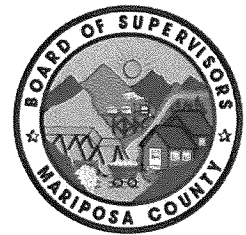


MARIPOSA COUNTY

Treasurer-Tax Collector-County Clerk ·



RESOLUTION - ACTION REQUESTED 2021-245

MEETING: May 4, 2021
TO: The Board of Supervisors
FROM: Keith Williams, Treasurer/Tax Collector
RE: Aramark - Yosemite Hospitality

MINUTE ORDER ATTACHED

RECOMMENDATION AND JUSTIFICATION:

Receive and Consider Request of Aramark -- Yosemite Hospitality LLC to Waive Penalties; Receive Information and Make Determination Whether Good Cause Exists to Waive Penalties Under Mariposa County Code 3.36.080 and 3.36.090; and Direct Staff to Return with Formal Resolution Memorializing the Board's Finding and Determination.

Mariposa County Code 3.36.070 (Transient Occupancy Tax) provides in part that each operator shall make a return to the tax collector of the total rents charged and received, and the amount of tax collected for transient occupancies.

Mariposa County Code 3.36.080 provides that any operator who fails to remit any tax imposed by this chapter within the time required (due date) shall pay a penalty of ten percent (10%) of the amount of the tax in addition to the amount of the tax. The board of supervisors shall have the authority to waive penalties imposed by Section 3.36.080 and section 3.36.090 when the board of supervisors determines in a public meeting that good cause exists for waiving the penalties.

Mariposa County Code 3.36.090 provides in part that when taxes remain unpaid on the last day of the second succeeding calendar month after delinquency, operator shall pay an additional penalty of one and one half percent (1-1/2%) per month on the amount of the original tax together with any actual costs of collection incurred by the county up to the time the delinquency is paid. This additional penalty attaches on the first day of every month thereafter until payment is made or a court judgment is entered for the amount of unpaid taxes and penalties, whichever occurs first. In the event taxes are not received by the tax collector on the due date, the tax collector shall notify the operator of the delinquency and the addition of applicable penalties in writing within thirty (30) days of the delinquency.

On December 28, 2020, the Treasurer - Tax Collector received an email from Aramark stating that "due to changes in accounting procedures and tax compliance software, apportion of Mariposa Transient Tax (TOT) and Tourism Business Improvement District Assessment (TBID) that was charged and collected from the customers did not get remitted to Mariposa County" for the period of January 1, 2017 to July 31, 2020.

According to Aramark, as of March 5, 2021, the amount of underreported and

underpaid tax together with penalties is:

TOT Tax Due	10% Penalty	1.5% Penalty	Total
\$1,548,620.13	\$154,862.01	\$540,174.17	
\$2,243,565.31			

The Treasurer - Tax Collector has accepted that these figures accurately reflect the amount due and the penalties associated with the underpayment.

No part of the underpayment principal or penalty has been paid to date.

Mariposa County Code 3.36.080 gives the Board authority to determine in a public meeting whether and to what extent good cause exists to waive the penalties.

Aramark has submitted a letter with its explanation of the underpayment and its request for a finding of good cause to waive the penalties. The letter is included in the agenda materials. Staff understands that representatives of Aramark will be present at the meeting.

BACKGROUND AND HISTORY OF BOARD ACTIONS:

An issue of this type has not been brought to the Board before.

ALTERNATIVES AND CONSEQUENCES OF NEGATIVE ACTION:

If the Board does not find good cause to waive penalties, the Tax Collector will collect all underpayments and associated penalties then due.

ATTACHMENTS:

Aramark Request 1 (PDF)

RESULT: ADOPTED [4 TO 1]

MOVER: Miles Menetrey, District V Supervisor

SECONDER: Wayne Forsythe, District IV Supervisor

AYES: Rosemarie Smallcombe, Marshall Long, Wayne Forsythe, Miles Menetrey

NAYS: Tom Sweeney



COUNTY of MARIPOSA

P.O. Box 784, Mariposa, CA 95338 (209) 966-3222




MARSHALL LONG, CHAIR
ROSEMARIE SMALLCOMBE, VICE-CHAIR
TOM SWEENEY
WAYNE FORSYTHE
MILES MENETREY

DISTRICT III
DISTRICT I
DISTRICT II
DISTRICT IV
DISTRICT V

MARIPOSA COUNTY BOARD OF SUPERVISORS MINUTE ORDER

TO: KEITH WILIAMS/Treasurer – Tax Collector

FROM: RENÉ LaROCHE/Clerk of the Board 

SUBJECT: Receive and Consider Request of Aramark -- Yosemite Hospitality LLC to Waive Penalties; Receive Information and Make Determination Whether Good Cause Exists to Waive Penalties Under Mariposa County Code 3.36.080 and 3.36.090; and Direct Staff to Return with Formal Resolution Memorializing the Board's Finding and Determination

RESOLUTION: 2021-245

The following action was taken by the Mariposa County Board of Supervisors on **May 4, 2021**:

L.1. Treasurer-Tax Collector-County Clerk RES-2021-245

Receive and Consider Request of Aramark -- Yosemite Hospitality LLC to Waive Penalties; Receive Information and Make Determination Whether Good Cause Exists to Waive Penalties Under Mariposa County Code 3.36.080 and 3.36.090; and Direct Staff to Return with Formal Resolution Memorializing the Board's Finding and Determination

Keith Williams/Treasurer - Tax Collector - County Clerk gave the staff report, noting that the staff report erroneously notes amounts of underreported and underpaid taxes, together with penalties, through March 5, 2021 but that it is actually through December 31, 2020.

Marty Dakessian/Dakessian Law attorneys for Aramark noted that Mr. Williams accurately recounted the issue; advised that Aramark has had a clean filing history since it took over operation of the area's facilities in 2016. Mr. Dakessian advised that in this situation, there was a computer glitch in January, 2017, which caused the accounts to be coded to a separate account and mis-assigned to the wrong category. Mr. Dakessian noted that it did not come to Aramark's attention until sometime in July of 2020 and precipitated an audit of the account where the issue was discovered and corrected. Mr. Dakessian noted that Aramark came forward with the issue as soon as possible, and then requested that the Board waive the penalties pursuant to County Code. Mr. Dakessian noted that the standard is reasonable cause; advised that what constitutes reasonable cause is not defined in the County Code but noted that Aramark has a good filing history; referred to the Internal Revenue Service's First Time Penalty Abatement program; advised that treasury regulations exist to allow for the waiver of an isolated computational or transcriptional error; and noted that Aramark took corrective action and notified the County as soon as they could get the

facts straight. Mr. Dakessian concluded by saying that the penalty system is probably there to deter people who are bad actors or repeat offenders to punish conduct and that his client does not think that applies in this instance; and requested abatement of the penalties.

Supervisor Smallcombe required clarification regarding when the County Clerk was notified subsequent to the July 2020 discovery of the error. Mr. Dakessian advised that Aramark corrected the issue in the system in July 2020 and notified the County in December 2020; and noted that they came forward and reported something that the County otherwise would not have discovered.

Supervisor Forsythe referenced Mr. Dakessian's statement regarding correcting the issue and inquired if that means in the books, or if it means paying the 1.5 million dollars recognized as being owed. Mr. Dakessian responded that it meant corrected in the books, and that they are waiting for an assessment to write the check. In response to Supervisor Forsythe's inquiry, Mr. Dakessian affirmed that the taxes that were due were not paid. In response to Supervisor Forsythe's inquiry as to whether the IRS would have allowed that, Mr. Dakessian offered that it took some time to identify with accuracy; restated that they came forward in December to notify about the issue; and stated that he didn't think that Supervisor Forsythe's IRS comparison was a fair characterization.

Supervisor Menetrey inquired why the amount due was not remitted as soon as it was determined to be underpaid and, then, followed by this request. Mr. Dakessian responded that, typically, the County sends an assessment first. Supervisor Menetrey questioned the remark regarding Aramark not paying the bill because they hadn't gotten a bill from the County. Mr. Dakessian advised that they need a bill to pay it; and reiterated that Aramark discovered the issue and reported it.

Supervisor Long noted that, in mirroring the IRS, he recalls having to pay taxes first before discussing penalties, and noted that the right thing to do is pay the back taxes then discuss interest later. Supervisor Long also noted that he has never heard of any business needing to get a bill from the County to pay these taxes and requested clarification from the Tax Collector. Keith Williams advised that the only time his office sends out a notice of anything due is when they are demanding payment and that, in all other circumstances, it is the operators who do it. Mr. Williams also noted that when they have an amended return, which is what this is, they get a spreadsheet. Mr. Williams noted that, normally, they receive returns for each month; and advised that he did not send a demand letter because he only does so when they are going through a collection action. Supervisor Long inquired if there have been other instances where an operator who know they owe money, withholds payment until receiving a bill. Mr. Williams responded only in a collection action because the normal practice is to file an amended return when it is found that additional money is owed.

Steven Rauser/Aramark attorney stated that the fact that Aramark contacted the Tax Collector in December 2020 needs to be taken into consideration when considering the lack of a bill. He reiterated that Aramark contacted the Tax Collector in December 2020, and have been in contact with the Tax Collector since then trying to get a finite answer regarding the penalties; and noted that the reasons we're into the month of May is because Mr. Williams told them that he was not in a position to abate the penalties and that they had to come before the Board to plead their case. Mr. Rauser suggested that because of that, the timeframe from December to this point is arguing de minimis, and the fact that it has not been paid because they have been attempting to resolve this issue should be taken into consideration.

Supervisor Menetrey inquired if there was agreement between all parties that the base tax owed is the approximate 1.548 million dollars. Mr. Rauser affirmed. Supervisor Menetrey referenced the portion of the letter from Dakessian Law that

states that Aramark is prepared to pay the taxes due within days if the Board of Supervisors grants a waiver of the penalties and interest, and inquired why that tax wasn't paid in advance of this decision. Mr. Rauser responded that it goes back to the statute of limitations, which Aramark believes is three years because of a provision in county code that notes that the tax collector cannot make an assessment or require records be kept longer than 3 years. Discussion ensued between Supervisor Menetrey and Mr. Rauser regarding the effects of a three-year statute of limitations given the monthly filing periods. Mr. Rauser noted that, in lieu of figuring out what the tax is plus penalties and dropping what is outside the statute, Aramark is proposing to pay the 1.5 million dollars, which is the tax for the entire period, if they can get the penalty abated. Supervisor Menetrey remarked that they discovered all of this in July of 2020, notified the County five months later in December, and now have reached that statute of limitations point in time, and now are saying that if the Board does not waive the penalties that they are not going to pay. Mr. Rauser reiterated that Aramark is fully prepared to pay the 1.5 million dollars because there's a reasonable exception in this case, but because the penalties are such a large amount, Aramark would like to invoke its right to minimize the penalties. Mr. Rauser noted that if they cannot get the penalties abated as reasonable cause, they feel that they can invoke their right to have the penalties waived.

Public comment opened. Sonia Gates/Aramark Corporation Tax Director received permission to speak from Mr. Dakessian and advised that when they realized that there was an error in their system in July 2020, it took months to figure out where it started. Ms. Gates noted that even after contacting Mr. Williams, they were going back and forth saying here are our numbers and asking if he was comfortable with them. Ms. Gates advised that, at that point, she didn't think that they had the ability to pay and, in fact, felt that they were still working as a team to determine amounts due including interest, penalties, and tax; otherwise, she would have made payment. Ms. Gates also noted that, in addition, some of the tax erroneously went to the State of California. Public comment closed.

Supervisor Long requested that County Counsel clarify the statute of limitations. Steven W. Dahlem/County Counsel noted that the only statute of limitations that he is aware of regarding transient occupancy taxes is Revenue and Taxations Code section 7283.51, which is a four year statute of limitations from the date on which the transient occupancy taxes were required to be paid. County Counsel further noted that if the County was to initiate litigation, it would be bound by this statute of limitations, but that there would certainly be arguments of when the County knew or should have known.

Supervisor Menetrey advised that he appreciates Ms. Gates' comment about the confusion, but remarked that everyone knew that the tax was due in December, and it has continued to incur interest since. He also noted his concern with the letter seeming to suggest that Aramark will not pay if the Board does not agree to waive the penalties.

Supervisor Smallcombe advised that she, too, is troubled by the fact that despite the identification of the accounting glitch, there have been no funds proffered to address the underpayment. She discussed her background as a licensed customhouse broker and noted that if they were in a situation where there was a question of improper fee payments, it was incumbent on them to deliver a good faith estimate of the duties that were payable and then negotiate with the customs service. She stated that she realizes that we are talking about separate regulatory bodies but she feels that, at a minimum, she would have gone in and reported it, remitted a certain amount while negotiating the final amount. Supervisor Smallcombe also referenced the comment about three years for record retention but noted that is not necessarily

the same as the statute of limitations. Mr. Rauser responded that he was making an analogy with records retention because there is nothing in the ordinance regarding statute of limitations for the transient occupancy tax and, to him, records retention is analogous to a statute of limitations. Mr. Rauser also remarked that he believes there is also a general state statute. Mr. Dakessian remarked that he feels that the discussion of statute of limitations is secondary. Mr. Dakessian also noted that he wished to clarify that there was not a sitting on funds type of situation; and remarked that he does not want to take a situation where a taxpayer with a clean filing history, undertakes its actions in good faith, reports a computer error three years after the fact, and is now showing reasonable cause for abatement.

In response to Supervisor Sweeney's inquiry, Ms. Gates advised that their system was corrected at the beginning of August, and that the proper taxes are now being collected and remitted.

Supervisor Smallcombe noted that, with the Customs Service, they needed to keep the records as long as they were needed. Mr. Dakessian noted that was done in this instance, but that what Mr. Rauser was referencing was the lack of an explicit code. Mr. Dakessian also stated that they went back to January 2017 and have been in discussions with Mr. Williams. In response to Supervisor Smallcombe's inquiry, Ms. Gates noted that she did not know if there was anything in GASBE that would govern this situation, and requested an explanation of how Supervisor Smallcombe would have analyzed the accounting standards. Supervisor Smallcombe responded that her point is that there is a legal framework that touches upon things like statutes of limitations and, similarly, there are best practices that apply to things like audits in a company and outside auditing firms. Supervisor Smallcombe noted that, in this instance, there are a series of transactions that were applied in a computer system; and offered that, in her past, they would have sat down with their attorneys and auditors to try to figure out where they deviated from legal and accounting practices. Ms. Gates advised that when the issue was identified, they set up a reserve but that Aramark has thousands of accounts. Ms. Gates also noted that Aramark remits a lot of money to Mariposa, and that the amount missed was small by comparison.

Supervisor Menetrey noted that everyone is still agreed there is an amount due; and he voiced his concern regarding the verbiage in the letter that implies that the only way the principle due will be paid is if the County waives the penalties and interest. Mr. Dakessian advised that this is not the case; and that they will make the payment. Supervisor Menetrey and Mr. Dakessian further discussed the letter and its implications. Mr. Dakessian noted that was not a conditional statement but, rather, was meant to indicate that they are prepared to remit payment within days; and assured that he is here today indicating that they will make payment. Supervisor Menetrey noted his thanks for the assurances, and remarked that the other thing the Board needs to consider is the potential precedent that might be set with their decision. He continued noting that there have been other requests before this Board to forgive penalties and interest which were denied; and noted that the precedent that is set with this decision today will carry forward; and advised that he is not sure that he wants to do that.

Supervisor Long noted that concerns that as being the reason for his earlier question to County Counsel and inquired if the four year statute of limitations is from the date the error was discovered. County Counsel noted that it would be four years from the date the payment is due; and advised that it is not included in County Code because it is State law. Keith Williams clarified that the information which they provided was that the error started in January 2017, with that first payment being due in February. Mr. Williams also noted that by his count, that would take us to February 2021, so just four months. Supervisor Long noted that his suggestion is to

follow the advice of County Counsel and the calculations of the Tax Collector as the Board cannot break the law and won't be setting a precedent.

Board discussion ensued regarding how the penalties will be calculated, and utilizing which dates.

Supervisor Menetrey moved that the Board deny the request to waive the fees and penalties, and that they allow the Tax Collector to figure out what is owed. The motion was seconded by Supervisor Forsythe.

Supervisor Sweeney discussed the applicability of the waiver because there's no malfeasance, and inquired if any codes or statutes apply. County Counsel noted that the County Code is on the item before the Board, and the ability to consider the waiver has to be done on the finding of good cause which is the determination of this Board.

Having a motion and second on the floor, Chair Long called the vote.

Supervisor Smallcombe remarked that the major consideration for her was that she does not see evidence of good faith to negotiate in the beginning and, had that occurred, there might have been a different conclusion.

ACTION:

Finding insufficient cause, the Board denied the request to waive penalties and gave direction to County Counsel to initiative litigation regarding the matter in the appropriate court to toll the statute of limitations.

RESULT: **ADOPTED [4 TO 1]**

MOVER: Miles Menetrey, District V Supervisor

SECONDER: Wayne Forsythe, District IV Supervisor

AYES: Rosemarie Smallcombe, Marshall Long, Wayne Forsythe, Miles Menetrey

NAYS: Tom Sweeney

