

Income 39: Gross Conservation Easement Credit

An income tax credit is available for tax years beginning on or after January 1, 2000, for the donation of a perpetual conservation easement in gross on real property in Colorado. A gross conservation easement (GCE) gives the easement holder the right to prohibit certain acts with respect to the property in order to maintain it in a manner that will preserve its value for recreation, education, habitat, open space, or historical importance. [§38-30.5-102, C.R.S.] In order to qualify for the credit, the donation must meet the requirements of §§38-30.5-101, et seq., and 39-22-522 C.R.S., Internal Revenue Code §170(h), and their associated regulations.

CREDIT QUALIFICATIONS

A taxpayer must meet certain statutory requirements in order to claim a GCE credit. Additionally, GCE donors must apply to the Division of Real Estate to request a tax credit certificate in order to claim a credit. There are also limits on the number of credits a taxpayer can claim for a given year.

Eligible taxpayers

Taxpayers eligible to claim a GCE credit are:

- Colorado resident individuals,
- C corporations,
- trusts,
- estates,
- members of a pass-through entity who receive the credit from the entity's donation, regardless of whether such members are Colorado residents.

A limited liability company with only one member will generally be disregarded for federal tax purposes (IRS Regulation §301.7701-3) as well as for state tax purposes. Therefore, a sole member is not a "member of a pass-through entity" and does not qualify as a "taxpayer" for the credit unless they otherwise meet the definition of a "taxpayer". [§39-22-522(1), C.R.S.]

Nonresident individuals are not eligible to claim credits for GCE donations they make individually. However, a Colorado resident who claims a credit and subsequently moves to another state may use any remaining carryforward credit or transfer such remaining credit to another taxpayer. A part-year resident is eligible to claim a credit for a GCE donation only if the donation was made while they were a Colorado resident.

Certificate application and annual limit

Any taxpayer donating a GCE on or after January 1, 2011 must apply to the Division of Real Estate and receive a tax credit certificate in order to claim the credit on an income tax return. The aggregate total of credits that the Division of Real Estate can certify each year is limited (capped). If the cap has been reached for the donation year, the Division of Real Estate may "waitlist" the credit and issue a tax credit certificate for the credit to be claimed on a return for a subsequent tax year. [§39-22-522(2.5) C.R.S.]

Multiple donations

Only one credit may be claimed each year by each donor of an easement.

- A taxpayer cannot claim multiple credits for separate donations they make in the same tax year, even if the donations are made by different pass-through entities of which the taxpayer is a member or if one or more of the credits are transferred to other taxpayers.
- A taxpayer may not purchase additional credits for any year in which they claim a credit from a new donation.
- For tax years 2013 and prior, a taxpayer may not purchase credits or claim credit from a new donation they make if credit from a donation they made in a prior year is being carried forward either by themselves or by a transferee.

For a waitlisted credit claim, the above rules will be applied to both the year of the donation and the year of the tax credit certificate. The carry forward period will be applied based on the year of the tax credit certificate.

Example: A taxpayer donates a GCE in 2016, and the tax credit certificate allows the credit to be claimed on the 2017 tax return. The taxpayer must not have claimed any other new credits in 2016 or 2017, either on a tax return or on an application to the Division of Real Estate. If the taxpayer donates another GCE in 2017, a credit would not be allowed for that donation, even if the Division of Real Estate would have waitlisted the credit to 2018. If the credit is not fully used on the 2017 return, the remaining credit can be carried forward for up to 20 years, through 2037.

CREDIT COMPUTATION

The credit amount is based on the lesser of the fair market value (FMV) of the donation or the federal tax basis in the donation, and depends on the year in which the qualifying donation is made. [§§39-22-522(3.7) and (4)(a), C.R.S.] The following table outlines the calculation of the credit and the maximum allowable credit based upon the date of the donation.

Year of donation	Credit calculation	Maximum allowable credit
2015 or later	75% of the first \$100,000 of FMV or basis, plus 50% of FMV in excess of \$100,000	\$1,500,000
2007-2014	50% of FMV or basis	\$375,000
2003-2006	100% of the first \$100,000 of FMV or basis, plus 40% of FMV in excess of \$100,000	\$260,000
2000-2002	100% of first \$100,000 FMV or basis	\$100,000

When a donation is made collectively by multiple taxpayers, the credit calculation and the maximum allowable credit from the preceding table apply to the donation as a whole. Donations made collectively by multiple taxpayers include those made by:

- a married couple, regardless of whether they file jointly or separately,
- all members of a pass-through entity that makes a donation,
- all tenants in common, joint tenants, or other similar ownership groups that donate a GCE on jointly owned land.

The credit resulting from the donation and any associated income are allocated to the owners, partners, shareholders, or members in proportion to their distributive shares of income or ownership from the entity or group. [§39-22-522(4)(b), C.R.S.]

CREDIT USE, REFUND, AND TRANSFER

In general, the amount of credit a taxpayer can use is limited to their net tax liability. If a taxpayer's credit exceeds their tax liability, the excess credit may be carried forward for up to 20 years after the first year it was eligible to be claimed. The credit may not be carried back to a prior tax year.

A pass-through entity that makes a donation must, for the first year the credit is allowed, either distribute the credit to its members or transfer the credit to other taxpayers on its members' behalf (see "Transfer of credit" below for additional rules). The entity cannot carry forward the credit to future tax years.

Refundable credit

Generally, if a taxpayer's credit exceeds their tax liability, the taxpayer cannot claim a refund for the excess credit. However, if the State Controller certifies by the end of the tax year that state revenues are in excess of certain thresholds, then taxpayers who donated a GCE may elect to receive a limited refund of the credit. The credit was refundable for tax years commencing in 2000, 2001, 2005, and 2015.

For tax years beginning on or after January 1, 2000, but before January 1, 2003, if any part of a credit is to be refunded, the total amount of credit that can be used from that donation for that tax year is \$20,000. This limit increases to \$50,000 for donations made in tax years beginning on or after January 1, 2003. Because the tax attributes of a credit are generally determined by the laws as they exist in the year the credit is created, the increase in the limitation to \$50,000 does not apply to donations made prior to January 1, 2003, even if the credit from such donation is carried forward to tax years beginning on or after January 1, 2003.

If the credit from one donation is used by more than one taxpayer and any part of the credit is refunded, then the aggregate credit used by all taxpayers for that tax year is limited to \$50,000 (\$20,000 for donations made prior to 2003). This limitation applies to:

- A married couple, regardless of whether they file jointly or separately,
- All members of a pass-through entity that makes a donation,
- All tenants in common, joint tenants, or other similar ownership groups that donate a GCE on jointly owned land, and
- The taxpayers who donate the GCE and all transferees of that credit.

Taxpayers in such a group need to coordinate their use of the credit so that it either does not exceed this limitation, or is restricted to each taxpayer's net tax liability.

Transfer of credit

A GCE donor can transfer all or part of their unused credit to a "transferee" who meets the definition of a taxpayer who can claim the credit. [§§39-22-522(2), (2.7), and (7), C.R.S.] For tax years beginning on or after January 1, 2003, credits can be transferred in any increment and there is no limit to the number of transferred credits a transferee can use each year. Beginning June 7, 2005, a transferee must purchase the credit by the due date of the income tax return, not including extensions, on which the credit will be used. [§39-22-522(7)(g), C.R.S.] A transferee cannot transfer a credit to another taxpayer.

Transfer of credit: pass-through entities

A pass-through entity cannot purchase a credit for use by itself or its members. A pass-through entity that makes a donation may directly transfer the credit to other taxpayers on its members' behalf, but only if all of the following conditions are met.

- Each partner, shareholder or member consents to the transfer.
- Each partner, shareholder or member could, under the restrictions of the law, have claimed and transferred their pro rata share of the credit directly. [§39-22-522(4)(b), C.R.S.]
- The partners, shareholders or members have not yet filed Colorado tax returns and used, sold, or carried forward the credit. Once these actions have occurred, any remaining credit must be sold by each individual taxpayer rather than at the entity level.

Transfer of credit: disallowance of a transferred credit

If a credit that has been transferred is disallowed, the transferee will be held liable for the tax otherwise offset by the disallowed credit, plus any applicable penalty and interest. [§39-22-522(9), C.R.S.] All protest rights regarding a transfer item adjustment reside with the donor of the easement or the transferor of the credit, who is considered the tax matters representative in all matters with respect to the credit. For additional information regarding the tax matters representative, see Department Rule 39-22-522(3)(g) and §39-22-522(7)(i), C.R.S.

Transfer of credit: income from the sale

The Federal Tax Court determined that the GCE credit is a capital asset with no basis and that the holding period begins at the time the credit is granted. Therefore, the gain from the sale of the credit must be included in federal taxable income, which is then subject to Colorado income tax. A Colorado capital gain subtraction can be claimed if the credit was held for at least five years prior to its sale (see FYI Income 15 for more information). If the credit is transferred by a nonresident (who donated a GCE as a member of a pass-through entity), the income that nonresident receives from the transfer of the credit is Colorado source income and must be reported as such on the taxpayer's Colorado return. [§39-22-109(2)(a)(V), C.R.S.]

Deceased taxpayer

Upon the death of a taxpayer the credit passes to the decedent's estate. If the decedent is the donor of the easement, the estate may use the credit to offset income tax owed by the estate or may transfer some or all of the credit according to the transfer rules. If the decedent is a transferee, the estate may use the credit to offset income tax owed by the estate, but may not transfer the credit. [§39-22-522(7)(h), C.R.S.]

FEDERAL DEDUCTION ADDBACK

Any taxpayer who claims a GCE credit and a federal charitable contribution deduction for the same donation must make an addition to taxable income (an "addback") on their Colorado income tax return in the amount of the deduction used each year. [§§39-22-104(3)(g) and 39-22-304(2)(f), C.R.S.] However, a pass-through entity should not include the deduction or the addback in its Colorado income or tax calculations.

The addback must begin the first year the deduction is claimed, even if the credit is waitlisted by the Division of Real Estate, transferred to another taxpayer, or carried forward to a subsequent tax year. Any carryover deduction used in a subsequent year must be added back on that year's Colorado income tax return. The aggregate addback for all donors of a GCE is limited to the donation amount needed to generate the credit, as allocated to each donor. For donations made on or after January 1, 2015, the maximum aggregate addback is \$2,950,000.

High income taxpayers

If a taxpayer's itemized deductions are reduced because their federal adjusted gross income (AGI) is above the annual limit, then the required addback on their Colorado return is reduced by the same proportion.

DOCUMENTATION

A GCE donor who does not file a return with the following documents as required will have any claims of their share of the credit disallowed.

Form DR 1305

Any taxpayer engaging in any activity related to a GCE credit during the tax year must file a Colorado income tax return with all applicable parts of the Gross Conservation Easement Credit Schedule (Form DR 1305). Activities related to a GCE credit include:

- Receiving a tax credit certificate for the donation of a GCE, either directly or as a member of a pass through entity that made a donation, and claiming the new credit
- Using credit to offset tax liability,
- Carrying credit forward to the following year,
- Transferring credit to another taxpayer for that tax year. For example, credit transferred April 10, 2009 can be used on a 2008 return, so the donor must report this transfer on their form DR 1305 for 2008, not 2009.

A GCE donor whose credit is waitlisted to a subsequent year by the Division of Real Estate does not need to file Form DR 1305 until the tax year for which the tax credit certificate is issued.

Forms DR 1304 and 1303

For tax years 2013 and prior, a GCE donor must attach a Gross Conservation Easement Public Information Schedule (Form DR 1304), a Gross Conservation Easement Donor Schedule (Form DR 1303) and all listed supporting documents for the first year the credit is eligible to be claimed. Transferees and members of pass-through entity donors should not file these forms or their supporting documents. Starting with tax year 2014, these forms and attachments are no longer required.

To view public information regarding GCE credit claims filed with the Department of Revenue prior to 2014, see the Additional Services list at www.Colorado.gov/RevenueOnline.

FURTHER READING

- State law and regulation
 - § 39-22-522, C.R.S. and Dept. Rule 39-22-522
 - § 39-22-522.5, C.R.S. (dispute resolution for credits disallowed prior to May 2011)
 - § 39-22-104(3)(g) and Dept. Rule 39-22-104(3)(g) (addback for individuals, estates, and trusts)
 - § 39-22-304(2)(f) and Dept. Rule 39-22-304(2)(f) (addback for corporations)
- Federal law and regulation
 - 26 U.S.C. § 170 (regarding charitable contribution deduction)
 - 26 CFR § 1.170A
- Court cases
 - Huber v. Kenna, 205 P.3d 1158, 1161 (Colo. 2009).
 - Tempel v. Commissioner, 136 T.C. 341, 351 n.19 (2011)
 - Kowalchik v. Brohl, 2012 COA 49, 277 P.3d 885
 - Carpenter v. Commissioner, T.C.Memo 2013-172
 - Esgar Corp. v. Commissioner, 744 F.3d 649 (10th Cir. 2014)
 - Markus v. Brohl, 2014 COA 146, ___ P.3d ___
- Other guidance
 - www.Colorado.gov/RevenueOnline (reports of 2000-2013 GCE donations)
 - www.colorado.gov/pacific/dora/conservation-easement-program (Division of Real Estate)
 - www.irs.gov/pub/irs-wd/0126005.pdf (regarding state income tax deductions allowed to transferees)
 - [IRS Publication 526](#) (regarding charitable contributions)
 - [IRS Form 8283](#)