

Nassau County
Office of the Comptroller



**Review of Entertainment Surcharge Tax - NYCB Theatre in Westbury
(Managed by the Westbury Music Fair LLC, a subsidiary of Live Nation)**

GEORGE MARAGOS

Comptroller

June 22, 2015

NASSAU COUNTY
OFFICE OF THE COMPTROLLER

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Executive Summary

Westbury Music Fair LLC is required to pay Nassau County an Entertainment Surcharge Tax of \$1.50 per seat sold for events at the NYCB Theatre in Westbury in accordance with Chapter 179 of the Laws of New York 2000, Local Law No. 28-2000. The Nassau County Administrative Code, Article 3a Entertainment Surcharge Regulation¹ allows tax-exempt organizations to be exempt from the tax.

Key Findings:

Westbury Music Fair LLC owes the County a total of \$548,198 for the period January 1, 2012 to September 30, 2014. This amount includes surcharge taxes of \$321,361 related to audit findings on 214,241 seats sold during the audit period, plus penalties of \$160,681 and interest of \$66,156.

- The audit determined that 190,268 tickets were sold for 183 curtain restricted events incorrectly excluded from the Surcharge Tax Returns; and
- The audit found that another 23,973 tickets were sold but not included on Westbury Music Fair LLC's tax returns.

Key Recommendations:

We recommend that Westbury Music Fair LLC:

- remit the amount owed of \$548,198 to the County in connection with the curtain restricted events and the unreported ticket sales; and
- report and remit taxes on tickets sold to curtain restricted events.

The matters covered in this report have been discussed with the officials of Westbury Music Fair LLC. On May 28, 2015, we submitted a draft letter with the findings to Westbury Music Fair LLC for their review. They requested an Exit Conference which was held on May 28, 2015. Westbury Music Fair LLC provided their response on June 10, 2015. Their response and our follow up to their response are included as Appendix A and B to this report.

¹ Nassau County Administrative Code, Article 3a Entertainment Surcharge Regulations §5-93.0 Exemptions.

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Introduction

Background

The Comptroller's Office has completed its review of the Entertainment Surcharge Tax for events held at the NYCB Theatre in Westbury ("NYCB") Managed by Westbury Music Fair LLC (a subsidiary of Live Nation).

The Entertainment Surcharge Tax regulation imposes a surcharge tax of \$1.50 per ticket for entertainment events held in Nassau County at venues having a permanent seating capacity of 2,500 seats. The Nassau County Administrative Code, Article 3a Entertainment Surcharge Regulation² also allows tax-exempt organizations to be exempt from the tax. According to New York Tax Law Chapter 179.2 (Section 1202(d)(iii)), "such tax may be collected and administered by the county treasurer or other fiscal officers of Nassau county by such means and in such manner as other taxes which are now collected and administered by such officers or as otherwise may be provided by such local law, ordinance or resolution". In order to be eligible for this exemption, the organization must have a valid tax-exempt certificate and be the direct payer of record.³ Any entity failing to pay the \$1.50 surcharge tax shall be subject to a penalty of fifty percent on the tax amount due plus interest of nine percent per annum, compounded daily on the total tax and penalty amount.⁴

As shown in Exhibit I, Westbury Music Fair LLC sold a total of 359,184 tickets and paid \$538,776 to the County for events held at the NYCB from January 1, 2012 to September 30, 2014.

² Nassau County Administrative Code, Article 3a Entertainment Surcharge Regulations §5-93.0 Exemptions.

³ New York State Department of Taxation and Finance, Publication 843 (12/09), A Guide to Sales Tax in New York State for Exempt Organizations, page 16.

⁴ Nassau County Administrative Code, Article 3a Entertainment Surcharge Regulations §5-104.0.a,b.

Introduction

Exhibit I

**Westbury Music Fair LLC Entertainment Surcharge Taxes Paid and Tickets Sold
NYCB Theatre at Westbury
2012 to September 30, 2014**

<u>Year</u>	<u>Tickets Sold</u>	<u>Taxes Paid</u>
2012	140,874	\$ 211,311
2013	139,334	\$ 209,001
2014	78,976	\$ 118,464
Total	<u>359,184</u>	<u>\$ 538,776</u>

Audit Scope, Objectives, and Methodology

The objective of the audit was to review the entertainment tax revenues collected by the Office of the Nassau County Treasurer to ensure that the taxes were computed correctly, remitted in a timely manner, and properly recorded in the County's accounting system, the Nassau Information Financial System ("NIFS"). Our review period was from January 1, 2012 to September 30, 2014.

The auditors reviewed all the monthly tax returns during the scope period and tested the number tickets sold and for compliance with the tax-exempt guidelines. The tax returns submitted by Westbury Music Fair LLC were compared to the Ticketmaster reports⁵ to verify the accuracy of the number of tickets sold and complimentary tickets issued. We also examined documents to support the tax-exempt tickets sold.

We believe our review provides a reasonable basis for the findings and recommendations contained herein.

⁵ Ticketmaster reports are used by the event operators to record all tickets sold and complimentary tickets issued for all events listed on the tax returns.

Findings and Recommendations

Audit Finding

Westbury Music Fair LLC Did Not Pay Entertainment Surcharge Tax on All Tickets Sold and Improperly Claimed Exemptions

Our review found Westbury Music Fair LLC owes the County \$548,198 for 214,241 tickets not reported on the Surcharge Tax Returns from January 1, 2012 to September 30, 2014. As shown in Exhibit II below, the amount due includes the ticket tax of \$321,361 plus penalties of \$160,681 and interest of \$66,156. The 214,241 unreported tickets are grouped into two categories based on the underlying issue (190,268 tickets related to seating capacity and 23,973 tickets related to errors and unsupported exemptions). Explanations for each category follow the Exhibit.

Exhibit II

**Westbury Music Fair LLC
NYCB Theatre at Westbury
Taxes Owed to County
January 1, 2012 through September 30, 2014**

<u>Tickets Not Reported on Tax Returns</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>	<u>Total</u>
Tickets for 183 Event - for Venues Claimed to be Less Than 2,500 Seats	55,597	73,002	61,669	190,268
Tickets Related to Other Errors and Unsupported Exemptions	14,446	2,566	6,961	23,973
<u>Total Tickets Not Reported on Tax Returns</u>	<u>70,043</u>	<u>75,568</u>	<u>68,630</u>	<u>214,241</u>
 <u>Calculation of Amounts Owed</u>				
Entertainment Tax Due @ \$1.50/Ticket	\$ 105,064	\$ 113,352	\$ 102,945	\$ 321,361
Penalty for Non Payment of Taxes (50% of Tax)	\$ 52,532	\$ 56,676	\$ 51,473	\$ 160,681
Interest to Date (9% Compounded Daily) ¹	\$ 37,378	\$ 21,827	\$ 6,951	\$ 66,156
<u>Total Amount Due</u>	<u>\$ 194,974</u>	<u>\$ 191,855</u>	<u>\$ 161,369</u>	<u>\$ 548,198</u>

¹ Calculated from tax return due date through January 2, 2015.

Findings and Recommendations

- **183 Events (190,268 Tickets) Were Incorrectly Exempted by Westbury Music Fair and Not Reported on the Surcharge Tax Returns**

We examined the events reported on the Surcharge Tax Returns and compared them to the Ticketmaster Event Recap Report which lists all events held at NYCB. We found that 190,268 tickets related to 183 events were incorrectly excluded from the Surcharge Tax Returns. Westbury Music Fair LLC explained that the tickets sold for these events were not included on the tax returns because the events had a seating capacity of less than 2,500 seats and therefore were exempt from the tax.

All events held at NYCB are in one room that has a permanent seating capacity of 2,862. Westbury Music Fair LLC stated that it uses drop curtains to block off parts of the stage and temporarily reduce venue seating based on projected ticket sales for each event. However, the use of curtains in this manner does not reduce the permanent seating capacity of the Theatre. According to the Surcharge Tax regulations, taxes are imposed on every facility that has a permanent seating capacity in excess of 2,500 individuals and therefore, these events are subject to the surcharge tax. As a result, the total amount due related to these 190,268 tickets, including penalties and interest, is \$485,749, calculated in Exhibit III as follows:

Exhibit III

Entertainment Tax Due	
190,268 tickets @ \$1.50/Ticket	\$ 285,402
Penalty for Non Payment of Taxes (50% of Tax)	\$ 142,701
Interest to Date (9% Compounded Daily) ¹	\$ 57,646
Total Amount Due	<u>\$ 485,749</u>

¹ Calculated from tax return due date through January 2, 2015.

- **23,973 Tickets Not Reported Due to Other Westbury Music Fair LLC Errors and an Unsupported Exemption**

We reviewed the number of tickets sold and complimentary tickets on the Surcharge Tax Returns and compared them to the Ticketmaster reports. We found that 23,973 tickets were shown as sold on the Ticketmaster reports but incorrectly excluded from the Surcharge Tax Returns during the audit period. The tickets improperly excluded were the result of Westbury Music Fair LLC reporting an incorrect number of tickets for certain events and the lack of evidentiary support for

Findings and Recommendations

an event claimed to be tax-exempt. As a result, the total amount due related to these 23,973 tickets, including penalties and interest, is \$62,449, calculated in Exhibit IV as follows:

Exhibit IV

Entertainment Tax Due 23,973 tickets @ \$1.50/Ticket	\$ 35,959
Penalty for Non Payment of Taxes (50% of Tax)	\$ 17,980
Interest to Date (9% Compounded Daily) ¹	\$ 8,510
Total Amount Due	<u><u>\$ 62,449</u></u>

¹ Calculated from tax return due date through January 2, 2015.

Audit Recommendations:

We recommend that Westbury Music Fair LLC:

- a) remit the amount owed of \$548,198 to the County for the 214,241 tickets sold and not reported on the Surcharge Tax Returns; and
- b) discontinue its practice of not reporting tickets sold on the Surcharge Tax Return when NYCB uses drop curtains to block off parts of the stage and venue seating, as this does not reduce permanent seating capacity. These tickets are still subject to the tax.

Appendix A – NYCB Theatre at Westbury Response



Phone: (212) 885-5304
Fax: (917) 332-3741
Email: JGulant@BlankRome.com

June 10, 2015

BY CERTIFIED MAIL RETURN RECEIPT REQUESTED AND EMAIL

Ms. JoAnn F. Greene
Director of Field Audit
Office of the Comptroller
240 Old Country Road
Mineola, New York 11501

Email: jgreene1@nassaucountyny.gov

RE: Nassau County Entertainment Surcharge - NYCB Theatre at Westbury / Westbury Music Fair, LLC (Taxpayer ID # 13-3984613)

Dear Ms. Greene:

We are writing you concerning an audit report that you issued, dated May 28, 2015 (the "Report"), with respect to our client, NYCB Theatre at Westbury / Westbury Music Fair, LLC (Taxpayer ID # 13-3984613) ("Westbury"), in which you find that Westbury owes Nassau County (the "County") \$548,198 of Nassau County Entertainment Surcharge (the "Surcharge"), interest and penalties.

When we met with you face-to-face on May 28, 2015, we were advised to issue to you our formal response to the Report, after which we will be provided with the opportunity to present our position with the County attorneys. We were advised that only the County attorneys have the ability to address any concerns we have regarding the legality of the assessment contained in the Report. In addition, we were advised that the deadline to submit our formal response to the Report would be extended to June 10, 2015. As such, and per your instruction, this letter serves as our formal response to the Report.

The Surcharge was enacted in July 2000 with the first report due for shows occurring in October 2000 (Nassau County Administrative Code Article 3a Sec 5-90.0). Westbury has timely and consistently reported and remitted payment for the Surcharge to the County since the first filing was due and was contacted by a County Surcharge representative (the "Representative") to explain Westbury's filing procedures for the Surcharge shortly after filing its first returns.

The Chrysler Building 405 Lexington Avenue New York, NY 10174-0208
www.BlankRome.com

Appendix A



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As indicated in the attached affidavit provided by Jason Stone, SVP of Booking for Live Nation, Mr. Stone explained to the Representative during the 2000 calendar year that Westbury has two show formats at its venue. A significant percentage of the shows are configured with less than 2,500 capacity and a curtain system installed to limit the seating capacity to approximately 1,600 to 1,800 seats (“Curtain Restricted Shows”). The curtain system for the Curtain Restricted Shows takes approximately four hours to install and the remaining seats are concealed and made inaccessible to the seated audience. For the Curtain Restricted Shows, the contracts with performing artists entered into by Live Nation Entertainment, the parent company of Westbury (“Live Nation”), specifically limit the number of tickets that may be sold for the event to the lesser capacity. As indicated in the attached schematic diagram, tickets for Curtain Restricted Shows are sold online and through other modes in a manner that specifically limits the seating capacity (and therefore the potential seats to be sold) to a level of between 1,600 to 1,800 seats. There are also shows configured with a seating capacity in excess of 2,500 as the entire venue holds approximately 2,800 seats (see attached diagrams).

In 2000, Mr. Stone explained to the Representative that Westbury submitted documentation for all shows (those shows with capacities both greater and less than 2,500) with the Surcharge returns, but only paid a Surcharge on the shows with seating capacity in excess of 2,500. *Additionally, Mr. Stone stated that Westbury was being remodeled in 2001 and it could remove seats to limit the total seats to under 2,500 if it were necessary in order to avoid reporting the Surcharge. The Representative agreed with Westbury’s Surcharge reporting procedures, confirmed that Westbury was in compliance with its Surcharge reporting, and assured Mr. Stone that removing the additional seats was not necessary.* No Surcharge notice or assessment was received by the County with regard to Westbury’s reported Surcharges for 2000 through 2011.

In 2008, Westbury enclosed detailed event listings with its Surcharge filings, including details regarding Curtain Restricted Shows. Westbury further believes that it provided such details with its 2000 through 2007 Surcharge filings.

The Report finds that Westbury owes approximately \$548,198 of Surcharge, interest and penalty, a majority of which relates to the Curtain Restricted Shows. As noted above, this is contradictory to the instruction and guidance received from the Representative that contacted Mr. Stone shortly after Westbury filed its first Surcharge returns with the County for October 2000. Westbury respectfully protests the Surcharge on several grounds.

First, Westbury received confirmation from the County as to the propriety of its reporting process for Curtain Restricted Shows and no Surcharge notice or adjustment was made to any Surcharge returns filed with the County from 2000 through 2011.



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In addition, this assessment raises legitimate concerns as to whether this Surcharge is being imposed in a fundamentally fair manner. As noted above, Westbury directly (and apparently, detrimentally) relied upon the representations made in 2001 by the Representatives that it was not required to remove seats in order to avoid a Surcharge on Curtain Restricted Shows (which it was prepared to do). We believe that a change in interpretation of these rules without prior notification to Westbury (or an opportunity to potentially cure the issue) would be both inappropriate and fundamentally unfair in this case.

Moreover, the County's application of the Surcharge at Westbury puts the venue at a competitive disadvantage against other County venues, such as the Tilles Center (which is located on a college campus and is therefore exempt from the Surcharge). We understand that Westbury and Nikon at Jones Beach Theater (another venue owned by Live Nation) are the only two venues in the County, besides the Nassau Veterans Memorial Coliseum, that are required to remit the Surcharge to the County. Further, if Westbury were required to collect the Surcharge for its Curtain Restricted Shows, it would also be placed at an unfair competitive disadvantage as compared to smaller venues (such as The Space at Westbury) that are not potentially subject to the Surcharge and have a seating capacity similar to the Curtain Restricted Shows (i.e., between 1600 and 1800 seats).

Therefore, based on the guidance and confirmation of Westbury's reporting procedures received by the Representative shortly after the Surcharge was enacted; that no Surcharge notice or adjustment was made to Westbury's 2000 through 2011 Surcharge returns; and the competitive disadvantage it suffers from the Surcharge reimbursement provided to certain other venues; Westbury respectfully requests both (i) a waiver of the assessed Surcharge, penalty, and interest for the Curtain Restricted Shows, and (ii) further guidance from the County as to whether this Surcharge will be imposed with respect to Curtain Restricted Shows on a going-forward basis.

It should be noted that the foregoing is not intended as a comprehensive analysis of our potential defenses to an assertion of the Surcharge on the Curtain Restricted Shows, but merely highlights several concerns that we have identified as an initial matter with respect to the assertion of the application of the Surcharge in this case. In this regard, we reserve our rights with respect to any legal remedies available to us at either law or equity, and intend to fully defend against this assessment of the Surcharge (and interest and penalties), if necessary, in an appropriate forum.

Finally, we reserve the right to comment on the assessment of \$62,449 of Surcharge, interest and penalties that you describe in the Report as being due to "errors and an unsupported exemption" (the "Other Assessment"). Westbury has requested the supporting documentation

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with regards to the Jerry Seinfeld Hurricane Sandy Benefit Concert included in the Report as discussed in the May 28, 2015 meeting with the Comptroller. The documentation to support tax exemption for this show will be provided as soon as it is obtained. Thank you in advance for your consideration.

Sincerely,

A handwritten signature in blue ink that reads "Joseph T. Gulant".

Joseph T. Gulant
Blank Rome, LLP

Appendix A

AFFIDAVIT

State of New York:

County of Nassau:

Jason Stone, being duly sworn, deposes and says:

1. I am SVP of booking for Live Nation, Inc. ("Live Nation"). I have held that position since 1998, and before that time, I was SVP with Music Fair Enterprises, Inc. which owned the Westbury Music Fair prior to 1998. My date of hire by Music Fair Enterprises, Inc. was November 1974. Thus, I have been associated with Westbury since 1974.
2. In or around 2000, the time that the Nassau County Entertainment Surcharge (the "Tax") was first imposed, I was contacted by a representative of the Nassau County Treasurer (the "Treasurer Representative") for the purpose of explaining the Tax filing procedures of NYCB Theatre at Westbury / Westbury Music Fair, LLC (EIN: 13-3984613) ("Westbury"), an entity which operates a theater.
3. I explained to the Treasurer at that time that:
 - a. Westbury has two show formats at its venue: (1) a show configuration with less than 2,500 seats ("Curtain Restricted Shows"), and (2) a show configuration with more than 2,500 seats.
 - b. A significant percentage of the shows at Westbury are Curtain Restricted Shows with a curtain system installed to limit the seating capacity to approximately 1,600-1,800 seats. The curtain system takes approximately four hours to install and the remaining seats are concealed and made inaccessible to the seated audience.
 - c. Westbury submitted documentation for all of its shows (Curtain Restricted Shows and shows with seating capacities greater than 2,500) with the Tax returns that it filed, but only remitted Tax with respect to the Curtain Restricted Shows.
 - d. Westbury was remodeling its theater in 2001 and it could remove seats to limit the total seats to under 2,500 if it were necessary in order to avoid reporting the Tax.
4. The Treasurer Representative expressed to me agreement with Westbury's Tax reporting procedure of only reporting the Tax with respect to the shows that are not Curtain Restricted Shows, and confirmed that Westbury was in compliance with its Tax reporting obligations.

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5. The Treasurer Representative further informed me that removing additional seats from Westbury's theater was not necessary for Westbury to avoid paying the Tax on the Curtain Restricted Shows.

I understand that this affidavit will be submitted to the Nassau County Treasurer in connection with its determination of the Tax liability of Westbury, and I consent to its use for this purpose.



Jason Stone

Subscribed and sworn to before me this 30 day of
January, 2015



Notary Public



EMILY GONZALEZ
MY COMMISSION # FF 185568
EXPIRES: February 4, 2019
Bonded Third Budget Notary Services

Appendix B – Auditor’s Follow-up

Auditor’s Follow up:

We reiterate that Westbury Music Fair LLC should remit the surcharge taxes of \$548,198 to the County for the 190,268 tickets related to seating capacity and 23,973 tickets related to errors and unsupported exemptions.

NYCB Theatre in Westbury has a permanent seating capacity of 2,500 seats and therefore all events at this facility are subject to the Entertainment Surcharge Tax. Westbury Music Fair LLC used a Curtain Restricted system to temporarily reduce the seating capacity, based on lower projected ticket sales. They did not pay taxes on these Curtain Restricted events.

The affidavit provided as part of Westbury’s response was not adequate to confirm that a Treasurer’s Office Representative had agreed to allow Westbury Music Fair LLC to not pay taxes on Curtain Restricted events, which they claimed had occurred “on or around 2000”. Westbury Music Fair LLC could not provide the name of the Treasurer’s Office employee or why that person would be able to amend the County Law for these events.

Westbury Music Fair LLC should collect and remit taxes on all events based on this permanent seating capacity.

The 23,973 tickets not reported on the tax returns includes the Jerry Seinfeld Hurricane Sandy Benefit event claimed to be tax exempt. Westbury failed to supply proof to support the claimed exemption.