

BILL ANALYSIS AND FISCAL IMPACT REPORT
Taxation and Revenue Department

January 19, 2024

Bill: SB-22

Sponsor: Senator Ron Griggs

Short Title: Mall Renovation Tax Credit

Description: This bill creates new personal and corporate income tax credits called the “Mall Renovation Tax Credit”. These credits would be effective for taxable years January 1, 2024, until December 31, 2033, a 9-year span. These credit will have a cap of \$50 million for both PIT and CIT. The project must be completed on a mall, which is defined as real property located in New Mexico that provides space for at least 20 individual business that are retail or food or beverage establishments.

This credit will be in an amount equal to the qualifying costs incurred by a taxpayer for a mall renovation project multiplied by a rate equal to the gross receipts tax rate (state and local) of the location of the project. Qualifying costs as defined in the bill are costs that have been incurred by the taxpayer specifically for planning, designing, construction and construction-related equipment for the restoration, renovation and rehabilitation of a mall. The taxpayer must have costs equal to or greater than \$250,000, which cannot include any amount for which the taxpayer receives a federal new markets tax credit.

The taxpayer will be required to pre-certify the project with the Economic Development Department (EDD). Within 1 year of completion of the project, the taxpayer will be required to apply with EDD for this credit and if approved EDD will issue a certification of eligibility. If approved by EDD, the taxpayer would claim the credit with the Taxation and Revenue Department (Tax & Rev). If the taxpayer is unable to use the full amount of credit during the first year, the credit may be carried forward for 5 consecutive tax years.

Effective Date: Not specified; 90 days following adjournment (May 15, 2024). Applicability – The provisions of this act apply to taxable years beginning on or after January 1, 2024.

Taxation and Revenue Department Analyst: Pedro Clavijo

Estimated Revenue Impact*					R or NR**	Fund(s) Affected
FY2024	FY2025	FY2026	FY2027	FY2028		
--	(Unknown but up to \$100,000)	(Unknown but up to \$100,000)	(Unknown but up to \$100,000)	(Unknown but up to \$100,000)	R	General Fund

* In thousands of dollars. Parentheses () indicate a revenue loss. ** Recurring (R) or Non-Recurring (NR).

Methodology for Estimated Revenue Impact: Some unknown aspects do not allow Tax & Rev to estimate a precise fiscal impact. First, it is unknown how many malls will initiate renovation projects and the size of those projects. Second, Tax & Rev cannot anticipate how much taxpayers will invest in renovation projects and, therefore, how much credit they may potentially claim against either their income tax or corporate tax liability since it depends on whether the process to claim a credit and the amount of the final credit will incentivize projects. Finally, the credit depends on the gross receipts tax (GRT) rate of the project's location. Based on these limitations of information and ability to make assumptions, Tax & Rev determined the fiscal impact will be negative but unknown. Per the bill, the maximum amount of the credits would not exceed \$50 million each for credits claimed under Personal Income Tax (PIT) and Corporate Income Tax (CIT).

Policy Issues: The bill aims to stimulate mall renovation, an essential part of the retail trade sector by offsetting the GRT paid on these renovation projects through PIT and CIT credits.¹ The economic impacts of these renovation projects will also be seen in the local construction industry. Thus, different sectors will help boost general economic activity and employment. Retail trade is one of New Mexico’s larger sectors, making a substantive contribution to tax revenue. However, the full extent of the costs and benefits of this credit is unknown.

According to EDD data,² the retail trade sector strongly impacts economic activity dynamics and contributes roughly one-fifth to Matched Taxable Gross Receipts (the GRT base). The National Retail Federation reports that this sector is the second contributor of all private industry gross domestic product (GDP) in New Mexico and supports approximately one-fourth of the total nonfarm payroll workforce.³ The positive economic impact of these credits will be felt only if the proposed tax incentive is sufficient to trigger generalized renovation projects and if it is accompanied by other strategies.

For instance, since the credit is non-refundable, it is possible that the taxpayer may not receive the benefit of the entire credit—they have little incentive to undertake a renovation project if they have little or no New Mexico tax liability to offset. During a large renovation project, a mall may have negative taxable income and net operating losses that reduce or eliminate their tax liability, causing the incentive to go unused. However, the credit may be carried forward for up to 5 years, and so be available if the mall has positive taxable income in future years.

For ease of taxpayer use as well as ease of Tax & Rev administration, Tax & Rev recommends this proposal instead be a GRT deduction rather than PIT and CIT credits. Deductions are simply claimed on GRT returns by taxpayers, and Tax & Rev simply processes them. This is much more straightforward than the proposal in this bill. Here, taxpayers would be required to pay GRT regularly, and then submit a credit application to EDD; EDD would review and certify the credit; and finally, the taxpayer would claim the credit on an annual PIT or CIT return from Tax & Rev. Tax & Rev would have to track carryforward of unused credits for 5 years.

Additionally, the retail trade sector is moving chiefly toward non-store retailers due mainly to the retail digital transformation. This might affect some sources of revenue for local governments, such as property tax, pending the second-best use of this land. For its part, destination-based sourcing and internet gross receipts tax shall enable the continued flow of GRT revenue to local governments regardless of this major change in the retail trade sector.

The credit has a defined aggregate claim limit and an end date of tax year 2033. Tax & Rev supports fiscal limits and sunset dates for policymakers to review the impact of tax expenditures before extending them. This is critical to this bill as at the current moment the fiscal impact is unknown.

While tax incentives may support particular industries or encourage specific social and economic behaviors, the proliferation of such incentives complicates the tax code. Adding more tax incentives: (1) creates special treatment and exceptions to the code, growing tax expenditures or narrowing the tax base, with a negative impact on the General Fund; and (2) increases the burden of compliance on both taxpayers and Tax & Rev. Adding complexity and exceptions to the tax code does not comport generally with the best tax policy.

¹ The retail trade sector comprises two main types of retailers: store and non-store retailers. This bill is supposed to target the former.

² <https://edd.newmexico.gov/wp-content/uploads/2023/10/September-2023-Economic-Summary-New-Mexico.pdf>

³ nrf.com/retailsimpact

Technical Issues: On page 2 and page 5, under Subsection B., the credit depends on the GRT rate, which may change semi-annually on January 1 and July 1. The bill should specify which rate be used when calculating the credit. Tax & Rev suggest the following language: “the rate that is effect when the expenses were incurred.”

For clarity purposes, Tax & Rev recommends a change in the language in Page 2, line 12-14. Such language might read: “plan, including phases of construction, if any. If the economic development department determines that the mall renovation project is likely to meet the requirements for mall renovation income tax credit.”. The same recommendation is made in Page 6, lines 8-10: “plan, including phases of construction, if any. If the economic development department determines that the mall renovation project is likely to meet the requirements for mall renovation corporate income tax credit.”.

There is a time limit for when a taxpayer must apply for the certification of the credit from the EDD, but there is no limit on when the taxpayer must claim the credit on a tax return. Adding a deadline to claim the credit will help keep the \$50 million certification cap for both PIT and CIT claimed consistent over each tax year. Tax & Rev suggests adding language at page 3, line 10, stating that the tax credit must be claimed starting in the year that the credit is certified as eligible by EDD. Tax & Rev suggests the following language: “A taxpayer who receives a certificate of eligibility shall claim the credit commencing in the first eligible tax year stated in the certificate of eligibility.”

On page 2, lines 19-20, the taxpayer is required to apply within one calendar year of “completion” of the project. It is not clear when a project is completed, or who makes that determination. Tax & Rev recommends the following language: “Within one calendar year of the date that the project manager of a mall renovation project or owner of the mall certifies that the mall renovation project is complete...”

On page 3, line 2, and page 6, line 23, applications for certification of the credit will not be approved if EDD has already approved \$50 million in certifications in that calendar year. But this only affects the approval process; it fails to limit what may be paid out in any given fiscal year because the credit can be carried forward to future tax years. More certainty, control, and accountability could be achieved through an amendment reflecting language found in Section 7-2-18.32(D) NMSA 1978.

Tax & Rev recommends the following additions on page 3, line 9 and page 7, line 5, after “approved.”: “The certification must include the taxpayer identification number, first eligible tax year, and shall be numbered for identification and declare its date of issuance and the amount of the tax credit allowed. The economic development department shall provide the taxation and revenue department appropriate information for all eligible taxpayers to whom certificates are issued. The method of interagency certification sharing shall be in secure and performed on regular intervals agreed upon by both the taxation and revenue department and the economic development department.”

These credits are separate under Income Tax and Corporate Income Tax acts. However, it is unclear whether EDD must be able to determine which tax credit the taxpayer is eligible for or intends to take. Tax & Rev suggests an aggregate certification cap across both the Income Tax and Corporate Income Tax acts to remove any responsibility for EDD to predetermine which type of credit will be claimed. Tax & Rev suggests in Section 1, subsection D. and Section 2, subsection D., after the “aggregate amount of credits” add, “combined for Mall Renovation income tax credits and corporate income tax credits.”

The bill does not state that a taxpayer that claims a mall renovation income tax credit pursuant to the Income Tax Act shall not also claim a mall renovation corporate income tax credit pursuant to the Corporate Income Tax Act for the same renovation project. Tax & Rev suggests in Section 1, subsection D. and Section 2, subsection D., that the language specify one credit certification per project. Such language might read: “A taxpayer that has submitted an application for a mall renovation corporate

income tax credit with respect to a mall renovation project may not submit an application for a mall income tax credit with respect to the same mall renovation project” for Section 1, Subsection D, and “A taxpayer that has submitted an application for a mall renovation income tax credit with respect to a mall renovation project may not submit an application for a mall renovation corporate income tax credit with respect to the same mall renovation project” for Section 2, subsection D.

In Section 1, page 4, line 24 and Section 2, page 8, Line 7, the definition of “qualifying costs” states that the taxpayer has not received a federal credit for the federal new markets tax credit. The bill does not detail what information will be provided to EDD to verify this condition in determining final qualifying costs and therefore the amount of the credit.

Page 3, line 9 does not establish whether the taxpayer can appeal or protest a denied application.

On page 4, lines 16-19, the definition of “mall” is problematic. In the first instance, it is not the mall itself that provides space to the businesses, but rather the owner of the real property constituting the mall that does so. Second, the words “provides space” are ambiguous and not capable of being evenly applied. This term might include real property that is provided free of charge, or where a business is simply allowed to occupy space. Finally, the language “individual businesses that provide retail or food and beverage establishments” is confusing. It is not clear when a business is an “individual” business, or how a business provides an “establishment”, or how an “establishment” differs from a “business”. Tax & Rev suggests the following alternative language: “‘Mall’ means real property located in New Mexico whose owners have leased or licensed retail space within or on that real property to at least 20 retail or food or beverage businesses.”

On page 4, lines 21-22, the term “seventy-five percent of a mall” is unclear. Tax & Rev suggests stating instead “seventy-five percent of the overall square footage of a mall, including both indoor and outdoor real property within the exterior boundaries of the mall.”

Page 5, line 2, page 8, and line 10 include “construction-related equipment” as a “qualifying cost.” However, the bill does not establish if construction-related equipment must be purchased to qualify for the credit or if they can be rented, which is typically the case.

The bill does not state that EDD may create regulations if needed. Tax & Rev suggests allowing EDD to develop rules. An example of this language is in Subsection F of Section 7-2-18.19 NMSA 1978, “The energy, minerals, and natural resources department may issue rules governing the procedure for administering the provisions of this subsection.”

Other Issues: While the bill requires pre-certification of the costs, it is unclear what purpose pre-certification is meant to serve. Pre-certification does not carry any benefits, nor does failure to get pre-certification carry any penalties. While the bill states that a “taxpayer shall apply for pre-certification”, e.g. on p. 2, line 6, it is not clear what the consequences of failure to apply for such pre-certification are. Furthermore, if EDD does not approve a pre-certification application, it is not clear what the consequences of such refusal will be. Tax & Rev suggests striking the entirety of Section C of the bill, as it appears to serve no purpose other than adding administrative costs and complexity to the bill.

Section D of the bill requires that the taxpayer obtain an affidavit from a certified public accountant (CPA) “verifying that the qualifying costs were incurred by the taxpayer and meet the requirements of this section.” Tax & Rev believes that CPAs will be reluctant to provide this certification, as it goes beyond an accounting function and requires legal analysis. Furthermore, EDD will review the application before certifying and will be making this determination for itself before approving the credit. Tax & Rev recommends striking the language on page 2, lines 23-25 adding this requirement.

Tax & Rev is now required by Section 7-1-84 NMSA 1978 to compile and present a tax expenditure budget, which includes the number of taxpayers that claim and the amount of claims for a tax expenditure. Credits are seen as a tax expenditure and will be included in this report. For that reason, Tax & Rev recommends that on page 4, lines 6 through 14 and page 7, lines 14 through 22 are stricken in full.

The credits' calendar year cap will be determined by EDD at the time of certification. In a calendar year, the claims made on returns may not match that cap amount. Thus, the amount certified and the amount in credits claimed in a tax year as reported in the tax expenditure report will differ as the two are separate processes. Overall, the aggregate amount claimed should not exceed the aggregated cap amounts.

A memorandum of understanding will be required to ensure certification data from EDD is shared with Tax & Rev if not required statutorily.

Administrative & Compliance Impact: Tax & Rev will need to update forms, instructions, and publications and make information system changes. Tax & Rev's Revenue Processing Division (RPD) anticipates a low impact after implementation. Additionally, Tax & Rev's Administrative Services Division (ASD) will be required to test the system changes. It is anticipated this work will take approximately forty hours, split between 2 existing full-time employees. Tax & Rev's Information Technology Division (ITD) estimates that implementing the bill will require approximately 100 hours or less than 1 month and an estimated staff workload cost of \$5,550.

Estimated Additional Operating Budget Impact*				R or NR**	Fund(s) or Agency Affected
FY2024	FY2025	FY2026	3 Year Total Cost		
--	\$4	--	\$4	NR	Tax & Rev – RPD - Implementation
--	\$2.9	--	\$2.9	NR	Tax & Rev – ASD - Operating
--	\$5.6	--	\$5.6	NR	Tax & Rev – ITD – Staff workload

* In thousands of dollars. Parentheses () indicate a cost saving. ** Recurring (R) or Non-Recurring (NR).