

Hydroelectric power stations must pay the hydraulic levy from 1 January 2013 before 20 May 2015

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Royal Decree 198/2015, of 23 March, implementing article 112 bis of the Waters (Consolidation) Act and regulating the levy on the use of inland waters for the production of electricity at inter-regional boundaries.

The Official Journal of Spain (abbrev.: BOE) of 25 March 2015 has published Royal Decree 198/2015, of 23 March, implementing article 112 *bis* of the Waters (Consolidation) Act and regulating the levy on the use of inland waters for the production of electricity at inter-regional boundaries ("the Royal Decree").

The Royal Decree implements the new tax introduced by the Energy Sustainability (Tax Measures) Act 15/2012 of 27 December, specifying aspects necessary for imposition of the levy and requiring owners of hydropower plants to make payment with effect from 1 January 2013, date on which Act 15/2012 came into force. The Royal Decree is passed under the aegis of the second final provision of Act 15/2012, which in turn refers to art. 149(1) (22) of the Spanish Constitution, by virtue of which the State, in connection with hydraulic resources and their exploitation when the waters flow through more than one delegated region (*comunidad autónoma*),

is recognised legal authority over legislation, unified regulation and concessions. The levy shall only apply in inter-regional basins.

At the time of creation of the levy by Act 15/2012, it was already apparent that the new levy was seriously questionable "from the very justification of its creation, which does not match the nature of the tax. According to the Preamble and art. 29 of the Bill, the new levy is justified on environmental grounds, insofar as seeking "the protection and improvement of publicly-owned waters". Such reasoning, however, is contradicted both by the nature of the tax – which actually does not tax the use or consumption of water, but the production of electricity¹ – and by the paltry amount of the tax receipts that goes into actions of the basin water services regulation authorities (*organismos de cuenca*): 2% of the levy collected, compared to 98% going into the purse of Spain's Debt Management Office (*Tesoro Público*)"².

¹ With regards to the quantification of the tax, we explained that while the taxable event is defined as "the use and exploitation of publicly-owned property to which art. 2(a) of this Act refers, for the production of electricity at power station busbars", the tax base is "the economic value of hydroelectric power produced" regardless of the water use or consumption it requires. The result of this contradiction is a vague and arbitrary legal definition of these two essential elements of the levy.

² Carlos Vázquez Cobos and Blanca Lozano, "¿Tiene un soporte constitucional el nuevo canon por utilización de las aguas continentales para la producción de energía eléctrica?", available online: <http://www.gomezacebo-pombo.com/index.php/es/conocimiento/analisis/item/415-%C2%BFtiene-un-soporte-constitucional-el-nuevo-canon-por-utilizaci%C3%B3n-de-las-aguas-continentales-para-la-producci%C3%B3n-de-energ%C3%ADa-el%C3%A9ctrica>.

This same criticism was made to the levy in the Report of the Committee of Experts for the reform of the Spanish tax system in 2014³. The Report states that “the mechanism for quantifying the levy is completely unrelated to the harm caused to the publicly-owned waters. On the contrary, “the tax base of the levy shall be determined by the basin water services regulation authorities and shall be the economic value of hydroelectric power produced and measured at power station busbars in each annual tax period through the use and exploitation of publicly-owned waters” (...) Although the levy is formally linked to the publicly-owned waters concession, its elements of quantification reveal, rather, a tax on the turnover of hydroelectric power stations (...). Therefore, we are in the face of a new measure to reduce the tariff deficit that will impinge on hydroelectric power stations rather than taxation intended to preserve the publicly-owned waters”.

The Report highlighted the lack of environmental justification for the levy, since “the amount collected should fully go to the basin water services regulation authorities”, but leaned towards recommending its complete abolition, off-settable by increasing the tax on electricity (Proposal no. 90):

This proposal was influenced by the lack of justification and unfairness of the tax, since “considering that the production of electricity by hydropower plants must be the subject of a charge for use of publicly-owned waters, such should be the generic levy provided in art. 112 of the Waters Act. Under this provision, in the event of use of publicly-owned waters, the tax base of the levy shall be determined “by the value of that use or profit from the same”, but *–given that in both cases the tax base is the economic value of the exploitation – a tax rate over and above that set for the charge on occupancy of publicly-owned waters is unjustified”*.

The Government has decided, however, to keep the levy, its lack of fairness remaining insofar as it entails an unjustified increase for hydroelectric power stations of the tax applicable under the Waters Act to the use of publicly-owned waters, however much Decree 198/2015 intends to give it greater environmental justification. To this

end, the Royal Decree provides that, in addition to the 2% of the collection which was considered by the statute establishing it as receipts of the basin water services regulation authorities acting as collectors, the remaining 98% shall be paid into the Debt Management Office, although in the Spanish Government Budget “at least an amount equal to such amount” shall be allocated to actions “for the protection and improvement of publicly-owned waters”.

Nonetheless, however much the final allocation of proceeds through the levy is repeated in several regulatory provisions and measures to protect and safeguard publicly-owned waters that must be financed are specified (art. 14), none of the provisions has sufficient authority to bind the legislator drafting each year’s Spanish Government Budget Act. There is nothing preventing the budget act, a higher-ranking rule, from not including the reservation required by this regulation. It would not even be necessary to amend the Waters Act or Act 15/2012, which does not provide for this final allocation of 98% of the proceeds through the new levy.

The accrual of the levy shall occur with the initial granting and annual maintenance of the hydroelectric concession and shall be due in the amount and for the periods provided in the terms and conditions of the concession or authorisation (art. 112 *bis*(2) of the Waters Act). To this end, the first additional provision of the regulation provides for the review of administrative concessions currently enabling each of the hydroelectric uses that were in effect on 1 January 2013, the entry into force of Act 15/2012. Regardless of the review and until it occurs, who were concessionaires of hydroelectric uses on 1 January 2013 are required to pay the levy from 1 January 2013 in the terms laid down in art. 10 and the second transitional provision of RD 198/2015 (2nd additional provision, RD 198/2015).

The application of the levy thus acquires a questionable retroactive nature, because although Act 15/2012 provided that this tax would be applied to “the owners of facilities that produce electricity that on the entry into force of the same are the holders a hydroelectric concession “(first transitory

³ In order to analyse our tax system with a view to possible amendments, by Resolution of the Cabinet of 5 July 2013 a Committee of Experts for the reform of the Spanish tax system was created, charged with the preparation of a report and chaired by Manuel Lagares Calvo. The report is available online: <http://www.abc.es/gestordocumental/uploads/economia/fe007a24af859ec8ce790387ba6b7755.pdf>.

provision), this provision does not enable the Royal Decree to demand payment from such holders prior to its entry into force.

It is interesting to note that, in order to update the information relevant to the imposition of the new levy, before 1 January 2016, the Ministry of

Industry, Energy and Tourism will review the data on installed and nominal capacity of hydropower producers contained in the Administrative Register of Electricity Production Facilities.

After this general comment, we summarise the elements of the new levy in the factsheet below.

Levy for use of inland waters for the production of electricity ("hydraulic levy")	
Obligors (art. 2)	Concessionaries of water for the production of electricity.
Taxable event (art. 1)	Use of inland waters located in the territory of various delegated regions for the production of electricity.
Tax rate (art. 7)	22% per annum.
Tax base (arts. 3 and 6)	<p>Economic value of the electricity produced annually by each facility = TOTAL REMUNERATION obtained by the electricity produced and incorporated into the grid during a calendar year (market + other remuneration).</p> <p>Mixed pumping facilities: broken taxable value = electricity value produced by water stored + electricity value caused by water previously pumped.</p>
Exemptions (art. 112.bis.6 of the Waters Act)	<p>Hydroelectric resources exploited directly by public authorities for the management of publicly-owned waters</p> <ul style="list-style-type: none"> • Low power plants (≤ 50 MW): 90% <p>Facility power = sum of the powers of the groups installed in each hydroelectric plant (Register of Electricity Production Facilities) (art. 4)</p>
Deductions (art. 8)	<ul style="list-style-type: none"> • Pumping stations and power ≥ 50 MW: 90% • Mixed pumping facilities: 90% of the part of the tax base comprising the value of electricity from pumping • Hydroelectric facilities subject to public interest incentive: 90%

Levy for use of inland waters for the production of electricity ("hydraulic levy")	
Taxable period (art. 8.6 y 2nd trans. prov.)	Calendar year or proportional period at the start or end of the concession Retroactive nature: from 1 January 2013.
Assessment time limit (art. 10 and 2nd trans. prov.)	March following year. Transitional arrangements: <ul style="list-style-type: none"> • 2013: self assessment before 26 April 2015. • 2014: self assessment before 20 May 2015.
Form (DA 2ª)	Form 790 + RD 198/2015 schedule.
Management and collection (art. 12)	Basin water services regulation authorities. Information provided by the Ministry of Industry; Red Eléctrica de España; Market Operator; body responsible for assessments of the specific or additional remuneration regime and taxpayer before 15 March of the following year (arts. 4 and 5 and 2nd trans. prov.).
Earmark (arts. 12 to 14)	<ul style="list-style-type: none"> • 98% Debt Management Office → earmarked in the Spanish General Budget for protection of publicly-owned waters. • 2% basin water services regulation authorities.

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