



FOR INDEPENDENT
HYDRO OPERATORS IN SCOTLAND

HYDRO ELECTRIC SCHEMES – RATING

Galbraith

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REPORT FOR ALBA MEMBERS

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Signature:



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Date:
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BACKGROUND

As members of Alba Energy will be well aware, an appeal against the assessor's valuation methodology, following the 2010 revaluation, was taken before the Valuation Appeal Committee for Tayside. The subjects of appeal were a number of run of river hydro schemes, including one owned by the Old Faskally Farming Partnership and, consequently, the case is known as Old Faskally & Others vs The Assessor for Tayside (Old Faskally case).

The principal argument led by the appellants in the Old Faskally case was that the penstock is specifically excluded from value by the terms of The Valuation for Rating (Plant and Machinery) (Scotland) Regulations 2000. It was essential to the case that the "penstock" was defined as comprising not simply the pipeline, but the whole construction, from intake weir to outflow, which harnesses energy, by way of a "pressurised column of water", so that it may be converted into electricity in the turbine house (and thereafter sold to customers). By the terms of this argument, all apparatus outwith the turbine house is exempt from valuation. The appellants led expert evidence in support of this view and the committee was content with such and found in favour of the appellants, determining that the only elements that fell to be valued comprised the land and water rights, together with the turbine house. Application of the appellants' methodology resulted in rateable values equating to 10% of calculated gross receipts.

The decision by Tayside Valuation Appeal Committee was subsequently appealed by the assessor to the Lands Valuation Appeal Court, which determined that the committee had erred somewhat in its interpretation and application of the Plant & Machinery Regulations. Consequently, the court remitted the matter back to the committee for further consideration.

The Old Faskally case relates to valuations assessed as a consequence of the 2010 revaluation. However, at the subsequent revaluation exercise, undertaken in 2017, the valuations assigned to small hydro schemes increased significantly, which resulted in the industry lobbying government in an effort to resolve the anomaly of hydro generation being assessed at a significantly higher level than other renewable technologies.

The result of such lobbying initially secured transitional relief, providing a cushion against large increases in rateable value following the 2017 revaluation and, more recently, two further significant changes, namely;

1. An undertaking to introduce 60% relief with effect from 1st April 2018; and
2. An undertaking to fast-track a review of the Plant & Machinery Regulations, having particular regard to hydro generation.

In the interim, the Valuation Appeal Committee for Tayside published its findings following further consideration of the Old Faskally case and confirmed that it is content with its understanding of the definition of a penstock and that such should be excluded from the valuation and that the valuations promoted by the original appellants should be maintained. However, the committee also revised its previous support for the comparative method of valuation and, on this occasion, endorsed the assessor's use of the so-called "Revenue" (or "Receipts & Expenditure") method, albeit with significant variations on the assessor's division of assets. As a result, the assessor has again appealed the committee's decision, describing it as "perverse".

ACTIONS

In order to optimise the position for owners and operators of hydro generation schemes, Alba has been active on a number of fronts. Firstly, lobbying government in partnership with the British Hydropower Association, which has generated the undertakings outlined above; secondly, seeking the opinion of legal counsel with regard to any future appeal that may be pursued in respect of the 2017 revaluation.

In giving consideration to a possible future appeal – potentially to be brought before the Lands Tribunal, so that the court may set precedent for all small hydro subjects – Alba representatives dealing with this matter determined that opinion should be sought from a QC familiar with rating law and regulation.

The previous Old Faskally case had been led by the advocate Tony MacIver, who subsequently retired. Accordingly, careful consideration was given to alternative counsel and advice sought from Geoff Clarke QC.

As Mr Clarke did not have the advantage of previous involvement with the hydro sector, a number of meetings were held in order to apprise him of the pertinent issues.

OUTCOMES

The initial opinion provided by Geoff Clarke QC proffered the view that the assessor was mistaken in his use of the “revenue” method of valuation, where the more traditional and transparent “comparative” method might still be legitimately used. However, in order to advance this approach, it would be necessary to substantiate the valuation of small hydro subjects with the example of a scheme rented out in its entirety. To date, no such scheme has been provided as evidence, but Galbraith is currently negotiating the terms of one, which may yet provide the basis of a case for the 2017 appeals.

Geoff Clarke then provided an interesting subsequent view, which suggests that, in using revenue to assess the annual value of hydro generation schemes, the assessor may have erred in including income other than that derived from the sale of electricity generated. The opinion suggests that income derived from incentivisation payments – Renewable Obligation Certificates (ROCs) or Feed-in-Tariffs (FiTs) – may be excluded from a proper assessment of small hydro subjects when determining their rateable value.

As noted previously, the Valuation Appeal Committee for Tayside has maintained its broad support for the arguments led by the appellants at the original hearing. However, the assessor’s latest appeal – asserting that the committee’s decision is “perverse” – will eventually result in the matter being reviewed once again before the Lands Valuation Appeal Court.

The effect of the assessor’s actions is that the committee must prepare a stated case, summarising the key issues, which will subsequently be considered by the Lands Valuation Appeal Court. Representatives of Alba, including counsel, will have an opportunity to review

and recommend adjustments to the stated case.

The advice received from counsel and advisors to Alba is to progress in a measured fashion and to wait for the government's review of Plant & Machinery legislation and the emergence of "wholly rented" schemes as evidence. The landscape is subject to change, with the government undertaking to put measures in place to address the valuation anomaly impacting on the hydro sector.

Issues arising from the Old Faskally case will be further addressed upon receiving the Valuation Appeal Committee's stated case.

With regard to appeals lodged in respect of the 2017 revaluation, there is a broad window within which to give consideration as to how best to proceed. Any formal appeal is likely to be taken before the Lands Tribunal for Scotland. However, with government reliefs proposed for 2018/19, there is no urgency to make any such application and, given the other matters which are presently in train, it is considered prudent to maintain a holding position to provide an opportunity for greater clarity, while both government and assessor make their intentions clearer.

It is not the role of government to design a valuation method and, while fundamental flaws in the assessor's approach have been exposed, a successful outcome will require a legitimate system of valuation for small hydro. That method has yet to be established. In order to prepare for an eventual hearing of the 2017 appeals, Alba directors and members may wish to commission further opinion, to provide a full account of how rateable values ought to be produced for small hydro. This is a subject for discussion in the new year.

Members of Alba Energy may be assured that their 2017 appeals remain valid, but they need take no action until further advised. Payments of business rates to Local Authorities should be made when due; however, should an action over rateable values be successfully taken in the future, rebates may be claimed retrospectively. In the meantime, Alba will keep members informed of government relief being made available for 2018/19.