**18 January 2019**

**BUSINESS RATES FOR SMALL HYDRO – LEGAL CHALLENGE**

Dear Member

For the last five years, Alba Energy has been in a protracted dispute with the Tayside Assessor, in order to challenge the Rateable Values (RVs) ascribed to small hydro sites throughout Scotland. Alba considers these valuations – from which business rates are calculated – to have been inappropriately high in the 2010 valuation roll and grossly excessive in 2017.

For small hydro in general, the level of business rates has become a threat to the continuing viability of the sector.

In order to bring formal appeals against the 2017 RVs it has been necessary, first, to settle the dispute relating to the 2010 roll. The original challenge was brought by “Old Faskally Farming Co & Others” (represented by Alba Energy). The revised valuations for “Old Faskally & Others” have twice been agreed by the Tayside Valuation Appeals Committee and, twice, the Assessor has appealed the committee’s decisions in the courts.

Last Tuesday, 15th January, the Lands Valuation Appeal Court (LVAC) heard the second appeal of the Tayside Assessor against the committee, defended by Alba Energy.

From the arguments heard on Tuesday, we believe the Assessor’s appeal has failed.

However, we cannot be certain until the written verdict of the judges – Lady Dorrian, Lord Malcolm and Lord Docherty – is delivered next month.

The judges will also decide whether to accept the Rateable Values put on the small hydro subjects, or whether they will instruct the Tayside committee to explain further – or possibly alter the valuations.

From the point of view of the hydro sector in general, the most encouraging aspect of the hearing was the broad acceptance on all sides that the Penstock or pipeline of a run-of-river hydro was not rateable for the purposes of valuation.

If this position is established in both the previous and current roll, we believe it provides a primary argument against the Assessor’s valuations of small hydro sites.

During Tuesday’s hearing, their lordships narrowed the argument down to what they considered to be the only two salient questions outstanding in the case.

These two questions were:

*1. Although Penstock and pipeline, broadly defined, may not be rateable, some component parts of civil works should still be rateable under class 4 of the Plant & Machinery order. Their Lordships wanted to know if the committee had, as instructed at the last hearing, considered items in class 4 and conducted a “sequential analysis” of rateable elements (ie checked all classes of the PMO). In its stated case, the committee does indeed claim to have done so, and to have considered new items, but its proposed 25:75 split of assets nevertheless produced the same result as the comparative method which it had previously used. How did these figures duplicate each other? Shouldn’t the new items have altered the percentage?*

*2. Shifting from the “Comparative Method” (using rental values for water rights plus the value of the “shell” of the powerhouse) to the “Revenue & Expenditure” method (based on calculation of rateable assets between tenant and landlord), how did the committee actually calculate its 25:75 split between tenant (ie operator) and landlord?*

Inconveniently, in its stated case, the Tayside Committee did not actually explain how it calculated 25%. In reality, we believe they came to that figure because it was a reasonable proportion, which comfortably covers all the rateable elements of a small hydro scheme, and which squared with the results previously produced by the comparative method.

Meanwhile, it seemed clear that the 50:50 split favoured by the assessors possessed neither explanation nor reasonableness.

We will find out for certain in their written Opinion, but their Lordships did not appear to consider the committee to have been acting contrary to the law – the only test that would support an appeal – but rather as missing an element of explanation.

Which leaves the small hydro sector still waiting for a definitive conclusion.

In the meantime, the following may be considered the important developments of the case.

* “Old Faskally & Others” appear to have established clearly that the penstock (or pipeline), broadly defined, does not fall to be rated.
* In which case, other rateable elements that fall outwith the definition of a penstock are, in terms of cost, proportionately minor.
* In the hearing, the judges indicated that the foundations of the building might be rateable, as well as the “shell”. But we in the hydro sector don’t have a problem including the value of the foundations, as that would still only represent a minor percentage of overall costs.
* The same would go for the other item raised as potentially falling into class 4: the intake structure.
* Since the most costly parts of a hydro scheme (penstock/pipeline and turbine/generator) do not fall to be rated, it should be possible to demonstrate clearly that rateable elements comprise no more than 25% of a hydro scheme – as the committee has suggested.

However, in brief subsequent discussion, it is clear that, even if the Judges endorse the 25:75 split, Scottish assessors will not accept that for the 2017 small hydro appeals.

Bluntly, they are going to be intransigent until otherwise instructed by a court.

The assessors have now repeated their position that they want to take the 2017 cases to the Lands Tribunal – the court into which they appear to put their faith.

This does not discount a political solution. Discussions continue with Scottish Government that may yet be able to work something out through the “Tretton review” of the Plant & Machinery order – which will be meeting again next month – and the Opinion of the Old Faskally Judges may assist in that.

But if we are formally to get fair and reasonable valuations from the assessors for the grossly disproportionate Rateable Values of 2017 – and defend the small hydro sector against the threat of unsupportable business rates – it is likely that the only means of doing so will be to confront them decisively at the Lands Tribunal.

Scottish Government relief on business rates for hydro sites currently represents a discount of 60% (the amount we argued represented the excess in the valuations) but this relief is not assured in the long term. Only by correcting the primary valuations of small hydro sites can fair business rates (in line with other comparable sectors) be guaranteed.

First, though, we need to see how definitive Lady Dorrian is going to be in her written Opinion from last Tuesday’s hearing. That will be decisive in the argument we bring to the Lands Tribunal in any subsequent case.

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