

1. What is the Sugar-Sweetened Beverage Product Tax?

The Sugar-Sweetened Beverage Product Distribution Tax (“tax” or “SSB tax”) is a City excise tax adopted by the voters in November 2016 on the distribution of “sugar-sweetened beverage products” in the City of Boulder. Products whose distribution is subject to the tax include products like soda, energy drinks, and heavily presweetened tea, as well as the syrups and powders used to produce them, such as the boxed syrup used to make fountain drinks. Certain drinks such as infant formula, milk products, alcoholic beverages, and 100% natural fruit and/or 100% vegetable juice are exempt.

2. Who is responsible for paying the tax?

Each distributor of sugar-sweetened beverage products shall pay the tax imposed on each non-exempt distribution of a sugar-sweetened beverage product, except that if there is a chain of distribution within the City of Boulder involving more than one distributor, the tax shall be levied on the first distributor subject to the jurisdiction of the city, unless the tax is not paid by the first distributor for any reason, it shall be levied on subsequent distributors, provided that the distribution of sugar-sweetened beverage products may not be taxed more than once in the chain of commerce within the city (please see question 30). The City’s interpretation of the definition of “distribution” includes retailers obtaining and bringing the beverages into the City themselves (“self-distributors”). In June of 2017, the city amended the code to include “self-distribution” by a retailer in the definition of “Distribution” or “Distribute.” If a retailer of sugar-sweetened beverages (or sugar-sweetened beverage products used to make sugar-sweetened beverages that are sold to consumers) procures taxable products from an unregistered distributor or through a self-supply strategy and those products are sold to consumers in Boulder, then such procurement meets the definition of “Distribution” and “Distribute” and such procurements are taxable to the retailer.

3. When does the Tax take effect?

The tax took effect on July 1, 2017. Taxes are due monthly. The first return was due August 21, 2017 and on the 20th of every month after that. Those who fail to file their returns and remit tax payments will be subject to enforcement action.

4. What is the tax rate?

The tax rate is two cents (\$0.02) per fluid ounce for ready-to-consume, liquid sugar-sweetened beverage products. However, the tax on added “caloric sweeteners” in the form of syrups and powders is calculated on the maximum volume, in fluid ounces, of beverage that the syrup or powder can produce based on the manufacturer’s instructions.

While the ordinance requires the tax to be paid on the first non-exempt distribution in the City, if it is not paid at that time, it is payable on the next (or any subsequent) distribution, provided that no taxable product may be taxed more than once.

How is the tax calculated?

For Sugar-Sweetened Beverages:

$$\text{Number of ounces of Sugar-Sweetened Beverage} \times \text{Tax Rate} = \text{Sugar-Sweetened Beverage Tax}$$

For example;

- a 12-ounce can of Sugar-Sweetened Soda X .02 = **24 cents Sugar-Sweetened Beverage Tax (SSB Tax)**
- an 8-ounce bottle of Sugar-Sweetened Beverage X .02 = **16 cents SSB Tax**

For Syrups or Powders:

(A) The manufacturer's suggested serving size for the volume of fluid ounces of sugar-sweetened beverages produced from syrup or powder upon the initial distribution of syrup or powder; or

(B) If the labeling or packaging does not specify the recommended number of servings per container, the tax shall be calculated using the largest volume of fluid ounces of sugar-sweetened beverages that could be produced from syrup or powder upon the initial distribution of syrup or powder.

For Example - a 750ml bottle of flavored syrup has 20 grams of sugar per one ounce serving and there are 25 servings in the container.

$$\begin{aligned} 25 \text{ servings} \times 12 \text{ ounces (one serving size)} &= 300 \text{ ounces of SSB} \\ 300 \text{ ounces} \times .02 \text{ (SSB tax rate)} &= \mathbf{\$6.00 \text{ SSB Tax}} \end{aligned}$$

5. What qualifies as an added "Caloric Sweetener" or Syrup?

Some sugar-sweetened beverages are created with added "caloric sweeteners" or syrups. Those sweeteners or syrups are substances or combination of substances that meets all the following criteria:

- Is suitable for human consumption;
- Adds calories;
- Is perceived as sweet to humans when consumed.

"Juice concentrates" used as ingredients in beverages are generally considered caloric sweeteners and, as such, the beverages that contain juice concentrates are taxable.

6. What is the definition of "distribution" or "distribute"?

"Distribution" or "distribute" means the transfer of title or possession:

- From one business entity to another for consideration; or
- Within a single business entity, such as by a wholesale or warehousing unit to a retail outlet or between two or more employees or contractors; or
- For products for which the tax imposed by this chapter has not been paid by a prior distributor, "distribution" or "distribute" also means the placement of a product with a retailer of sugar-sweetened beverage product.

"Distribution" or "Distribute" shall not mean the retail sale to a consumer.

7. What are some typical taxable distributions?

Typical taxable distributions would be:

- Delivery of syrup to fast food or other restaurants;
- Delivery of syrup to stores that sell fountain drinks;
- Delivery of Bottled Sugar-Sweetened Beverages with added caloric sweeteners to retail outlets and restaurants.
- Purchase of Bottled Sugar-Sweetened Beverage or powders/syrups with added caloric sweeteners from unregistered distributors (self-distribution).

This is not an exclusive list of taxable distributions but is intended only to provide typical examples.

8. How is medical use defined?

Any beverage that meets the statutory definition of “medical food” under the Orphan Drug Act, 21 U.S.C. 360ee(b)(3), as amended. The Orphan Drug Act provides: “The term ‘medical food’ means a food that is formulated to be consumed or administered internally under the supervision of a physician and that is intended for the specific dietary management of a disease or condition for which distinctive nutritional requirements, based on recognized scientific principles, are established by medical evaluation.”

In order to meet the definition of “medical food,” a beverage must meet the following criteria:

- Specially formulated and processed product (as opposed to a naturally occurring foodstuff used in its natural state) for the partial or exclusive feeding of a patient by means of oral intake or enteral feeding by tube, meaning a tube or catheter that delivers nutrients beyond the oral cavity directly into the stomach or small intestine;
- Intended for the dietary management of a patient who, because of therapeutic or chronic medical needs, has limited or impaired capacity to ingest, digest, absorb, or metabolize ordinary foodstuffs or certain nutrients, or who has other special medically determined nutrient requirements, the dietary management of which cannot be achieved by the modification of the normal diet alone;
- Provides nutritional support specifically modified for the management of the unique nutrient needs that result from the specific disease or condition, as determined by medical evaluation;
- Intended to be used under medical supervision;
- Intended only for a patient receiving active and ongoing medical supervision wherein the patient requires medical care on a recurring basis for, among other things, instructions on the use of the medical food; and
- Marketed by the manufacturer as a medical food, either on the product labeling or in other marketing material.

9. Does this tax apply to soda only?

No, this tax applies to any ready-to-consume sugar-sweetened beverage that contains at least 5 grams of caloric sweetener per 12 fluid ounces (or equivalent ratio) and to the volume of sugar-sweetened beverage that can be produced from certain syrups and powders.

10. How do I determine whether the tax applies to the distribution of a beverage?

Below is a suggested 2-step method for determining whether the tax applies to the distribution of a

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Sugar-Sweetened Beverage. It does not constitute legal advice and so legal counsel should be consulted on the applicability of the tax to the distribution of a beverage.

Step 1: Does the non-alcoholic beverage have at least 5 grams of caloric sweetener per 12 fluid ounces?

If NO, then the tax does not apply. (Example: This includes most diet drinks that don't have calories.)

If yes, proceed to Step 2.

Step 2: Does the Sugar-Sweetened Beverage meet any of the following criteria:

- Milk is the primary ingredient, i.e. the ingredient constituting a greater volume of the product than any other;
- For medical use;
- Liquid sold for use for weight reduction as a meal replacement;
- Product commonly referred to as "infant formula" or "baby formula;"
- Alcoholic beverage;
- Consists of one hundred (100) percent natural fruit or vegetable juice;
- Sweetened medication such as cough syrup, liquid pain relievers, fever reducers, and similar products.
- Distribution of syrups and powders sold directly to a consumer and intended for personal use by a consumer that are not already pre-mixed into a sugar-sweetened beverage product such as granulated sugar, honey, agave and similar products.
- Products commonly used exclusively to mix with alcohol that may exceed 5 grams or more per serving of caloric sweetener per 12 ounces of fluid that is not a sugar sweetened beverage, including without limitation margarita mix, bloody mary mix, daiquiri mix, club soda, tonic water or similar products.

If YES, then the tax does not apply. (Example: 100% fruit or vegetable juice that, by definition, don't have added sugar because it is 100% fruit or vegetable.)

If NO, then the tax is likely to apply to the beverage. Please see Question #4 for tax calculation instructions.

11. Is sugar (e.g., sucrose, glucose, fructose, etc.) an added caloric sweetener?

Yes. Sugar is an added caloric sweetener because it meets the definition of an added caloric sweetener as found in Chapter 3-16. It (i) is suitable for human consumption; (ii) adds calories to the diet if consumed; (iii) is perceived as sweet when consumed; and (iv) is used for making, mixing, or compounding sugar-sweetened beverages.

12. Is the distribution of granulated sugar -- an added caloric sweetener -- a taxable distribution?

Chapter 3-16 exempts the distribution of natural or common sweeteners from the tax when those products are sold directly to a consumer and intended for personal use. Chapter 3-16 defines natural or common sweeteners to include granulated sugar. However, once granulated sugar is used by a business to make a sugar sweetened beverage, the distribution of the granulated sugar becomes taxable on the volume in fluid ounces of beverage produced.

13. Is the Tax a Sales Tax?

No. This is an excise tax imposed on the distribution of sugar-sweetened beverage products in the city.

14. May distributors increase their prices to retailers to pay for the Tax? Are there restrictions on how a retailer passes through sugar-sweetened beverage tax expense on receipts and invoices to consumers?

The ordinance does not prohibit distributors from increasing prices; that is a private business decision. The ordinance does not prohibit retailers from increasing the shelf pricing; that is a private business decision.

In February 2018, the Boulder City Council adopted a change to Title 3 of the city code which clarifies the city's position on taxes and pass-through items on retail invoices and receipts:

3-17-31. - Receipt for Customer-Paid Tax or Tax Pass-Through. It shall be unlawful for a vendor to identify on a receipt any amount as a "tax" other than the tax collected for the retail sale. A vendor may identify amount(s) on the receipt for an amount from another transaction that it is passing on to the customer as a "pass through," "surcharge," or other words that indicate that it is not a direct tax on the transaction. It shall be unlawful for a vendor to fail to show on the customer receipt any amount charged as a tax on the transaction.

15. Invoice/ Receipt

How should the beverage tax be presented on the invoice between a distributor and a retailer? Included in the sales price line amount or can it be a separate line item? Should the invoice include any particular language/descriptions with reference to the beverage tax?

On the first distribution in the City, the Sugar-Sweetened Beverage Tax (SSBT) should be separately stated on the invoice from the distributor to the retailer. The city recommends that the tax line item be titled "Sugar-Sweetened Beverage Tax," "Sugary Drink Tax," or a similar description.

16. Is a sale to a nursing homes or assisted living facility a distribution subject to the beverage tax since this is the residents' home?

The distribution of ready-to-drink sugar-sweetened beverages, powders and syrups to nursing homes or assisted living facilities is taxable in the city. The distribution has taken place when the distributor delivers SSB products for consideration to the facility. If you have questions about a powder or syrup, please contact the Revenue & Licensing Division for clarification.

17. Rounding: For ready-to-drink sugar-sweetened beverages, are ounces rounded to the full ounce before calculating the tax or is the tax rounded after multiplying it with the actual ounces of the beverage?

For purposes of tax calculation, the total number of ounces of sugar-sweetened beverage distributed should be calculated without rounding. That total number of ounces should then be multiplied by \$.02. The resulting total tax liability can be rounded to the nearest cent if necessary.

18. Exempt Purchasers – Are any entities exempt from the beverage tax? Public schools? State and Local governments? County jail? Military? Churches? What documentation does the distributor need to obtain and maintain in such instances?

There are no exempt purchasers/entities listed in the ordinance.

19. Donations – If a product that is subject to the sugar-sweetened beverage tax when sold is donated, is the beverage tax still due the City? If not, would the City please specify what types of donations and/or to which types of organizations this exemption would apply? i.e. What if products are donated to a non-profit food bank? To a business?

Bona fide donations of SSB products are exempt from the SSB tax. A bona fide donation is a voluntary, gratuitous gift disposed of by the donor out of liberality or generosity, where the donee is enriched and the donor impoverished. There may be no quid pro quo, no reciprocal obligations and no personal benefit for the donor.

20. Unknown volumes – How is the distributor to determine the volume of finished product made from syrups/ powders/ concentrates if the manufacturer instructions are not present and it is the retailer who produces the finished product? Can a reasonable estimate be used?

Please see # 4 above. The city is willing to consider methods for calculating liabilities that are agreed-upon between distributor and retailer. Requests for consideration and approval should be sent to ssbtax@bouldercolorado.gov.

21. Refunds – If the SSB Tax is collected in error on a product and/or from a retailer/distributor, from whom should the retailer/distributor seek a refund – the first distributor or the City – and how?

The retailer may seek a refund/credit from the distributor.

22. When is the SSB Tax due?

The SSB Tax must be remitted/postmarked on or before the 20th day following the month (or on the next business day if the 20th falls on a weekend or holiday) the SSB Tax was incurred.

23. Where can I find the language of the SSB Tax itself?

The Tax is Title 3, Chapter 16 of the Boulder Municipal Code, linked here:

https://library.municode.com/co/boulder/codes/municipal_code?nodeId=TIT3RETA_CH16SUSWBEPDI
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24. I am a retailer. Do I have any obligations under the Tax? To aid in the city's collection of taxes due under this chapter, **when requested by the city manager**, any retailer of sugar-sweetened beverage products that receives sugar-sweetened beverage products from a distributor shall:

- Provide to the city evidence that the distributor from whom the sugar-sweetened beverage products were received has registered (a list of registered distributors will be on the city's website) as a distributor with the city; or

- Report to the city all such transactions, the volume in ounces of sugar-sweetened beverage products received in each transaction, and the identity and contact information of any unregistered distributor from whom the sugar-sweetened beverage product was received and remit it to the city (this is only a **one**-time notification of an unregistered distributor to the city).

In June of 2017, the city amended the code to include “self-distribution” by a retailer in the definition of “Distribution” or “Distribute.” If a retailer of sugar-sweetened beverages (or sugar-sweetened beverage products used to make sugar-sweetened beverages that are sold to consumers) procures taxable products from an unregistered distributor or through a self-supply strategy and those products are sold to consumers in Boulder, then such procurement meets the definition of “Distribution” and “Distribute” and such procurements are taxable to the retailer.

25. What about penalties and interest?

The Tax imposed by this Chapter shall be administered in the same manner as taxes imposed pursuant to Chapter 3-2-2 and, without limitation, shall be subject to the same delinquency penalties, appeals processes and other enforcement provisions set forth in Chapter 3-2-22.

26. For companies that use a debit blocker identification number, what is the debit blocker number if I want to pay online?

The debit blocker number is 4601888750.

27. A question has come up regarding multiple distributions in the city and taxing the first distribution.

Here is the scenario.

Distributor A distributes SSB product to Distributor B in Boulder. Distributor B then distributes some of that SSB product outside the city. Technically Distributor A would owe SSB Tax on the first distribution. However, Distributor A does NOT know what SSB products were shipped out of the city by Distributor B which in turn would result in a refund.

The city’s proposed solution is that Distributor A and Distributor B come up with an agreement on who pays the SSB Tax on product that is delivered and sold in Boulder and have the city review and sign off on the agreement. This agreement would protect Distributor A, Distributor B and the city. As long as the tax is paid once the city is not concerned about which distributor is paying the tax.

28. Is the distribution of Kombucha and other fermented beverages taxable?

If a beverage contains 5 or more grams of caloric sweetener per 12 fluid ounces and is not otherwise exempt in the ordinance, then it is taxable.

29. The ordinance exempts any beverage consisting of 100 percent natural fruit or vegetable juice with no added caloric sweetener. What is the taxation of products that combine 100% juice with water and other non-caloric ingredients?

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100% juice products are exempt. If a beverage label does not make a "100% juice" claim, but the product does not list sweeteners or added sugars on the ingredients list (other than fruit or vegetable concentrates) and contains the same or less sugar (in grams per oz.) than what would be expected from the same volume of 100% fruit or vegetable juice of the same type based on USDA standards, then the product is not taxable. The City's tax treatment of these types of juice beverages is based in part on pending FDA rules that require "added sugars" be separately disclosed on Nutrition Facts Labels. The following information is excerpted from the Food and Drug Administration's website:

The final rule requires "Includes X g Added Sugars" to be included under "Total Sugars" to help consumers understand how much sugar has been added to the product.

The definition of added sugars includes sugars that are either added during the processing of foods, or are packaged as such, and include sugars (free, mono- and disaccharides), sugars from syrups and honey, and sugars from concentrated fruit or vegetable juices that are in excess of what would be expected from the same volume of 100 percent fruit or vegetable juice of the same type. The definition excludes fruit or vegetable juice concentrated from 100 percent fruit juice that is sold to consumers (e.g. frozen 100 percent fruit juice concentrate) as well as some sugars found in fruit and vegetable juices, jellies, jams, preserves, and fruit spreads.

The city considers any soda or carbonated juice drink to be taxable products if the ingredients include one or more juice concentrates as ingredients.

More information on the updated FDA rules can be found at:
www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm385663.htm

30. Where can I get information about paying the Tax?

For information regarding the tax, please contact the city's Tax & Licensing Division at:

City of Boulder

Finance Department

Attention: Tax & License Division

P.O. Box 791, Boulder, CO. 80306

Phone: 303-441-3436

Email: SSBTax@bouldercolorado.gov

Website: <https://bouldercolorado.gov/services/sugar-sweetened-beverage-tax>