

DEPARTMENT OF REVENUE

Taxpayer Service Division - Tax Group

INCOME TAX

1 CCR 201-2

Regulation 39-22-526. Credit for Environmental Remediation of Contaminated Land

Basis and Purpose. The bases of this rule are §§ 39-21-112(1) and 39-22-526, C.R.S. The purpose of this rule is to clarify requirements relating to the credit for environmental remediation of contaminated land.

- (1) **General Rule.** Effective January 1, 2014, taxpayers or qualified entities that have obtained a Tax Credit Certification Letter from the Colorado Department of Public Health and Environment certifying completion of approved environmental remediation may apply the amount set forth in the Tax Credit Certification Letter as a credit or transferrable expense amount against income taxes. ~~Except for credits carried forward from prior years, no credit is allowed for any tax year commencing on or after January 1, 2023. A credit properly claimed for a tax year commencing prior to January 1, 2023 can be carried forward to a subsequent tax year pursuant to this rule. This credit expires on January 1, 2023. A credit generated in tax year 2022 must be claimed for that tax year, and is not eligible to be claimed, transferred, or carried forward in subsequent tax years.~~
- (2) **Claiming the Credit.**
 - (a) The originating taxpayer that generated the credit must claim the credit no later than the tax year following the year the Tax Credit Certification Letter was issued by filing the applicable Department-issued form with their income tax return.
 - (b) If the credit amount exceeds the taxpayer's income tax due for that year, the credit may be carried forward for five years and must be applied against the income tax due for the earliest of the income tax years possible. Following the five-year carry-forward period, any remaining credit is extinguished and may no longer be used.
- (3) **Transfer of a Credit.**
 - (a) The originating taxpayer of the credit must transfer the credit no later than the tax year following the year the Tax Credit Certification Letter was issued, and may only transfer the portion of a credit that has not been applied against the transferor's income tax.
 - (b) Only the originating taxpayer that generated the credit may transfer all or part of a credit, and the credit may be transferred only once. A transferee cannot thereafter transfer the credit, under any circumstance, to any other taxpayer or entity. Credits may only be transferred to individuals, trusts, estates, or C corporations. A pass-through entity may not purchase or otherwise be a transferee of a credit.
 - (i) Upon the death of a taxpayer, a credit passes to the decedent's estate. If the decedent is either the originating taxpayer or received the credit as a member of a pass-through entity, the estate may use the credit to offset income tax owed by the estate or may transfer some or all of the credit as allowed by statute. If the

original credit holder's estate transfers the credit, the credit remains on the same carry-forward schedule (with the 5-year carry forward limitation discussed in Section 3(d) of this Rule) as the original credit holder. If the decedent is a transferee of the credit, the estate may use the credit to offset income tax owed by the estate but cannot transfer the credit.

- (c) To transfer a credit amount from the originating taxpayer to a transferee, both parties must file the appropriate Department-issued forms with their income tax returns in the year of the transfer. The forms must specify the amount of the credit that is being transferred. A transferee will only be granted the transferred credit if the transferee's stated credit amount matches the amount established on the forms filed by the originating taxpayer.
 - (d) If a transferred credit amount exceeds a transferee's income tax due in the year of the transfer, the transferred credit may be carried forward for five years following the year in which the credit was originally claimed and must be applied against the income tax due for the earliest of the income tax years possible. Following the five-year carry-forward period, any remaining credit is extinguished and may no longer be used.
 - (e) If the originating taxpayer transfers a credit to a transferee and that credit is later disallowed (either in full or in part), the transferee will be held liable for the disallowed credit that was utilized plus any applicable penalty and interest.
- (4) **Transfer of a Transferable Expense Amount.**
- (a) A transferable expense amount must be transferred by the originating qualified entity. A qualified entity may transfer a transferable expense amount at any time prior to the due date, not including any extensions, for filing the transferee's income tax return no later than the tax year following the year the Tax Credit Certification Letter was issued. A transferable expense amount may only be transferred to individuals, trusts, estates, or C corporations. A pass-through entity may not purchase or otherwise be a transferee of a transferable expense amount.
 - (b) A qualified entity is required to file the appropriate Department-issued forms with its income tax return or equivalent reporting information in the year the transferable expense amount is transferred. A transferee must also file a Department-issued form with their income tax return in the year the transfer occurs. The forms must specify the amount of the transferable expense amount that is being transferred. A transferee will only be granted a transferable expense amount if the transferee's stated credit amount matches the amount established on the forms filed by the qualified entity.
 - (c) Only the qualified entity that generated the transferable expense amount may transfer all or part of a transferable expense amount. A transferee cannot thereafter transfer the credit to any other taxpayer or entity. The only exception to the rule that a transferee of a transferable expense amount cannot transfer the credit is that a tax credit held by a transferee's estate for taxes owed by the estate may be transferred by the decedent's estate as stated in section 39-22-526(2)(c)(VI), C.R.S.
 - (d) If a transferred transferable expense amount exceeds a transferee's income tax due in the year of the transfer, the transferred transferable expense amount may be carried forward for five years following the year in which the transferable expense amount was originally claimed and must be applied against the income tax due for the earliest of the income tax years possible. Following the five-year carry-forward period, any remaining credit is extinguished and may no longer be used.

- (e) If a qualified entity transfers a transferable expense amount to another taxpayer and that transferable expense amount is later disallowed (either in full or in part), the transferee will be held liable for the disallowed credit that was utilized plus any applicable penalty and interest.
- (5) **Tax Matters Representative.** The tax matters representative (TMR) is the person who transfers the credit or transferable expense amount. A pass-through entity that transfers the credit to, or sells the credit on behalf of, its partners, shareholders or members, is the TMR, unless the entity's status as the TMR is revoked or otherwise changed in accordance with paragraphs (c), (d), and (e) below.
- (a) *Representation.* The value and validity of an environmental remediation credit held by a transferee is derived from, and dependent on, the credit generated and/or transferred by the TMR. Therefore, an adjustment of a credit made by the Department against the TMR shall also be binding on the credit held by a transferee. Final resolution of disputes between the Department and the TMR is binding on transferees of the credit.
- (b) The TMR represents a transferee in matters including, but not limited to:
- (i) Amounts expended for the approved remediation;
 - (ii) The certificate issued by the Colorado Department of Public Health and Environment;
 - (iii) Notifications and correspondence from and with the Department of Revenue;
 - (iv) Audit examinations;
 - (v) Assessments;
 - (vi) Settlement agreements; and
 - (vii) The statute of limitations.
- (c) *Effective Date.* The rights and responsibilities of the TMR and transferee, including the right to a hearing, appeal, notification, and limitations of action set for in §§ 39-22-526(1)(d)(~~VII~~)(VIII) and (IX), 39-22-526(2)(c)(VII) and (VIII), C.R.S. begin with the transfer of the credit or transferable expense amount.
- (d) *Changing the TMR Designation.* Any person who has claimed a credit or who may be eligible to claim a credit in relation to a TMR's environmental remediation, but not a transferable expense amount, may petition the Department to change the TMR's designation if the TMR:
- (i) Is incarcerated;
 - (ii) Is residing outside the United States, its possessions, or territories;
 - (iii) Is deceased or, if the representative is an entity, is liquidated or dissolved;
 - (iv) Is under eighteen years of age, or the court determines the person to be legally incompetent;

- (v) Does not request a hearing pursuant to sections 39-21-103 or 39-21-104, C.R.S., provided that the petition to change the TMR's designation is filed within 10 business days after the final date for requesting a hearing;
 - (vi) Does not appear at hearing or fails to adequately participate in the hearing process, including by failing to file a required pleading or failing to appear at a scheduled conference; or
 - (vii) Does not file an appeal of a final determination pursuant to section 39-21-105, C.R.S., provided that the petition to change the TMR's designation is filed within 10 business days after the final date for filing an appeal.
- (e) *Petition to Change TMR's Designation.*
- (i) The petition to change the TMR's designation must be in writing and filed with the Department.
 - (ii) The petition must contain at least the following information:
 - (A) The petitioner's name, address, and tax account number;
 - (B) A statement that the petitioner is a person who has claimed a credit or who may be eligible to claim a credit in relation to the TMR's environmental remediation, including the taxable period(s) and amount of tax in dispute;
 - (C) A summary statement of the grounds upon which the petitioner relies for changing the TMR's designation; and
 - (D) A proposed replacement TMR, including the replacement TMR's qualifications to serve as TMR in accordance with the criteria for representation listed in paragraph (f) below.
 - (iii) The Department may provide the TMR and transferees with notice of the petition and an opportunity to respond.
 - (iv) The Department will issue an order regarding the petition as soon as practicably possible.
- (f) *Criteria for Representation.* The Department will determine whether a TMR is unavailable or unwilling to act as a TMR based on the criteria in Section (5)(d) of this rule and whether a petition to change the TMR's designation should be granted. The Department will then determine the appropriate person to serve as the TMR. Criteria that the Department may consider when determining who will serve as the TMR includes:
- (i) The general knowledge of the transferor and any proposed replacement TMR regarding the credit at issue.
 - (ii) The transferor's and any proposed replacement TMR's access to the records of the environmental remediation credit.
 - (iii) The views of the transferees involved in the transaction.
- (g) *Statute of Limitations.* The statute of limitations of the transferor and any extension to the statute of limitations agreed to by the TMR will also apply to the transferees of the credit.

- (6) **Disallowance of a Credit or a Transferable Expense Amount.**
- (a) *Notice to TMR and Transferees.* When the Department disallows a credit or transferable expense amount in full or in part, the Department shall issue a notice to the TMR setting forth the proposed adjustment, regardless of whether the state tax liability of the TMR is affected by the proposed adjustment. The Department shall also send to the transferee a notice of the proposed adjustment of the transferee's credit.
 - (b) *Multiple Transferees.* If there is more than one transferee of a credit or transferable expense amount, the Department will generally allocate proportionally any proposed adjustment based on the percentage of the overall credit or transferable expense amount originally transferred to each transferee. However, the Department may allocate the adjustment among and between the transferees in any manner appropriate to the circumstances.
 - (c) *Request for Hearing.* A request for a hearing pursuant to sections 39-21-103 or 39-21-104, C.R.S., can only be made by the TMR. A transferee does not have a right to protest the disallowance of a credit or transferable expense amount claimed under section 39-22-526, C.R.S. If the TMR does not timely request a hearing pursuant to sections 39-21-103 or 39-21-104, C.R.S., a transferee may petition the Department to change the TMR's designation within 10 days after the final date for requesting a hearing. The rules for filing such a petition are set forth in Paragraphs 5(d), 5(e), and 5(f) of this rule. If the Department grants the petition, the new TMR may request a hearing pursuant to sections 39-21-103 or 39-21-104, C.R.S., within 30 days of the Department's order regarding the petition.
 - (d) *Notification and Request to be Admitted as Party.* The Department will issue a notice of a hearing under sections 39-21-103 or 39-21-104, C.R.S., to the TMR and transferee(s) of the credit or transferable expense amount. Such notice shall advise the transferee(s) of the right to be admitted as a party to the hearing upon the filing of a written request setting forth a brief and plain statement of the facts that entitle the person to be admitted and the matters to be decided. The Department may admit parties for limited purposes.
- (7) **Final Determination and Appeal.** The Department will issue, pursuant to section 39-21-103, C.R.S., a notice of final determination to the TMR and transferee(s) of the credit or transferable expense amount. The TMR, not the transferee(s), may appeal the determination in accordance with section 39-21-105, C.R.S. If the TMR does not file an appeal pursuant to section 39-21-105, C.R.S., a transferee may petition the Department to change the TMR's designation within 10 business days after the final date for filing an appeal. The rules for filing such a petition are set forth in Paragraphs 5(d), 5(e), and 5(f) of this rule. If the Department grants the petition, the new TMR may file an appeal pursuant to section 39-21-105, C.R.S., within 30 days of the Department's order regarding the petition.
- (8) **Confidentiality.** Except as otherwise provided in section 39-21-113, C.R.S., every tax return and all information contained therein is confidential. Section 39-21-113(17.7)(b), C.R.S., provides an exception to the Department's confidentiality rule for tax information relating to a claim for a credit for the approved environmental remediation of contaminated property pursuant to section 39-22-526, C.R.S. As used in section 39-21-113(17.7)(b), C.R.S., "credit" includes both a credit claimed pursuant to section 39-22-526(1), C.R.S., as well as a credit based on a transferable expense amount claimed pursuant to section 39-22-526(2), C.R.S. As used in section 39-21-113(17.7)(b), C.R.S., "cases," is not limited to cases in administrative hearing, in district court, or in further appellate courts, but also includes information pertinent to any disallowed credit or transferable expense amount for the approved environmental remediation of contaminated property pursuant to section 39-22-526, C.R.S.

Cross References:

1. An originating taxpayer that intends to transfer a credit must file forms DR 0349 and DR 0348 with the Department of Revenue concurrently with the filing of their income tax returns.
2. A qualified entity that intends to transfer a transferable expense amount must file forms DR 0349, DR 0348 and DR 0112. A qualified entity may be required to file additional information to effectuate the transfer of the credit. For more information on the filing requirements of qualified entities, see Department Publication FYI [Sales Income 42](#), "Environmental Remediation of Contaminated Land Credit."