

**October 13, 2019**

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

Dear Member

I am writing to inform you of the current legal position of the hydro sector, as we continue our challenge to the Assessor over the insupportable Rateable Values (RVs) that have been applied to small hydro sites in Scotland.

We have been engaged in several separate strands of activity, which we aim to bring together to a conclusion next year:

- The long-running 2010 case of “Old Faskally & Others”, now nearing completion
- Negotiations with Scottish Government and the Assessor through the “Tretton Review”
- The curious case of the 77 appeals, now being called in by the Highland Appeal Committee for a hearing in November
- Preparation for a decisive hearing of the 2017 appeals at the Lands Tribunal

**Old Faskally & Others**

Earlier this year, the Assessor took the “Old Faskally Six” back to court for the second time. In their verdict, the judges of the Lands Valuation Appeal Court (LVAC) issued a single instruction to the Tayside Committee. (This is the committee which heard the original Old Faskally appeal and which has continued to support the position of the six appellants, as represented by Alba.)

Leading the judges, Lady Dorrian instructed the committee to reconsider which components of a hydro scheme should be rateable. To date, the committee’s view has been that 75% of hydro construction works are *not* rateable.

Foremost among non-rateable items of a small hydro scheme are the turbine, generator and pipeline – representing the principal costs of construction. In his evidence to the court, the Assessor agreed that he had *not* deemed these items to be rateable for the 2017 valuation. Where the Assessor differed from Alba and the committee was in his view of the civil works associated with installation of the pipeline. These installation works – deemed to be rateable by the Assessor – represent the costs that the LVAC judges have instructed the committee to re-examine.

However, the LVAC also stated that such civil engineering works are to be assessed only in terms laid out by one particular section – Class 4 – of the Plant & Machinery Order. Crucially, items in this class are considered to be rateable only if they are “in the nature of a building or structure”. To date, the committee has deemed that 25% of a hydro scheme should be rateable. The court has required the committee to check this percentage. Is there anything else in the civil works that might be considered a building or structure?

To most hydro operators this won't be a complicated argument. Aside from the occasional thrust-block, pipeline installation does not consist of construction, but rather of digging holes, blasting rock, transporting pipe lengths and inserting them into a trench, which is then backfilled. There is no improvement to the ground or structure created, hence this activity – which represents approximately 20% of costs – would appear to be straightforwardly non-rateable.

Nevertheless, the committee has called on the appellants of the Old Faskally case to submit their original costs for examination. Though the committee's request is reasonable, carrying it out has not been simple. These are schemes that range in age from 15 to 70 years.

But thanks to the efforts of all the scheme operators going back over old accounts – and with Monzie digging out costings from 1948 – Kenny Hunter (of Hunter Hydro Services) has managed to break down the figures as clearly as possible into their relevant categories and a submission has been made by Alba Energy to the Tayside Committee. This shows proportions of rateable:non-rateable components that chime with the committee's percentage (25% rateable, or less) and which are, furthermore, consistent with all modern hydro schemes.

The committee has now accepted this submission of evidence and has asked Alba to meet the Tayside Assessor to agree these facts so that a final determination may be reached.

A further purpose of the forthcoming negotiations with the Assessor will be to agree that the 2017 appeals should be heard in a decisive case at the Lands Tribunal next year.

### **The Tretton Review: a political alternative?**

For the last 18 months, representatives of the British Hydropower Association – led by Kenny Hunter – have been meeting with Assessors and Scottish Government to see if a solution could be found to the problem of hydro RVs. At the beginning of this process, government officials and ministers (including Finance Secretary Derek Mackay and energy minister Paul Wheelhouse) gave the impression that they understood the problem and wanted to facilitate a solution. By providing a 60% relief package, they acknowledged the precise proportion which the hydro sector had argued was the excess in the Rateable Values. Reducing business rates for small hydros by nearly two-thirds brings them into line with the closest comparable sector: Small Wind (also supported by the Feed-in-Tariff system).

At the start of this process, Scottish Government acknowledged reliefs weren't a long-term solution. The Tretton Review was tasked with investigating whether there might be other means of correcting the

hydro RVs. The simplest solution would have entailed a very minor amendment to secondary legislation: namely, the Plant & Machinery Order.

Unfortunately, this early promise has not been borne out. During the course of the Tretton negotiations – despite the meticulous provision of evidence from the hydro sector – it became increasingly apparent that neither government nor assessors were inclined to make meaningful changes to secondary legislation or calculations of Rateable Values, however disproportionate. A revised version of the report is due to be published at the end of the month, but its conclusion seems likely to be: that the status quo is maintained; that the assessors’ figures should not be altered; and that reliefs are the only means of correcting the economic impact on operators. Discussions with government will continue in the hope of a change of policy, or heart, but there is unlikely to be any guarantee that the reliefs can be sustained at current levels in the long term; nor will there be any solution for those enterprises that fall foul of state-aid regulations. (A company operating several hydros is likely to breach “de minimis” amounts of state aid and, therefore, to be ineligible for reliefs.)

Alba extends its gratitude to the BHA for conducting this task in the face of deepening intransigence. Discussions will continue with public finance minister Kate Forbes, who has shown some recognition that more than “Tretton” is required. And government meetings – through the Hydro Task and Finish Working Group – continue to provide a platform for lobbying industry concerns.

But with government unwilling to take action on behalf of the sector, it may be that the Tretton review’s real significance lies not in its investigations of policy, but in its value as a public record of Scottish Government and Assessor positions.

With the Old Faskally case reaching a conclusion and pressure from appeals mounting against the Assessor’s 2017 valuations, a settlement can only now be reached in the Lands Tribunal, with that case – the big one for small hydro – due to be heard next year.

## **The 77 Highland Appeals**

Meanwhile, in a plot-twist worthy of Scottish history, a complication has arisen in the Highlands.

The Highland Valuation Appeal Committee recently lost patience with the massive build-up of hydro appeals and decided that 77 cases ought to be heard on their watch, citing these for a committee hearing on the 5<sup>th</sup> November.

As a result, the Assessor and Alba have found themselves agreeing on at least one thing: that after six years wrangling over Old Faskally, the problem of the 2017 appeals could not be properly resolved by another committee, but needed to be brought before the overarching Lands Tribunal for Scotland (LTS).

Both the Highland Assessor, William Gillies, and Calum Innes of CKD Galbraith (representing Alba as well as individual appellants) wrote to the Highland committee, suggesting that these appeals had been cited

prematurely and ought to be “continued” (postponed) until the Land court had heard a test case next year.

But like a recalcitrant clan chief, the chairman of the Highland committee refused and insisted on hearing the cases himself. The Assessor has therefore been left with no option but to write to each of the 77 appellants to request they be individually referred to the lands court. This request would be made on a joint basis between the parties and, as such, the fees for lodging would be apportioned 50:50 between appellant and assessor.

A joint referral to the Lands Tribunal for Scotland effectively bypasses the Committee. In the event of the committee refusing a request for referral, the party seeking the referral may appeal this decision to the court, whereupon the LTS will make the decision as to where the hearing should take place.

The principal reasons for requesting referral to the LTS are that a case is complex and has a bearing in more than one valuation area. As this is self-evidently the case for the small hydro appeals, it is a near certainty that the Lands court will hear them.

Alba’s advice to appellants who find themselves in this situation is to make contact with the Assessor for Highland or, where they are represented, instruct their agents to do so in order that a referral to the Lands Tribunal may be made jointly.

It is important to note that any referral to the court must be made more than 14 days before the date an appeal is cited for hearing and, accordingly, a formal referral to the LTS requires to be made before October 22.

Costs for lodging an appeal with the Lands Tribunal are as follows

£100 – where net annual value does not exceed £10,000

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£150 – where net annual value exceeds £10,000 but not £50,000

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£300 – where net annual value exceeds £50,000 but not £100,000

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£500 – where net annual value exceeds £100,000

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It is important to be aware that withdrawal of an appeal would result in the case in question being ineligible to benefit, should the Lands Tribunal find in favour of the hydro sector.

If you have any queries, please do not hesitate to contact Calum Innes [Calum.Innes@galbraithgroup.com](mailto:Calum.Innes@galbraithgroup.com) (01738 456075 | 07909 978 643).

## **The Road to the Lands Tribunal**

With a conclusion to Old Faskally imminent and with appeals being referred from the committee to the court, a decisive hearing at the Lands Tribunal next year is now the only plausible outcome.

The situation for the small hydro sector has become a political and bureaucratic fiasco. Rateable Values have been ascribed to hydro sites that are proportionately two-and-a-half times greater than those of its nearest comparable industry. The Assessor won't alter his position, the government won't contemplate a solution, the original "Old Faskally" case brought successfully to the committee system has taken 6 years to be resolved.

During this period, however, the hydro sector has at least worked up a good argument and prepared its evidence. We have appointed effective counsel in the form of James Findlay QC and are in the process of procuring a final brief to take the Assessor and his perverse 2017 valuations to court.

This will proceed in three phases:

- Conclude the "Old Faskally" process and await the final determination of the Tayside Committee
- Agree the sample 2017 appeals to represent the whole hydro case and commission written Opinion from counsel on the argument to bring to the Lands Tribunal
- Make application for a hearing at the Lands Tribunal (for summer 2020).

In order to proceed, Alba has received generous offers of assistance from both the British Hydropower Association and Scottish Land & Estates.

Ultimately, however, we have relied – throughout – on the support of the Alba membership. And with legal proceedings now beginning in earnest, we are asking our members to extend that support further.

As discussed at the last AGM, and at the recent group visit to the Ormsary hydros, we are now going out to you with formal requests for additional finance.

All of us at Alba are very grateful for the support you provide.

Alexander Linklater  
On behalf of Alba Energy Ltd  
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