the associated costs.

The tax issue on which this case focused was whether or not the polluted state of the land was as a result of any action or omission on the part of the company that laid the pipes. If so, was the company responsible for remediation, not least because it was the leaky pipes that were at the heart of the problem, although NGN Ltd was responsible for the gas?

## The appeal – ‘the polluter pays’

NGN Ltd appealed against HMRC’s disallowance of the claim on the principle of ‘the polluter pays’, arguing that it was the laying of the pipes that was the pollution. If that were not the case, companies such as NGN Ltd could never enjoy the relief via LRR.

The appeal to the First-tier Tribunal (FTT) failed. The wording of the legislation was clear and covered the NGN Ltd position, as they were at least partially responsible for the contamination. It was agreed that at the time the expenditure was incurred, NGN would have been entitled to LRR were six conditions met:

- NGN acquired land in the UK
- The land was acquired for the purposes of NGN’s trade
- At the time of acquisition, all or part of the land was contaminated

- NGN incurred qualifying land remediation expenditure in respect of the land
- The qualifying land remediation expenditure was allowable as a deduction in computing the profits of NGN's trade
- The land must not have been in a contaminated state wholly or partly as a result of anything done or omitted to be done at any time by NGN or a person with a relevant connection to NGN

NGN then appealed to the Upper Tribunal (UT) which agreed that conditions four and six were not satisfied. NGN then appealed to the Court of Appeal (CoA) – the sums involved were very significant. HMRC also challenged the previous decision that condition three was met by NGN.

## The decision by the Court of Appeal

The CoA first considered condition six and found that:

- The contamination of the land arose from the possibility of harm due to an escape of gas
- The iron pipes themselves did not give rise to any harm
- The harm, or the possibility of harm being caused, arose because NGN pumped gas through the iron pipes
- The land would not have been contaminated if no gas had been pumped through the pipes
- The pumping of gas was an act by NGN which gave rise to, or caused contamination

As the contamination arose from an action of NGN, this meant that condition six was not met and LRR was not available. As condition six was not satisfied, the CoA did not need to consider conditions three and four. Whether the land was in fact in a contaminated state when acquired (condition three) or whether the expenditure had been incurred in respect of land (condition four). The CoA dismissed NGN's appeal.

In relation to condition three, those purchasing contaminated land must ensure that this is ideally identified at the time of purchase or, if not, identify the history of the land on discovery of the contamination.

The case is a timely reminder of the problems achieving LRR. For many it is also a useful reminder of the existence of the relief, what to spot and what to action at an early stage.

For Executors, as part of the instructions to the farm probate land agent valuer, questions of the land agent should be asked to confirm if there is any contamination. Should there be contamination then the Executor should take tax advice as to whether there is eligibility for LRR based on the information supplied by them. Again, this is a good example of the need for not only good instructions to the valuer but using a quality experienced farm valuer.

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