STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
INSTITUTIONAL INVESTOR, INC.	:	DETERMINATION DTA NO. 826331
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 2006 through February 28, 2011.	:	

Petitioner Institutional Investor, Inc. filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2006 through February 28, 2011.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, in New York, New York, on July 8, 2015 at 10:30 A.M., with all briefs submitted by February 5, 2016, which date began the six-month period for the issuance of this determination. Petitioner appeared by Michael Buxbaum, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Anita K. Luckina, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation was warranted in resorting to an indirect audit methodology in this matter and whether the methodology chosen had a rational basis and was reasonably calculated to determine sales tax due.

II. Whether petitioner's sales during the audit period were predominantly the sale of periodicals that were exempt from sales tax.

III. Whether petitioner's offering of a "PDF" version of its periodicals and other related items constituted a bundled transaction, subjecting its subscription sales of periodicals to sales tax.

FINDINGS OF FACT

1. Institutional Investor, Inc. (II) was a publishing company during the period December 1, 2006 through February 28, 2011 (audit period), publishing predominantly financial periodicals including magazines, newsletters and journals. It also sponsored conferences, seminars and training. The subject matter of the periodicals was highly technical and directed towards experts in the fields to which the periodicals were addressed. These fields included derivatives, hedge funds, investment banking, compliance and money management, among many others.

2. II was previously audited by the Division of Taxation (Division) for the period September 1, 1997 through August 31, 2000. After a completed field audit in which the Division found that II had books and records adequate for a detailed audit and II agreed to a test period audit method election to expedite the audit, the Division agreed to a refund of approximately $29,000.00. Although available to it, the Division chose not to review the prior audit file because it noted that no investigation of or adjustment to sales had been made in that audit. Mr. Mordechai Silberstein, the first auditor assigned to this matter, explained at hearing that the rationale for his decision not to review the prior audit with respect to sales was that he suspected that the sales of periodicals during the current audit period were being bundled with other taxable services and, therefore, subject to tax. He believed II had an obligation to demonstrate that the sales of periodicals were not being bundled with other taxable services.

3. In September 2009, the audit was initiated with the mailing of an appointment letter to II with a request for books and records that included sales invoices, merchandise and expense

purchase invoices, bank statements, cash receipts and disbursements journals, general ledgers, sales tax returns, federal income tax returns and documentation of exempt sales for the audit period December 1, 2006 through August 30, 2009 (initial audit period).

4. Upon meeting with a representative of II on November 17, 2009, Mr. Silberstein requested a detailed list of the company's products, whether sales tax was collected on sales of those products and a sample copy of the periodicals sold during the audit period. He also requested information on additional benefits received by the customer with a subscription, including access to websites. Further, if websites were made available to subscribers, the Division requested access to them for its audit. He also requested information on all formats in which the periodicals were offered, including print, digital and email.

5. After a prolonged interlude, in May 2010, II produced federal tax returns for 2006 and 2007, New York corporation tax returns for 2006 and 2007, a product list, a detailed general ledger for fixed assets and the sales tax returns for the initial audit period. The Division reviewed this information and requested more information on the product list, specifically inquiring about additional subscription benefits like access to websites and the format.

6. Although several discussions between II's representative and the Division transpired with respect to the product list and website access, II was not able to produce records substantiating the exemption claimed for its periodicals. Even though not disclosed to the Division during the audit, II used the services of a third party to handle the task of servicing, tracking and providing the information necessary for tax filings. For this reason, II was hampered, and largely frustrated, in its attempts to produce records on audit in a timely fashion.

7. The Division researched independently II's general marketing website and discovered additional products that had not been disclosed by II. When no additional information was

forthcoming from II, on December 21, 2010, the Division sent II a letter in which it cited the current law with regard to periodicals and the Division's identification of issues it believed petitioner's products had in qualifying for the exemption it claimed. The Division supplied examples of enhanced services or products supplied with subscriptions and noted the provision of website updates, access to archives and email updates. It also supplied copies of Advisory Opinions issued by the Division, which expressed its position on the issue of periodical exemptions. When no response was received from II, a letter was sent to II's representative on January 3, 2011, which stated that the records presented to date were inadequate and requested additional records. The Division also offered additional waivers to extend the period for assessment should II desire more time to produce more records.

8. On April 27, 2011, the Division sent an appointment letter to II's representative updating the audit period, which now covered the period December 1, 2006 through February 28, 2011. In the letter, an additional request for books and records for the extended period was made. In response, II supplied an Excel spreadsheet, which set forth the sales from the sales general ledger for the period September 1, 2009 through February 28, 2011. The Division used this spreadsheet to identify and separate products it believed were not taxable or were sold out of state. The remaining sales, denoted "exceptions" by the Division, were New York transactions for which the Division wanted more information to demonstrate eligibility for the exemption. It sent a request for this information and met with II's representative on September 23, 2011, but received nothing but a subscription card and advertisement that expired in 1999, seven years prior to the audit period. The Division was never given access to the websites made available to subscribers with their subscriptions.

9. Without further documentation, the Division determined that the records were inadequate for a detailed audit and estimated the sales tax due for the initial period of December 1, 2006 through August 31, 2009. The Division did this by utilizing an error ratio that was calculated using sales from the federal income tax return for the period October 1, 2009 through September 30, 2010 (the only full year available), $87,180,721.00, and dividing that by the tax determined to be due from the exceptions set forth above, $1,434,818.49. This yielded an error ratio of 1.646%. The error ratio was applied to II's sales per its federal returns allocated by quarter for 2007, 2008 and 2009, resulting in additional tax due of $4,611,948.68.

10. Since the detailed sales general ledger was provided for the updated audit period of September 1, 2009 through February 28, 2011, which included 53 New York products, but no proof offered to substantiate the exempt status of the sales, the Division disallowed all nontaxable sales in the sum of $28,290,720.90 and determined additional sales tax due for the updated audit period of $2,508,001.77.

11. On April 17, 2013, over three and one-half years after the initial appointment letter was issued, the Division issued two statements of proposed audit change. The first was for the initial audit period of December 1, 2006 through August 31, 2009, which asserted additional tax due of $4,611,948.68 plus interest. The second was for the updated period September 1, 2009 through February 28, 2011, which asserted additional tax of $2,508,001.76 plus interest. Petitioner disagreed with these statements and the Division issued two notices of determination, both dated May 8, 2013. The notice issued for the initial audit period, December 1, 2006 through August 31, 2009, asserted additional tax due of $4,611,948.68 plus interest, and the notice for the updated period, September 1, 2009 through February 28, 2011, asserted additional tax due of $2,508,001.76 plus interest.

12. In its brief, submitted on January 11, 2016, the Division made an adjustment to the total tax due for the inclusive audit period December 1, 2006 through February 28, 2011. The adjustment was made after the Division had an opportunity to review the audit verification letters submitted by II at hearing, reducing the total tax due for the audit period to $5,500,928.02 plus interest.

13. During the audit period, Robert Lamont was an editor of all the newsletters published by II and was familiar with all phases of production, from the writing of articles to the printing and mailing of the products and internet postings. It was Mr. Lamont's recollection that during the audit period the product was primarily the print version of the newsletter, with an online portable document format (PDF) appearing toward the end of the audit period. He recalled that the online edition was identical to the print version. He explained that the online PDF version of the newsletter was behind a "pay wall," meaning it was only available to subscribers. He believed that II posted "aggregated material," comprised of articles in the public domain, outside of the pay wall to "populate space" and "tease" visitors to the web page.

14. An archive was maintained for all the print issues that also had PDF versions on the website.

15. In stark contrast to the testimony of Mr. Lamont, the screen shot from the web page for one publication, Fund Directions, dated December 21, 2010, indicated that a subscription included the monthly print edition of the newsletter, full access to the website with rolling news and a fully searchable research archive, breaking news email alerts and a downloadable PDF version of the newest issue available the Friday before it came out in print. Similar language appeared on the web pages for other newsletters as well, including Global Money Management, Power Finance &

Risk, Derivatives Week, Foundation & Endowment Money Management, Wall Street Letter, Compliance Reporter, Fund Action, Real Estate Finance & Investment and Total Securitization.

16. During the pendency of the audit, II tried to collect the sales information that was requested by the Division. However, II's sales were solicited and then directed to a third party that maintained separate databases for each product and created a new database for every account each year. Databases had to be combined to analyze the data necessary to substantiate tax records requested by the Division. The process of gathering and organizing data into a usable format took almost two years to accomplish. Thus, II did not comply with the Division's information document requests (IDR) that sought information as to the claimed exempt status of II's products.

17. Subscription revenue was recognized as it was earned, i.e., even though a full year might have been paid in advance, revenue was earned only when the product was offered to the subscriber. Tracking this cash revenue stream was the obligation of the third-party fulfillment center.

18. II produced voluminous documentation at hearing that was described as the information requested by the Division in its IDR, dated February 10, 2012. Steven Weiss, CPA, the chief financial officer of II, described 20 products for which records were assembled to document New York sales. These products were as follows: Absolute Return; Absolute Return Alpha; On-Line Investment Library; AR; Institutional Investor World; InstitutionalInvestor.com; NL Guides; Alpha; Institutional Investor Magazine (both domestic and international); Compliance Reporter; Derivatives Week; Foundation & Endowment Money Management; Fund Action; Fund Directions; Global Money Management Letter; Money Management Letter; Power Finance & Risk; Real Estate Finance & Risk; and Wall Street Letter. Not included were four other products not discussed by any witness at hearing but were noted in petitioner's brief: EMII.com; Total

Securitization; MML; and WSL. He explained that some of the accounts were administered out of the country and for which II maintained no books and records, such as Absolute Return and Absolute Return Alpha. Others were "landing pages" for content that had no subscribers like AR Website and InstitutionalInvestor.com. II also produced Newsletter Guides, "one-off" publications, advertising supported, and not sold.

19. For each of the products that actually had New York sales to subscribers, II was able to produce the dates of the subscriptions, the end user or recipient, that recipient's address and zip code and the dollar amount of the subscription, which represented cash revenue.

20. Typically, the third party that handled the subscription accounts reported to the managers of the individual publications monthly with sales figures that were then forwarded to the financial comptroller, Mr. Randy Liebowitz, and used to prepare the sales tax returns. Because a large portion of gross sales were comprised of subscription revenue, only a small fraction were listed as taxable sales, which included sales of reprints and research.

21. Mr. Liebowitz readily admitted that he was unable to produce the records requested by the Division on audit due to the volume and complexity of the databases in which the information was housed by the third party.

22. It is not clear from the record what II offered to subscribers with respect to "other services" that may or may not have been included with the internet materials. Certainly, a PDF version of the print publication was available, but what other services were available was not clear. The advertising indicated that email updates, related articles, news items and other peripherals were included. II officers could not recall what and when the peripherals were offered with subscriptions, one even characterizing the extra items as mere filler.

SUMMARY OF THE PARTIES' POSITIONS

23. Petitioner argues that it sold tangible personal property during the audit period that was exempt from taxation as periodicals. II denies that it sold a taxable service, maintaining that it only sold print copies of its periodicals and made PDF versions available online.

24. Petitioner contends that the assessment was arbitrary and capricious and lacked a rational basis because it was based on a limited review of II's marketing website and an incorrect understanding of the Tax Law. Petitioner maintains that the Division knew II sold magazines and periodicals that were not subject to tax and still chose to disallow these exempt sales, thus failing to follow its own audit guidelines. Further, petitioner notes that the Division failed to take into consideration the voluminous documentation produced at hearing and thereafter that was used to prepare all the sales tax filings during the audit period.

25. The Division argues that its audit methodology was sound, beginning with a proper request for books and records with which petitioner failed to comply. Without the records, an estimated audit was performed based on available information that resulted in a rationally-based determination of petitioner's sales tax liability.

26. The Division contends that petitioner's evidentiary submissions at and after the hearing are not dispositive of its true tax liability since the submissions raise more issues that remain unresolved. The Division disputes petitioner's contention that it qualified for a periodicals exemption when the publications included access to a PDF online version in addition to updates, email alerts, and other peripheral information.

27. Ultimately, the Division argues that it was not given the access to the online web pages that would have enabled it to determine if the advertisements were mere puffing to drum up sales

or an accurate description of what was actually offered to customers, and petitioner did not offer satisfactory proof to establish that the peripherals were not actually offered.

28. The Division believes the prior audit has no relevance to the instant action, since it ended in 2000 and this audit began in 2006. Because so much of this case revolves around the online offerings, the older case does not have any relevance. Further, sales were not critically analyzed in the prior audit, and petitioner made no effort to demonstrate that there was a similar issue raised therein. Therefore, the reliance on the outcome of that audit was misplaced.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax on the receipts from every "retail sale" of tangible personal property except as otherwise provided in Article 28 of the Tax Law. A "retail sale" is "a sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . ." (Tax Law § 1101[b][4][i][A]). Tax Law § 1138(a)(1) provides that if a sales tax return was not filed, "or if a return when filed [was] incorrect or insufficient, the amount of tax due shall be determined by the [Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices. . . ." (Tax Law § 1138[a][1].) When acting pursuant to section 1138(a)(1), the Division is required to select a method reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (***see Matter of Your Own Choice, Inc.***, Tax Appeals Tribunal, February 20, 2003).

B. The standard for reviewing a sales tax audit where external indices were employed was set forth in ***Matter of Your Own Choice, Inc.***, as follows:

> "To determine the adequacy of a taxpayer's records, the Division must first request ***(Matter of Christ Cella, Inc. v. State Tax Commn.***, [102 AD2d 352, 477 NYS2d 858] ***supra***) and thoroughly examine (***Matter of King Crab Rest. v. Chu***,

134 AD2d 51, 522 NYS2d 978) the taxpayer's books and records for the entire period of the proposed assessment (***Matter of Adamides v. Chu***, 134 AD2d 776, 521 NYS2d 826, ***lv denied*** 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from within these records (***Matter of Giordano v. State Tax Commn.***, 145 AD2d 726, 535 NYS2d 255; ***Matter of Urban Liqs. v. State Tax Commn.***, 90 AD2d 576, 456 NYS2d 138; ***Matter of Meyer v. State Tax Commn.***, 61 AD2d 223, 402 NYS2d 74, ***lv denied*** 44 NY2d 645, 406 NYS2d 1025; ***see also***, ***Matter of Hennekens v. State Tax Commn.***, 114 AD2d 599, 494 NYS2d 208), that they are, in fact, so insufficient that it is 'virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit' (***Matter of Chartair, Inc. v. State Tax Commn.***, 65 AD2d 44, 411 NYS2d 41, 43; ***Matter of Christ Cella, Inc. v. State Tax Commn.***, ***supra***), 'from which the exact amount of tax due can be determined' (***Matter of Mohawk Airlines v. Tully***, 75 AD2d 249, 429 NYS2d 759, 760).

Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (***Matter of Urban Liqs. v. State Tax Commn.***, ***supra***). The estimate methodology utilized must be reasonably calculated to reflect taxes due (***Matter of W.T. Grant Co. v. Joseph***, 2 NY2d 196, 159 NYS2d 150, ***cert denied*** 355 US 869, 2 L Ed 2d 75), but exactness in the outcome of the audit method is not required (***Matter of Markowitz v. State Tax Commn.***, 54 AD2d 1023, 388 NYS2d 176, ***affd*** 44 NY2d 684, 405 NYS2d 454; ***Matter of Cinelli***, Tax Appeals Tribunal, September 14, 1989). The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous (***Matter of Scarpulla v. State Tax Commn.***, 120 AD2d 842, 502 NYS2d 113) or that the audit methodology is unreasonable (***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451; ***Matter of Cousins Serv. Station***, Tax Appeals Tribunal, August 11, 1988). In addition, '[c]onsiderable latitude is given an auditor's method of estimating sales under such circumstances as exist in [each] case'" (***Matter of Grecian Sq. v. New York State Tax Commn.***, 119 AD2d 948, 501 NYS2d 219, 221).

C. It is clear from the record that the Division made proper written requests for books and records on more than one occasion and then thoroughly examined what was produced. Unfortunately, those records, particularly sales records, fell short of what would have been required to perform a full and detailed audit. It is of no moment that petitioner chose to have its subscriptions administered by a third-party company that was unable to produce records necessary to comply with the Division's document requests for more than two years. Petitioner

had the obligation to maintain these records and have them available for the Division's inspection. (Tax Law § 1135[a][1].) Thus, the Division made a valid and proper decision to resort to an estimated methodology that it believed was reasonably calculated to reflect taxes due.

D. The methodology chosen by the Division for the initial audit period of December 1, 2006 through August 31, 2009, an error ratio applied to sales discerned from II's federal tax returns, was reasonably calculated to reflect the sales taxes due. The burden placed on II to prove the assessment incorrect is a heavy one.

For the updated audit period of September 1, 2009 through February 28, 2011, the Division was provided with a sales general ledger that enabled it to identify specific sales, but, for the most part, lacked the information or substantiation that would have qualified said sales to an exemption from tax. The majority of these sales were deemed taxable. As with the assessment for the initial period, petitioner's burden of proof is a heavy one.

In an attempt to demonstrate an entitlement to the exemption, voluminous documentation was produced by II at hearing and thereafter to substantiate New York sales and qualification for the exemption for periodicals. The testimony at hearing specifically addressed 20 products that II believed were not taxable either because they were not New York sales or were periodicals exempt from tax.

II's chief financial officer, Steven Weiss, explained that three products were immediately excludable because they were not New York sales (Absolute Return and Absolute Alpha Return) or were never launched as a product (On-Line Investment Library). With respect to the first two products, although the witness alleged they were sold by a company from the United Kingdom, the sales appeared on II's general ledger. With respect to On-Line Investment Library, that

company was reported to have had substantial sales during the audit period. Neither of these inconsistencies was resolved and do not assist II in meeting its burden of proof.

Several of the products discussed by Mr. Weiss were deemed "landing pages" for content that was purportedly supported by advertising and not subscriptions. AR, Institutional Investor World and the web page InstitutionalInvestor.com all reported substantial revenue in the sales general ledger, but no source documentation, including invoices or sales contracts, was introduced for any of these products to substantiate the claims made by II. Once again, II failed to meet its burden of proof.

Another similar product appearing in petitioner's general ledger with substantial revenue attached to it was NL Guides. This was described as an occasional advertising-supported newsletter. However, like the others mentioned, no supporting source documentation was provided and II failed to demonstrate any basis for not taxing its revenue.

E. Thirteen additional products were discussed in testimony: Alpha, Institutional Investor Magazine (both domestic and international editions), Compliance Reporter, Derivatives Week, Foundations & Endowment Money Management, Fund Action, Fund Directions, Global Money Management Letter, Money Management Letter, Power Finance & Risk, Real Estate Finance & Risk and Wall Street Letter. These were characterized by II employees as standard periodicals with online PDF versions. However, they were advertised with much more content available to subscribers, including email alerts, searchable databases, and daily and weekly updates.

Newspapers and periodicals are exempt from tax under Tax Law § 1115(a)(5) and 20 NYCRR 528.6(a) (***see Matter of 1605 Bookcenter, Inc.***, Tax Appeals Tribunal, July 25, 1991). However, when such products are bundled with taxable services like those listed in II's advertising (***see*** Tax Law §§ 1132[c]; 1105[c][1]; TSB-M-10[7]S), the entire transaction is

taxable. Generally, if a single invoice charge includes taxable and nontaxable components, the entire charge is subject to tax. (***Matter of La Cascade v State Tax Commn.***, 91 AD2d 784 [3d Dept 1982]; ***Matter of Artex Systems, Inc. v Urbach***, 252 AD2d 750 [3d Dept 1998]; Tax Law § 1132[c]; 20 NYCRR 527.1[b].) Although there is a provision for the situation where taxable and nontaxable items are sold together, as one package, a vendor may collect sales tax on only the taxable portion of the bill (i.e., not collect tax on the nontaxable items) if (1) the taxable and nontaxable items may be purchased separately, (2) the charges are separately stated on the bill and (3) the charges are reasonable in relation to the total charges. (TB-ST-860 [June 16, 2011].) Unfortunately, petitioner did not produce the source documentation that might have satisfied these requirements and the full amount of the receipt is taxable.

There were four other products not discussed by any witness at hearing that were listed in petitioner's brief: EMII.com, Total Securitization, MML, and WSL. The Division was able to research and submit in evidence web pages for Total Securitization, MML, and WSL that indicated they offered the same online added services as described above, i.e., items such as email alerts, searchable databases, and daily and weekly updates. Therefore, for the same reasons, the receipts for these products would also be taxable. As far as EMII.com, petitioner has offered no evidence to support an exemption other than the description stated in its brief. As an advertising landing page, it must be treated equally with AR, Institutional Investor World and the web page InstitutionalInvestor.com, all of which reported substantial revenue in the sales general ledger, but without support from source documentation, including invoices or sales contracts. As such, the Division's treatment of the revenue generated by EMII.com as taxable was proper.

F. Of the 53 products identified in the sales general ledger supplied by II pursuant to an IDR, only those listed above were addressed by petitioner, and the Division has taken the

position that II has not met its burden to demonstrate that the remaining products were eligible for an exemption. The Division argues, and this forum agrees, that receipts for property or services of any type mentioned in Tax Law § 1105(a) and (c) are subject to tax until the contrary is established. Since no proof was submitted with respect to these products, including invoices or other source documentation, they must be held taxable.

G. Although petitioner provided voluminous documentation with regard to subscription revenue and end users, this information lacks the probative value of underlying source documentation. Further, the actual content offered by II to subscribers of the various periodicals was not clearly delineated in the record, either in documentary or testimonial evidence. None of the witnesses had clear recollections of when online services began or what services were offered with a subscription. Vague inferences with regard to II's lack of technological expertise and its use of marketing puffery does not constitute the type of evidence which would meet II's burden to prove that such services were not offered during the audit period in the face of contradictory documentation.

It is also unfortunate that petitioner was unable to clearly make its position known to the Division on audit, provide open access to its pay sites to facilitate inspection of the services offered, or produce all the books and records prior to hearing. Given this scenario, it must be concluded that petitioner has not met its burden of proof.

In this matter, even with all the materials submitted, it was apparent that no source documentation existed or was deemed necessary to meet petitioner's burden of proof. In addition, petitioner was unable, or unwilling, to comprehensively analyze its online offerings during the audit period and submit proof that the periodicals were not bundled with other taxable services.

H. Petitioner appears to be relying on an estoppel argument with regard to the prior audit for the period September 1, 1997 through August 31, 2000, believing that the result in that audit, a refund, implied that its claimed periodicals exemption for subscription sales had been considered and accepted by the Division and should, therefore, be binding on the Division herein. Although not articulated by petitioner, if it is asking for such equitable relief, it must be denied.

As a general proposition, unless there are exceptional facts which require its application to avoid a manifest injustice, the doctrine of estoppel does not apply to governmental acts (***Matter of Consolidated Rail Corp.***, Tax Appeals Tribunal, August 24, 1995, ***confirmed*** 231 AD2d 140, ***appeal dismissed*** 91 NY2d 848; ***Matter of Harry's Exxon Service Station***, Tax Appeals Tribunal, December 6, 1988). This proposition is considered especially strong where a taxing authority is involved, since public policy supports the enforcement of the Tax Law (***Matter of Glover Bottled Gas Corp.***, Tax Appeals Tribunal, September 27, 1990). The Tax Appeals Tribunal has developed a three-part test in order to determine whether to invoke an estoppel, to wit, (i) whether there was a right to rely on a representation made by the Division, (ii) whether there was such reliance and (iii) whether the reliance was to the detriment of the party who relied upon the representation (***see, Matter of Consolidated Rail Corp.; Matter of Harry's Exxon Service Station***).

In this matter, petitioner has proffered no evidence whatsoever to prove that subscription sales, let alone bundled sales, were ever considered by the Division on the prior audit. The Division saw that sales had not been analyzed in the prior audit and correctly chose not to review the prior matter. It was incumbent on petitioner to prove each of the three requirements stated above to be entitled to equitable relief, and it has not done so.

I. The petition of Institutional Investor, Inc. is denied, and the two notices of determination, dated May 8, 2013, as modified by the Division and set out in Finding of Fact 12, are sustained.

DATED: Albany, New York
June 23, 2016

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE