

**IN THE
SUPREME COURT OF MISSOURI**

No. SC88605

MICHAEL JAUDES FITNESS EDGE, INC.,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

**Petition For Review
From The Administrative Hearing Commission,
The Honorable June Striegel Doughty, Commissioner**

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

The principal issue before the Court involves the construction of § 144.020.1(2), RSMo 2000, which imposes “[a] tax equivalent to four percent of the amount paid for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events[.]” The principal question presented is whether the fees paid to Appellant for services, which are primarily personal training and related instructional services, provided at its facility are taxable as “fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events.”

Thus, the Court’s review of this case will necessarily involve the construction of § 144.020.1(2), RSMo 2000, which is a revenue law of the State of Missouri.¹ This Court has exclusive jurisdiction over the issues pursuant to Article V, §3 of the Missouri Constitution.

¹ All statutory citations are to the Revised Statutes of Missouri of 2000, as amended, unless otherwise noted.

STATEMENT OF FACTS

1. Introduction

At issue in this case is whether Appellant is entitled to a refund of sales taxes paid by Appellant on hourly charges made to Appellant's customers for personal training services. The record in this case includes the decision of the Administrative Hearing Commission (L.F. 21-30)(Appendix A3-A14); the transcript of the August 31, 2006 hearing before the Administrative Hearing Commission and the exhibits admitted into the record by the Commission, including Appellant's Exhibits 1-8 and Respondent's Exhibits A-C.²

2. History of the Case

Pursuant to §144.190, Appellant filed an amended sales tax return for the quarterly tax period beginning July 1, 2002 through and including September 30, 2002 requesting a refund of Missouri sales tax charged on personal training services rendered at its business location. The total amount of refund claimed by Appellant for the July 1, 2002 – September 30, 2002 tax period was \$18,438.10 in tax plus statutory interest. (Appellant's Ex. 4; Respondent's Ex. A). Respondent denied this claim and issued a final decision on November 7, 2005 stating that such training fees are taxable. Appellant filed an appeal of this final decision with

² Citations to the Tr. are "Tr. p. ____." Citations to exhibits are "Appellant's Ex. ____" or "Respondent's Ex. ____" as appropriate.

the Administrative Hearing Commission on January 4, 2006. (L.F. 1-5). The Commission assigned this appeal case number 06-0006RS.

Pursuant to §144.190, Appellant filed amended sales tax returns for the quarterly tax periods beginning October 1, 2002 through and including December 31, 2004 requesting a refund of Missouri sales tax charged on training services rendered at its business location. The total amount of the refunds claimed by Appellant for the October 1, 2002 – December 31, 2002 tax period was \$177,441.62 in tax plus statutory interest. (Appellant’s Ex. 5; Respondent’s Ex. B). Respondent denied this claim and issued a final decision on February 3, 2006 stating that such training fees are taxable. Appellant filed an appeal of this final decision with the Administrative Hearing Commission on February 17, 2006. (L.F. 10-15) The Commission assigned this appeal case number 06-0169RS.

On February 28, 2006, Respondent filed a Motion to Consolidate Case Nos. 06-0006RS and 06-0169RS as both cases involved the same parties and identical issues of fact and law. On March 20, 2006, the Commission granted this Motion to Consolidate and assigned case number 06-0006RS to the matter. (L.F. 20)

The Administrative Hearing Commission conducted a hearing on August 31, 2007, during which Appellant presented testimony and exhibits regarding its business operations and the services that it provides to clients. Following the hearing, the parties filed briefs supporting their respective positions. On May 30, 2007, the Administrative Hearing Commission issued a decision that upheld

Respondent's denial of Appellant's refund claims. (L.F. 21-30). Appellant filed this Petition for Review of the Administrative Hearing Commission's decision.

3. Appellant's Operations

Appellant was founded in 1984 by its president Michael Jaudes. (Tr. p. 8) Michael Jaudes has educational and continuing training as a fitness professional. He has educational degrees in business and food science and holds professional certifications through multiple organizations, including the American Council on Exercise, ACE, Aerobics and Fitness Association of America and the AFAA. (Tr. p. 9).

Appellant provides its services in a facility that it owns that is located in St. Louis, Missouri. (Tr. p. 10). In addition to Michael Jaudes, Appellant has 23 full time employees as trainers. At the time of the hearing on August 31, 2006, Appellant had an additional 2 employees that were in training. (Tr. p. 35). These trainer/employees are compensated hourly on the basis of the number of training appointments the trainer completes. The hourly compensation of each trainer is based on tenure with Appellant and performance. (Tr. p. 35).

During the relevant refund periods (i.e., July 1, 2002 through and including December 31, 2004), Appellant has owned and operated a business that is in the business of providing personal training services. These services can be described as evaluation, training and instructional services in the areas of strength training, cardiovascular training, nutritional counseling and lifestyle advice.

Health and Physical Screenings and Evaluations

Appellant's relationship with its clients begins with a thorough physical assessment. At these screening and evaluation sessions, Appellant does clinical testing and physical testing that it describes as a "fitness physical." (Tr. p. 22). As part of this "fitness physical," each client initial completes a "Personal Information and Health History." (Appellant's Ex. 3). This evaluation form provides basic information such as height and weight, medical history, lifestyle history, musculoskeletal history, exercise history and nutritional history of each client that assists Michael Jaudes in an initial evaluation that provides a baseline for the client's relationship with Appellant. (Appellant's Ex. 3). It is similar to a form that would be used when a person initiates a relationship with any healthcare professional, including medical doctors. (Tr. p. 24).

In the second phase of the "fitness physical," each client is subjected to a fitness evaluation. The results of this fitness evaluation are recorded for Appellant's use on a "Fitness Evaluation Results" form. (Appellant's Ex. 3). This evaluation is fairly comprehensive and includes the following: static body measurements, fitness tests, vital signs, body composition tests, typical activities, past injuries, family medical history, current medications and doctor's care. When taking static body measurements, each client's height, weight, neck size, shoulder measurement, chest measurement waist measurement, oblique measurement, hip measurement, upper arm measurement, forearm measurement upper thigh

measurement, above knee measurement and calf measurement are recorded. (Appellant's Ex. 3). The fitness tests administered by Appellant include walking lunges, flexibility, squats, T.U.T., Harvard Step Test, push-ups, pull-ups, wall sit and sit-ups. (Appellant's Ex. 3). These tests are done in order to evaluate each client's physical ability in order to assist with the development of strength and cardiovascular training programs. For example, the Harvard Step Test was designed by Harvard University and is designed to measure how quickly a client's heart rate would return to a "normal," resting heart rate after performing a series of steps for three minutes at the rate of 96 steps a minute. (Tr. p. 31). The fitness tests are designed to be repeated by each client at intervals during his or her relationship with Appellant. (Appellant's Ex. 3). The results in these subsequent tests assist Appellant in the charting the progress of the client and modify or enhance such client's programs. (Tr. p. 24-25). The results can also quantify improvements for the clients and give evidence of such client's "body transformation." (Tr. p. 25).

Strength Training Instruction and Program Development

Appellant also provides strength training instruction and program development. When developing each client's strength training program, Appellant uses each client's baseline results gleaned from the health and physical screenings and evaluations that have been conducted. Each client's program is customized and take into account where the client "stand[s] physically for their age, for their body mass index, for their weight, [and] for their fitness level. (Tr. p. 27).

During a typical strength training session, a client will train “at least two to three upper body parts, some section of the core, functional training, time under tension conditioning, some segment of the lower body and a thorough stretch at the end.” In the environment provided by Appellant, more is accomplished by each client in his or her sixty (60) minute session than would typically be accomplished at a club or at home. (Tr. p. 27).

The design of the strength training program by Appellant and the instruction by its trainers are the essence of the services being rendered by Appellant. During each training session, the trainers are interacting with the clients by coaching, teaching, correcting form and technique, assessing movement patterns, and monitoring heart rates. (Tr. p. 28). On an on-going basis, the strength training program results are documented and enhanced by the trainers based on the clients needs and progress. In fact, each training session “is completely customized” based on client feedback and trainer observation and judgment. (Tr. p. 30). The results of each training session are documented by the trainers on a training log. (Appellant’s Ex. 3).

Cardiovascular Training

In addition to strength training instruction and program development, each trainer consults with and advises clients on individual cardiovascular training programs. These programs are based on each client’s physical abilities and conditions and goals and evolve as the client/trainer relationship continues. The

variables for each client program include type of cardiovascular training (i.e., treadmill, exercise bike, running, walking, etc.), the frequency of training per week, and the duration of each session and the intensity of each session. (Appellant's Ex. 3).

Nutritional Counseling and Lifestyle Advice

Appellant also provides individualized nutritional counseling to each of its clients. Prior to designing a nutritional plan, Appellant meets with its clients to determine what foods the client likes or dislikes, what foods are accessible to the client and what the client may eat in a typical day or week. (Tr. p. 26; Tr. p. 31). From these inputs, Appellant creates a customized, unique nutrition plan for each client. (Tr. p. 26; Appellant's Ex. 3).

Appellant has built its client list and business primarily through referrals from existing clients and health care professionals, including medical doctors. Accordingly, Appellant has long-term relationships with many of its clients. As a result, its assessment, training and nutritional programs for clients constantly evolve based on the client's changing needs, goals and physical abilities. (Tr. p. 26; Tr. p. 30). Appellant maintains a client training log for each client to measure client progress and assist with the evolution of such client's training and nutritional programs. (Tr. p. 29-30).

Appellant does not maintain a membership. Each client pays an hourly fee that ranges from \$62 to \$75 per hour in exchange for the physical assessment, training instruction or nutritional counseling that such client receives. (Tr. p. 51;

Tr. p. 34). All clients have appointments for specific times and dates with a trainer. Access to Appellant's business facility is secured by a locked door and is controlled by Appellant's employees. When a client arrives at the facility for an appointment, such client is typically "buzzed" in by a receptionist and directed to a waiting area. At the time of the client's appointment, the client is met by the trainer at the waiting area in the front of the facility and the service appointment is initiated. All appointment times are staggered and all appointments are conducted on a "one-on-one" basis between a client and his or her trainer. (Tr. p. 47; Tr. p. 51). Appellant does not offer any amenities to its clients to facilitate or promote client interaction with other clients or use of the facilities for purposes other than training or counseling as prescribed by each client's trainer.

STANDARD OF REVIEW

The decision of the Administrative Hearing Commission shall be reversed if: (1) it is not authorized by law; (2) it is not supported by competent and substantial evidence; (3) a mandatory procedural safeguard is violated; or (4) it is clearly contrary to the reasonable expectations of the general assembly. Section 621.193; *Concord Publishing House, Inc. v. Director of Revenue*, 916 S.W.2d 186 (Mo. banc 1996). This Court's review of the law is *de novo*. *Zip Mail Services, Inc. v. Director of Revenue*, 16 S.W.3d 588 (Mo. banc 2000). Because §144.020.1(2) is a tax imposition statute, it must be construed strictly against the taxing authority. §136.300.1; *Old Warson Country Club v. Director of Revenue*, 933 S.W.2d 400 (Mo. Banc 1996); *Utilicorp United, Inc. v. Director of Revenue*, 75 S.W.3d 725 (Mo. banc 2001).

POINTS RELIED ON

I. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN RULING THAT APPELLANT WAS NOT ENTITLED TO A REFUND OF SALES TAXES PAID ON APPELLANT’S PERSONAL TRAINING FEES BECAUSE THE EVIDENCE IN THIS CASE SHOWS THAT APPELLANT’S PLACE OF BUSINESS DOES NOT CONSTITUTE A PLACE OF ENTERTAINMENT, AMUSEMENT OR RECREATION IN THAT THE DETERMINATION OF WHETHER APPELLANT IS A PLACE OF AMUSEMENT, ENTERTAINMENT OR RECREATION SHOULD BE BASED ON THE NATURE AND CHARACTER OF THE SERVICES RENDERED BY APPELLANT AND CANNOT BE BASED SOLELY ON ITS FURNITURE, FIXTURES AND EQUIPMENT.

Columbia Athletic Club v. Director of Revenue, 961 S.W.2d 806 (Mo. banc 1998)

L & R Distributing, Inc. v. Missouri Dep’t of Revenue, 529 S.W.2d 375 (Mo. 1975)

Wilson’s Total Fitness v. Director of Revenue, 38 S.W.3d 424 (Mo. banc 2001)

§ 144.020.1(2)

§ 144.010.1(2)

§ 144.010.1(9)

II. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN RULING THAT APPELLANT WAS NOT ENTITLED TO A REFUND OF SALES TAXES PAID ON APPELLANT’S PERSONAL TRAINING FEES BECAUSE THE EVIDENCE IN THIS CASE SHOWS THAT THE SERVICES BEING PROVIDED BY APPELLANT ARE NONTAXABLE SERVICES IN THAT THE FEES PAID IN EXCHANGE FOR APPELLANT’S PERSONAL TRAINING SERVICES, EVEN IF PAID TO, OR IN A PLACE OF ENTERTAINMENT, AMUSEMENT OR RECREATION, ARE FOR DISCRETE NON-AMUSEMENT SERVICES AND ARE OUTSIDE THE SCOPE OF THE TAX IMPOSITION SET FORTH IN SECTION 144.020.1(2).

Kanakuk-Kanakomo Kamps, Inc. v. Director of Revenue, 8 S.W.3d 94 (Mo. banc 1999)

Old Warson Country Club v. Director of Revenue, 933 S.W.2d 400 (Mo. banc 1996)

Six Flags Theme Parks, Inc. v. Director of Revenue, 179 S.W.3d 266 (Mo. banc 2005)

§ 32.053

§ 144.020.1(2)

Missouri regulation 12 CSR 10-103.600

III. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN RULING THAT APPELLANT WAS NOT ENTITLED TO A REFUND OF SALES TAXES PAID ON APPELLANT'S PERSONAL TRAINING FEES BECAUSE THE DENIAL OF APPELLANT'S REFUND CLAIM WOULD BE VIOLATIVE OF MO. CONST. ART. X, SECTION 3, THE UNIFORMITY CLAUSE, IN THAT OTHER BUSINESS THAT PROVIDE SUBSTANTIALLY SIMILAR PERSONAL TRAINING SERVICES ARE NOT SUBJECT TO AN IMPOSITION OF THE SALES TAX.

508 Chestnut, Inc. v. City of St. Louis, 389 S.W.2d 823 (Mo.)

Southwestern Bell Telephone v. Morris, 345 S.W.2d 62 (Mo. banc 1961)

State v. Bates, 224 S.W.2d 996 (Mo. banc 1949)

State ex inf. Dalton v. Metropolitan St. Louis Sewer District, 275 S.W.2d 225 (Mo.

banc 1955)

§ 144.020.1(2)

Mo. Const. art. X, §3

ARGUMENT

I. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN RULING THAT APPELLANT WAS NOT ENTITLED TO A REFUND OF SALES TAXES PAID ON APPELLANT’S PERSONAL TRAINING FEES BECAUSE THE EVIDENCE IN THIS CASE SHOWS THAT APPELLANT’S PLACE OF BUSINESS DOES NOT CONSTITUTE A PLACE OF ENTERTAINMENT, AMUSEMENT OR RECREATION IN THAT THE DETERMINATION OF WHETHER APPELLANT IS A PLACE OF AMUSEMENT, ENTERTAINMENT OR RECREATION SHOULD BE BASED ON THE NATURE AND CHARACTER OF THE SERVICES RENDERED BY APPELLANT AND CANNOT BE BASED SOLELY ON ITS FURNITURE, FIXTURES AND EQUIPMENT.

Introduction

The principal issue in this case is whether the personal training fees paid to Appellant by its clients are taxable pursuant to §144.020.1(2). Section 144.020.1(2) imposes a sales tax on the following:

“A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows:

* * *

(2) A tax equivalent to four percent of the amount paid for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events.”

The terms “business” and “seller” for sales tax purposes are defined in §§144.010.1(2) and (9) as follows:

(2) “‘business’ includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit, or advantage, either direct or indirect, and is of such character as to be subject to the terms of sections 144.010 to 144.510.

(9) ‘Seller’ means a person selling or furnishing tangible personal property or rendering services, on the receipts from which a tax is imposed under section 144.020; ...”

As applied in this case, the Respondent is requesting that §144.020.1(2) be applied as a tax imposition statute and, as such, must be construed strictly against the taxing authority. §136.300.1; *Old Warson Country Club v. Director of Revenue*, 933 S.W.2d 400 (Mo. banc 1996); *Utilicorp United, Inc. v. Director of Revenue*, 75 S.W.3d 725 (Mo. banc 2001).

Based on the plain language of §144.010.1(2) and §144.020.1(2), for the personal training fees at issue to be subject to sales tax, the following requirements must be satisfied: (1) Appellant must be found to operate a place of amusement, entertainment or recreation; (2) the personal training fees must constitute “fees paid to, or in a place of amusement, entertainment or recreation”; and (3)

Appellant must be a “seller” engaged in “the business of . . . rendering a taxable service at retail in this state. The above test is conjunctive, and all elements must be satisfied for the sales tax to apply. As a threshold matter, we do not believe that Appellant should be deemed to operate a place of amusement, entertainment or recreation.

Earlier Case Law

Appellant recognizes that this Court has heard and decided cases that are superficially similar to this case in recent years. In *Columbia Athletic Club v. Director of Revenue*, 961 S.W.2d 806 (Mo. banc 1998), the taxpayer offered membership in its club and access to facilities for “aerobic training, strength training, cardiovascular training and nutrition/weight control training.” *Columbia Athletic Club* at 807. In its decision, this Court concluded that athletic and fitness club dues paid to a facility that had as its primary purpose the facilitation of exercise for health benefits, rather than amusement or recreation, should not be subject to a levy of Missouri state and local sales tax. After *Columbia Athletic Club*, it appeared that application of this “primary purpose” test would be necessary in matters involving the application of §144.020.1(2) to gymnasiums, fitness clubs and other athletic facilities.

However, the “primary purpose” test contained in *Columbia Athletic Club* was subsequently abandoned by this Court. In *Wilson’s Total Fitness v. Director of Revenue*, 38 S.W.3d 424 (Mo. banc 2001), this Court was again faced with deciding whether membership fees and dues paid to a fitness center were subject

to sales tax. In *Wilson's*, the taxpayer offered membership in its club and access to strength training, cardiovascular training, aerobic training and nutrition/weight control training similar to the taxpayer in *Columbia Athletic Club*. *Wilson's* at 425. In addition, the club in *Wilson's* offered its members massage, swimming, basketball, volleyball, racquetball, tennis and other activities to its members. In its opinion, the Court recognized the practical difficulty in finding facts and applying the “primary purpose” test and found that it could not be applied in a “meaningful and consistent manner.” *Wilson's* at 426. As a result, the Court overruled *Columbia Athletic Club* and established a bright-line rule that “athletic and exercise or fitness clubs are places of recreation for purposes of section 144.020.1(2), and the fees paid to them are subject to sales tax.” *Wilson's* at 426.

Appellant is distinguishable from taxpayer in Wilson's

Appellant is not seeking to relitigate *Wilson's*, and acceptance of our argument does not require that the Court reinstitute and attempt to apply the “primary purpose” test that delineates the “fine line between exercise that is focused on health benefits and exercise that is primarily focused on recreation” that was overruled in *Wilson's*. *Columbia Athletic Club* at 810. We are not arguing that the services of Appellant are not taxable because Appellant's clients are deriving health benefits from exercise.

We note that this Court created the “primary purpose” test in *Columbia Athletic Club* in order to determine whether sales tax applied to the services provided by a multi-purpose fitness facility, which by its own description and self

admission, provided discrete services that were geared towards both self improvement through health benefits and recreation and entertainment. The “primary purpose” test was in essence a facts and circumstances test. When the “primary purpose” test was abandoned in *Wilson’s*, this Court recognized the “dual nature” of the services that were being provided by clubs like Columbia Athletic Club and Wilson’s Total Fitness Center, and its holding in *Wilson’s* was adopted because the “primary purpose” test was “unworkable in fact” since the “fine line between exercise that is primarily focused on health benefits and exercise that is primarily focused on recreation simply cannot be distinguished in a meaningful and consistent manner.” *Wilson’s* at 426. The fitness facility and business model at issue in *Wilson’s* was substantially similar to the facility in *Columbia Athletic Club* as both facilities sold the following: membership in a club and access to strength training, cardiovascular training, aerobic training, nutrition/weight control training and swimming, basketball, volleyball, racquetball, tennis and other activities to its members.

Unlike the taxpayer in *Columbia Athletic Club* and, more importantly, *Wilson’s*, Appellant is not operating a facility that can be characterized as a “dual nature” facility. Appellant is not selling or providing membership to a fitness club or mere access to a place to exercise in exchange for fees. Rather, Appellant operates a “pure” personal training business. As a result, there is a significant factual distinction between the business of the taxpayer in *Wilson’s*, an “athletic and exercise or fitness club” that maintains a membership and where recreation is

a significant or primary, and Appellant's business, which provides discrete, identifiable personal services in the areas of health and fitness screenings and evaluations, strength training instruction and program development and nutritional counseling in exchange for an hourly fee. This significant operational difference is relevant and material for purposes of applying Missouri's sales tax law and should be necessarily reflected in different Missouri state and local sales tax treatment.

We ask the Court to ask itself the following question: does the mere existence of certain physical assets in a place of business transform a business into a place of amusement, entertainment or recreation? Based on our reading of the decision rendered by the Administrative Hearing Commission in this case, the Commission's logic in its decision was as follows: Appellant's facility bears similarity to the facility in question in *Wilson's* in that Appellant's equipment includes stationary cycles, treadmills, stairmasters, climbers, elliptical training equipment and weights. Thus, it is a fitness center, and the fees paid to Appellant are taxable as fees paid to a place of amusement, entertainment or recreation.

We believe that it is incorrect to assume that Appellant's use of exercise equipment in the provision of its services makes Appellant's facility an athletic and exercise or fitness club that should be characterized as a place of amusement, entertainment or recreation. The use of such an assumption would transform all places that contain exercise equipment into "places of amusement," including but not limited to physical therapy centers, orthopedic centers, physical testing

centers, hospitals and sports training institutes. However, common sense and experience would tell us that the above businesses do not become “places of amusement” solely as a result of the presence and use of exercise equipment in the course of the provision of services. For example, if a physical therapy center provides charges for its professional service and these services are by necessity rendered in a facility that contains exercise equipment, are such physical therapy services suddenly transformed into taxable services because the services are fees paid to or in a place of amusement, entertainment or recreation? We do not believe that the tax imposition of §144.020.1(2) should be interpreted so broadly as to yield such unexpected results.

Rather than using the existence of the stationary cycles, treadmills, stairmasters, climbers, elliptical training equipment and weights as conclusory evidence that Appellant’s facility is, per se, a place of amusement, entertainment or recreation, the determination of whether Appellant is a place of amusement, entertainment or recreation should be based on the nature and character of the business. *Acme Music Company v. Director of Revenue*, Case No. 95-002608RV, Mo. Admin. Hearing Comm’n (October 25, 1996). In performing this analysis, a court must consider how a business is viewed within normal contemplation from an objective viewpoint. *Kanakuk-Kanakomo Kamps, Inc. v. Director of Revenue*, 8 S.W.3d 94 (Mo. banc 1999). This analysis should not focus on the subjective interests of a business’ patrons or clients. *Branson Scenic Railway v. Director of Revenue*, 3 S.W.3d 788 (Mo. Ct. App. 1999).

In *L & R Distributing, Inc. v. Missouri Dep't of Revenue*, 529 S.W.2d (Mo. 1975), the Missouri Supreme Court addressed whether a facility's furniture, fixtures or equipment alone could convert the facility into a "place of amusement or entertainment." In its opinion, the Court discussed this issue in the following passage:

Defendants argue, somewhat casually, that the introduction of a coin-operated machine converts that place, any place it seems, into a "place of amusement or entertainment," since it "provides entertainment." We do not believe that the legislature intended such broad and strained construction of a "place of amusement." To us, the contrary seems much more reasonable, that a hotel lobby, a restaurant, a motel, a bus station or an airport is not, within normal contemplation, a place of amusement or entertainment, and that it is not converted into such by the installation of a pinball machine.

L & R Distributing, Inc. at 378.

We believe a similar analysis to the one above is appropriate in this case. Appellant's physical building is its "office" and the pieces of exercise equipment inside are the "equipment" or "tools" that enable Appellant to provide its services. Within normal contemplation, this "office" would not be deemed to be a "place of amusement." In practical effect, Appellant's facility is no different than an office maintained by a physical therapist, nutritionist or other medical professional. Pursuant to the logic behind the opinion in *L & R Distributing, Inc.* the presence

and use of exercise equipment does not by itself convert Appellant's facility to a "place of amusement." We do not think that the Legislature in crafting §144.020.1(2) or the Missouri Supreme Court in writing its opinion in *Wilson's* intended to classify a business like Appellant's as a "place of amusement."

In conclusion, pursuant to §144.010.1(2) and §144.020.1(2), for the personal training fees at issue to be subject to sales tax, the following requirements must be satisfied: (1) Appellant must be found to operate a place of amusement, entertainment or recreation; (2) the personal training fees must constitute "fees paid to, or in a place of amusement, entertainment or recreation"; and (3) Appellant must be a "seller" engaged in "the business of . . . rendering a taxable service at retail in this state. As set forth above, Appellant should not be deemed to operate a "place of amusement" and the personal training fees at issue should not be subject to a levy of sales tax.

II. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN RULING THAT APPELLANT WAS NOT ENTITLED TO A REFUND OF SALES TAXES PAID ON APPELLANT’S PERSONAL TRAINING FEES BECAUSE THE EVIDENCE IN THIS CASE SHOWS THAT THE SERVICES BEING PROVIDED BY APPELLANT ARE NONTAXABLE SERVICES IN THAT THE FEES PAID IN EXCHANGE FOR APPELLANT’S PERSONAL TRAINING SERVICES, EVEN IF PAID TO, OR IN A PLACE OF ENTERTAINMENT, AMUSEMENT OR RECREATION, ARE FOR DISCRETE NON-AMUSEMENT SERVICES AND ARE OUTSIDE THE SCOPE OF THE TAX IMPOSITION SET FORTH IN SECTION 144.020.1(2).

In its decision, the Administrative Hearing Commission concluded that Appellant is a place of amusement and recreation and that, as a result, the personal training fees paid to Appellant were subject to sales tax. Appellant believes that this conclusion was incorrect as a matter of law. Pursuant to §144.010.1(2) and §144.020.1(2), for the personal training fees at issue to be subject to sales tax, the following requirements must be satisfied: (1) Appellant must be found to operate a place of amusement, entertainment or recreation; (2) the personal training fees must constitute “fees paid to, or in a place of amusement, entertainment or recreation”; and (3) Appellant must be a “seller” engaged in “the business of . . . rendering a taxable service at retail in this state. We believe that Missouri’s case

law supports the assertion that not all fees paid to a place of amusement or recreation are subject to tax. In other words, once a taxpayer is determined to be a place of amusement, it does not necessarily follow that all receipts generated by the taxpayer are subject to sales taxes. See *Old Warson Country Club v. Director of Revenue*, 933 S.W.2d 400 (Mo. banc 1996); *Meramec Valley Owners' Association, Inc. v. Director of Revenue*, 936 S.W.2d 794 (Mo. banc 1997); *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346 (Mo. banc 2001); *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999); *Six Flags Theme Parks, Inc. v. Director of Revenue*, 102 S.W.3d 525 (Mo. banc 2003) (“*Six Flags I*”); *Six Flags Theme Parks, Inc. v. Director of Revenue*, 179 S.W.3d 266 (Mo. banc 2005) (“*Six Flags II*”); *Eighty Hundred Clayton Corp. v. Director of Revenue*, 111 S.W.3d 409 (Mo. banc 2003)(dissent by Judge Stephen N. Limbaugh, Jr.).

In *Old Warson Country Club*, this Court ruled that assessments used by the country club solely for capital improvement, made against members of the club who obtained something other than the right to enjoy the use of the club's facilities were not subject to sales tax. The taxpayer had six classes of club members; only four membership classes were subject to the assessment. *Old Warson Country Club* at 401. Three of the classes, upon acceptance in the club, were issued certificates representing the members' equity in the club. These classes were also entitled to vote on all matters submitted to the membership, and were eligible to hold any official position in the club. The fourth class of members did not have

equity interests in the club, voting rights or the ability to hold any club office. For all classes, up to one-third of the assessments made were refundable. *Old Warson Country Club* at 402.

In its opinion, this Court found that in order for the sales tax to apply, the members' fees must be paid to or in a place of amusement, and the club must be a seller engaged in the business of rendering a taxable service at retail. *Old Warson Country Club* at 402. For three of the membership classes, the court determined that because the assessments were used to make capital improvements to the club, they were in reality an equity transaction which enhanced the value of the members' capital in the club and membership assets, separate and apart from any payment of operating expenses related to the receipt of any service. *Old Warson Country Club* at 403. The fourth class of membership, the court noted, lacked sufficient indicia of ownership to characterize the capital assessments paid as equity contributions. However, to the extent a member had a right to a refund, the assessment more resembles a loan. Thus, this class of member stood in the relationship of a creditor to the club, and the assessment was not taxable. The nonrefundable portion of the assessment, the court concluded, was a payment for the continued right to use the club's facilities, and was taxable as a fee for service. *Old Warson Country Club* at 404.

However, more relevant to the instant case than the above recitation of the majority's holding in the *Old Warson Country Club* case was the analysis

employed by Judge Robertson in his opinion concurring in result in part and dissenting in part. In his opinion, Judge Robertson stated as follows:

As I read the principal opinion, a payment by a Club member for which the member receives something other than recreational services is not subject to sales tax. *Old Warson Country Club* at 405.

Later in the opinion, Judge Robertson sets forth his views on the nature of the sales tax imposition set forth in §144.020 as follows:

Missouri imposes sales tax "upon all sellers for the privilege of engaging in the business of . . . rendering taxable service at retail in this state." For taxable services, "[a] tax equivalent to four percent of the amount paid [is due] for admission . . ., or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events. . . ."

I believe these statutory provisions create a link between the fee or charge paid and the purposes for which they are paid. Sales tax is due only where the fee or charge paid is paid for a taxable service at retail.

The principal opinion says that the question at the fulcrum of this case is whether the Club is rendering taxable service at retail generally. Respectfully, I suggest that the question framed by the principal opinion is incomplete. It is incomplete because it either assumes that all fees paid to the Club are in return for the Club rendering taxable services at retail or it believes that no such linkage between the fee and the taxable service is necessary.

I submit that the more accurate statement of the issue is whether the Club is rendering a taxable service at retail in return for the capital improvement assessment the members pay. In answering this question, I acknowledge that the record supports a conclusion that the payment of the assessment permits a member to continue to pay monthly dues to use the Club facilities. It does not necessarily follow, however, that payment of the assessment is the necessary quid pro quo for the Club rendering taxable service at retail to the member. *Old Warson Country Club* at 406.

We assert that the application of the logic used by the Court in its principal opinion and Judge Robertson in his concurring opinion in the *Old Warson Country Club* case should result in a finding that the fees paid in exchange for Appellant's personal training services are not subject to a Missouri state and local sales tax. Again, the basic fact is that Appellant's clients pay a set hourly fee in exchange for identifiable services. No other fees (initiation dues, membership fees or any other fee or charges) are made by Appellant to its clients. Since the *Old Warson Country Club* case requires "a link between the fee or charge paid and the purposes for which they are paid" and that "[s]ales tax is due only where the fee or charge paid is paid for a taxable service at retail," this Court should conclude that the fees paid to Appellant by its clients should be deemed non-taxable personal training services.

We believe that our above reading of *Old Warson Country Club* can be reconciled with the Court's holding in *Wilson's*. For example, in *Wilson's*, the

Court was faced with determining the taxability of membership dues. Based on the evidence and record in the case, the membership dues in question in *Wilson's* were not found to be paid in exchange for specific services rendered by the club. Rather, the membership dues were paid by the customers in exchange for general access to the club's facilities. The holding in *Wilson's* was specifically worded as follows: "athletic and exercise or fitness clubs are places of recreation for purposes of section 144.020.1(2) and the fees paid to them are subject to sales tax."³ We believe the "linkage" required by *Old Warson Country Club* as a

³ The term "club" is a term of art for purposes of Chapter 144. "Club" has been defined as follows:

While the word "club" has no very definite meaning, it may be defined generally as a voluntary association of persons for the purposes of a social, literary, or political nature, or the like. A club is a definite association organized for an indefinite existence; not an ephemeral meeting for a particular occasion, to be lost in a crowd at its dissolution. 14 C.J.S. *Clubs*, §1 (1971). See *Concord Recreation Center, Inc. v. Director of Revenue*, RS-88-0124, Mo. Admin. Hearing Comm'n (February 23, 1989).

Appellant's clients cannot be characterized as a "voluntary association of individuals coming together for a common purpose." Since no membership exists and since its clients cannot be collectively viewed as a "voluntary association of

precondition to taxation under 144.020.1(2) was present in the Court's analysis in *Wilson's* as shown by the following logic: (1) there was a fee paid to Wilson's by its customers; (2) payment of the fee granted such customer's access to use the facilities provided by Wilson's as a place of exercise; and (3) the fee paid for access to Wilson's facilities was deemed paid in exchange for a taxable service (i.e. access to a place of amusement or recreation).

Our case is different than *Wilson's*. The personal training fees paid by Appellant's clients can not be accurately characterized as fees paid for access to use Appellant's facility merely as a place of exercise. Rather, the evidentiary record in this case specifically shows that Appellant's business can most aptly be described as one that renders personal services to clients. At the hearing, a significant amount of testimony was given by Michael Jaudes, the President of Appellant in an effort to describe the services rendered to Appellant's clients. Specifically, Appellant is in the business of providing "one-on-one" testing, training, instruction and coaching in the areas of health and physical screenings and evaluations, strength training instruction and program development, nutritional counseling and lifestyle advice. As such, there is no "linkage" in the instant case between the payment of fees by Appellant's clients and the rendering of a taxable service by Appellant to such clients. In fact, the opposite is true, the

individuals coming together for a common purpose," Appellant should not be considered a "club."

payment of fees by Appellant clients were directly attributable to and in exchange for discrete non-taxable services. Pursuant to §144.020.1, the sales tax is only imposed on the retail sale of tangible personal property and certain enumerated services. This statutory scheme is supported by Missouri regulation 12 CSR 10-103.600, which states “the sale of a service is not subject to tax unless a specific statute authorizes the taxation of the service.” When analyzed separately and/or collectively, it is apparent that the services rendered by Appellant are highly-specialized personal services. Each client receives individualized instruction and advice from educated and accredited fitness professionals. There is no support in Missouri’s sales tax statutes, regulations or body of case law for subjecting such services to sales tax.

In addition, the approach requiring a “linkage” between the payment of fees and the rendering of a taxable service in exchange for such fees that was adopted by the *Old Warson* Court majority and Judge Robertson in his concurring opinion is supported by the Court’s discussion in *Kanakuk-Kanakomo Kamps, Inc. v. Director of Revenue*, 8 S.W.3d 94 (Mo. banc 1999). The *Kanakuk-Kanakomo Kamps* case involved the taxability of tuition fees paid to an operator of summer camps for children. The camps offered the children to opportunity to participate in sports related activities including the following: football, soccer, basketball, baseball, tennis, kayaking, archery, fishing, golf, karate, mountain biking, riflery, track and field, volleyball, weight training, wilderness camping, wrestling, gymnastics, cheerleading, dance, fitness and nutrition, nature and leather craft

activities, water slides, the blob, water zipline, jet ski, water trolley, canoeing, diving, sailing, swimming, wind surfing, frisbee, ultimate frisbee, frisbee golf, aerial tennis, cross country, adventure games, wall climbing, juggling, rappelling, ropes, challenge courses, pottery, crafts, barn swing, warball, musical and dramatic presentations, putt-putt and washers. *Kanakuk-Kanakomo Kamps, Inc.* at 96. The participation in the above activities was scheduled and structured, and campers were able to choose activities or sports to specialize in as “major” sports and “minor” sports, and one of the focuses of the camp was to improve the athletic skills of the children participating. *Kanakuk-Kanakomo Kamps, Inc.* at 96. In the case, the taxpayer conceded that the games and sports provided to campers at its facilities were commonly viewed as recreational, but Kanakuk argued that its tuition fees were not taxable under §144.020.1(2) as fees paid to a place of amusement or recreation because the purpose of its camp was “training, instruction and lessons in sports activities.” *Kanakuk-Kanakomo Kamps, Inc.* at 97.

Based on our reading of the opinion in *Kanakuk-Kanakomo Kamps*, the Court seemed willing to entertain the taxpayer’s argument that its tuition fees were not fees paid to a place of amusement, but, rather, the tuition was for the non-taxable service of “training, instruction and lessons in sports activities.” However, the Court decided against the taxpayer and found that the tuition fees were paid for nothing more than use of an amusement or recreational facility and participation in recreational activities provided by such facility. The Court based its decision on

its examination of the evidentiary record in the *Kanakuk-Kanakomo Kamps* case. This record consisted of exhibits (lists of activities and promotional literature) and testimony. Based on the Court’s examination of the evidence, it concluded that in the lists “no mention is made of instruction or lessons.” *Kanakuk-Kanakomo Kamps, Inc.* at 97. The Court also found that the promotional literature did “not suggest that extensive time is spent on instruction regarding the various sports activities” and did include descriptions of the camps such as places of amusement or recreation. *Kanakuk-Kanakomo Kamps, Inc.* at 97. As a result, the Court found that the exhibits (both the lists and promotional literature) were “compelling evidence that the purpose of the camps in recreation, games and athletics.” *Kanakuk-Kanakomo Kamps, Inc.* at 97. Similarly, the Court was unpersuaded by the “self-serving and subjective claims of camp officials and a few parents that testified at the hearing” regarding the instructional nature of the camps. *Kanakuk-Kanakomo Kamps, Inc.* at 98.

As an interesting note, the Court did discuss how the record in *Kanakuk-Kanakomo Kamps* differed from the record in *Columbia Athletic Club*. In *Columbia Athletic Club*, the Court examined the record and found “virtually no evidence to refute [taxpayer’s] proof that the primary focus of the facility was not recreational.” This was in direct contrast to the record in *Kanakuk-Kanakomo Kamps* in which “substantial, if not overwhelming, evidence establishes that the camps [were] places of recreation.” *Kanakuk-Kanakomo Kamps, Inc.* at 98.

Again, unlike the record in *Kanakuk-Kanakomo Kamps*, the evidentiary record in this case specifically shows that Appellant’s business can most aptly be described as one that renders personal services to clients. At the hearing at the Administrative Hearing Commission, exhibits were submitted into evidence and a significant amount of testimony was given by Michael Jaudes, the President of Appellant in an effort to describe the services rendered to Appellant’s clients. Specifically, evidence was presented that Appellant is in the business of providing “one-on-one” testing, training, instruction and coaching in the areas of health and physical screenings and evaluations, strength training instruction and program development, nutritional counseling and lifestyle advice. A summary of the evidence regarding the services provided by Appellant (both exhibits and testimony) presented at the hearing before the Administrative Hearing Commission is as follows:

Health and Physical Screenings and Evaluations

At the outset of each client relationship, Appellant’s representatives meets the client to conduct health and physical screenings and evaluations. (Tr. p. 22). At these screening and evaluation sessions, Appellant does clinical testing and physical testing that it describes as a “fitness physical.” (Tr. p. 22).

As part of this “fitness physical,” each client initially completes a “Personal Information and Health History. (Appellant’s Ex. 3). This evaluation form provides basic information such as height and weight, medical history, lifestyle history, musculoskeletal history, exercise history and nutritional history of each

client that assists Michael Jaudes in an initial evaluation that provides a baseline for the client's relationship with Appellant. (Appellant's Ex. 3). It is similar to a form that would be used when a person initiates a relationship with any healthcare professional, including medical doctors. (Tr. p. 24).

In the second phase of the "fitness physical," each client is subjected to a fitness evaluation. The results of this fitness evaluation are recorded for Appellant's use on a "Fitness Evaluation Results" form. (Appellant's Ex. 3). This evaluation is fairly comprehensive and includes the following: static body measurements, fitness tests, vital signs, body composition tests, typical activities, past injuries, family medical history, current medications and doctor's care. When taking static body measurements, each client's height, weight, neck size, shoulder measurement, chest measurement waist measurement, oblique measurement, hip measurement, upper arm measurement, forearm measurement upper thigh measurement, above knee measurement and calf measurement are recorded. (Appellant's Ex. 3). The fitness tests administered by Appellant include walking lunges, flexibility, squats, T.U.T., Harvard Step Test, push-ups, pull-ups, wall sit and sit-ups. (Appellant's Ex. 3). These tests are done in order to evaluate each client's physical ability in order to assist with the development of strength and cardiovascular training programs. For example, the Harvard Step Test was designed by Harvard University and is designed to measure how quickly a client's heart rate would return to a "normal," resting heart rate after performing a series of steps for three minutes at the rate of 96 steps a minute. (Tr. p. 31). The fitness

tests are designed to be repeated by each client at intervals during his or her relationship with Appellant. (Appellant's Ex. 3). The results in these subsequent tests assist Appellant in the charting the progress of the client and modify or enhance such client's programs. (Tr. p. 24-25). The results can also quantify improvements for the clients and give evidence of such client's "body transformation." (Tr. p. 25).

Strength Training Instruction and Program Development

Appellant also provides strength training instruction and program development. When developing each client's strength training program, Appellant uses each client's baseline results gleaned from the health and physical screenings and evaluations that have been conducted. Each client's program is customized and take into account where the client "stand[s] physically for their age, for their body mass index, for their weight, [and] for their fitness level. (Tr. p. 27).

During a typical strength training session, a client will train "at least two to three upper body parts, some section of the core, functional training, time under tension conditioning, some segment of the lower body and a thorough stretch at the end." In the environment provided by Appellant, more is accomplished by each client in his or her sixty (60) minute session than would typically be accomplished at a club or at home. (Tr. p. 27).

The design of the strength training program by Appellant and the instruction by its trainers are the essence of the services being rendered by Appellant. During each training session, the trainers are interacting with the

clients by coaching, teaching, correcting form and technique, assessing movement patterns, and monitoring heart rates. (Tr. p. 28). On an on-going basis, the strength training program results are documented and enhanced by the trainers based on the clients needs and progress. In fact, each training session “is completely customized” based on client feedback and trainer observation and judgment. (Tr. p. 30). The results of each training session are documented by the trainers on a training log. (Appellant’s Ex. 3).

Cardiovascular Training

In addition to strength training instruction and program development, each trainer consults with and advises clients on individual cardiovascular training programs. These programs are based on each client’s physical abilities and conditions and goals and evolve as the client/trainer relationship continues. The variables for each client program include type of cardiovascular training (i.e., treadmill, exercise bike, running, walking, etc.), the frequency of training per week, the duration of each session and the intensity of each session. (Appellant’s Ex. 3).

Nutritional Counseling and Lifestyle Advice

Appellant also provides individualized nutritional counseling to each of its clients. Prior to designing a nutritional plan, Appellant meets with its clients to determine what foods the client likes or dislikes, what foods are accessible to the client and what the client may eat in a typical day or week. (Tr. p. 26; Tr. p. 31). From these inputs, Appellant creates a customized, unique nutrition plan for each

client. (Tr. p. 26; Appellant's Ex. 3). As the relationship with the client evolves, the client's nutritional plan is altered and enhanced accordingly.

As set forth above, Appellant's employees maintain a "one-on-one," long term relationship with Appellant's clients. In order to receive Appellant's services and be present at Appellant's facility, each client must make an appointment for a specific day and time with such client's trainer. While at Appellant's facility, the clients are accompanied at all times by the client's trainer and receives training or counseling as desired by the client. Appellant does not offer any amenities to its clients to facilitate or promote client interaction with other clients or use of its facility for purposes other than receiving training or counseling services as desired by the client and prescribed by each client's trainer.

The evidence as summarized above was submitted into the record by Appellant in support of its position and was unrefuted by Respondent. In fact, the only evidence submitted into the record by the Respondent was the following: Respondent's Ex. A, which was a detailed report documenting the amount of Appellant's sales tax refund claim for the July 1, 2002 – September 30, 2002 tax period; Respondent's Ex. B, which was a detailed report documenting the amount of Appellant's sales tax refund claim for the October 1, 2002 – December 31, 2004 tax periods; and Respondent's Ex. C, which was a brochure produced by Appellant that contains photographs of Appellant's business location and some of the equipment that is located at Appellant's facility. At the Administrative

Hearing Commission, Respondent's case was not based on the existence of facts that negated Appellant's description of its business and services.

**Imposition on Sales Tax on Personal Training Fees is Contrary to the Express
Legislative Purpose and Scope of the Tax Imposition Intended by Chapter**

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Another line of cases supporting the assertion that not all fees paid to a place of amusement or recreation are subject to tax culminated in *Six Flags Theme Parks, Inc. v. Director of Revenue*, 179 S.W.3d 266 (Mo. banc 2005) (“*Six Flags II*”). See also *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346 (Mo. banc 2001); *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999); *Six Flags Theme Parks, Inc. v. Director of Revenue*, 102 S.W.3d 525 (Mo. banc 2003). In *Six Flags II*, the facts were as follows. Six Flags was a corporation that operated a theme park in Missouri. The park contained a water park area that contained rides requiring the use of an inner tube. Six Flags rented inner tubes to customers that could be used on the water rides and its wave pool. Six Flags paid sales tax on its acquisition of the inner tubes that it rented. Six Flags also paid sales tax on fees charged to its customers for inner tube rentals. Six Flags filed a claim for refund on the Missouri sales taxes paid on these rental fees pursuant to §144.020.1(8). *Six Flags II* at 267. In deciding in Six Flags favor and granting the requested refund, this Court had to reconcile two conflicting

statutes: §144.020.1(2) and §144.020.1(8). In its opinion, the Court stated as follows:

“[t]he plain, simple, and unambiguous terms of section 144.020.1(2), when read in isolation, would impose a tax upon the inner tube rentals, while the plain, simple, and unambiguous terms of section 144.020.1(8), when read in isolation, would not. This Court has previously addressed the interaction of these two sections for rentals and leases of property in places of amusement in *Six Flags Theme Parks, Inc. v. Director of Revenue*, 102 S.W.3d 525 (Mo. banc 2003) and *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999). These cases hold ‘that section 144.020.1(8) is a more specific statute than section 144.020.1(2),’ thus section 144.020.1(8) controls the situation when it is applicable. *Six Flags II* at 268.

The Court’s decision in *Six Flags II* to give precedence to the more specific statute over a general statute when both arguable applied was driven by the principles of statutory interpretation. It is a truism of Missouri law that the goal of statutory construction is to give effect to the legislature’s intent. In crafting the sales tax law set forth in Chapter 144, the General Assembly was intending to impose a tax on the retail sale of tangible personal property and certain enumerated services. In deciding this case, the AHC should have considered whether the conclusion it reached regarding the taxability of the personal training fees charged by Appellant could be harmonized with the legislature’s purpose of

taxing only certain enumerated services. In *State Ex. Rel. Kemp v. Hodge*, 629 S.W.2d 353, 359 (Mo. banc 1982), the Court states: “Another basic principle of statutory construction is that statutes relating to the same subject matter . . . are in pari material and should be construed together. Therefore we should apply a rule of statutory construction which proceeds upon the supposition . . . [that these statutes] were governed by one spirit and policy and were intended to be consistent and harmonious in their several parts and provisions . . . the law favors constructions [of statutes] which harmonize with reason, and which tend to avoid unjust, absurd unreasonable . . . results. . .” (citations omitted); *see also McCormack v. Stewart Enterprises, Inc.*, 916 S.W.2d 219, 225 (Mo. App. 1995)(provisions of a legislative act are to be construed together and read in harmony whenever possible, hence, a section of an act should not be considered in isolation but as part of the entire act). Appellant asserts that the AHC’s interpretation failed to take into consideration the overarching framework of Chapter 144 and the scope of the tax imposition intended by the General Assembly when it imposed a sales tax.

In order to apply the rules of statutory interpretation quoted above to the instant case, Appellant believes the Court should consider not just the language of §144.020.1(2) in determining whether or not the personal training fees are subject to tax but also the general scheme of taxation which the legislature created in Chapter 144. It would seem contrary to legislative intent if the general tax imposition of §144.020.1(2) was deemed to take precedence over the scope of the

sales tax imposition intended by the legislature generally and contrary to legislative intent if the personal training fees at issue are subjected to tax by the general “fees paid to or in a place of amusement” language in §144.020.1(2) since the training, instruction and coaching in the areas of health and physical screenings and evaluations, strength training instruction and program development, nutritional counseling and lifestyle advice that are provided in exchange for the personal training fees are clearly not included in the enumerated list of services subjected to tax by §144.020. Because §144.020.1(2) is a tax imposition statute, it must be construed strictly against the taxing authority. At some point, a line must be drawn to prevent the continued expansion by Respondent of the tax imposition set forth in § 144.020.1 through administrative fiat. This case presents the Court the opportunity to revisit its analysis on the breadth of the tax imposition intended by the legislature in § 144.020.1(2) and draw such a line.

Policy of the Department of Revenue

In further support of our position above, we believe that Respondent had a policy of not taxing services like those provided by Appellant during the tax periods at issue even if such services were provided in “a place of amusement or recreation.” At the hearing conducted on August 31, 2006, testimony was taken from Mr. Stan Farmer, the Director of the Division of Taxation, Department of Revenue. (Tr. p. 52). In his position with the Department of Revenue, Mr. Farmer had personal knowledge of the policies of the Department related to sales

taxation. (Tr. p. 52). In addition, he served on the Director's Tax Policy Group. (Tr. p. 52-53). As part of the direct questioning of Mr. Farmer, Appellant had Mr. Farmer review 12 CSR 10-108.100, Amusement, Entertainment and Recreation, a draft regulation that was not formally promulgated as an effective regulation. See Appellant's Ex. 8. Mr. Farmer was specifically questioned regarding paragraphs (3)(A) and (3)(D) of 12 CSR 10-108.100. 12 CSR 10-108.100(3)(A) provides as follows:

Amounts paid to a place of amusement for admission to or participation in the amusement are taxable. **Amounts paid for lessons are not subject to tax.**

12 CSR 10-108.100(3)(D) provides as follows:

Any amount paid in a place of amusement for optional services that are themselves an amusement, or that facilitate participation in or admission to an amusement, is subject to tax. **Any amount paid in a place of amusement for optional services that are not themselves an amusement, and that do not facilitate participation in or admission to an amusement, is not subject to tax.**

Appellant concedes that 12 CSR 10-108.100 was and is not an effective, binding regulation and it was not introduced into evidence as such. (Appellant's Ex. 8; Tr. p. 60). However, upon direct questioning, Mr. Farmer, an admitted policy making employee of the Department of Revenue, stated that 12 CSR 10-108.100, including sections (3)(A) and (3)(D), represent "policies" of the

Department of Revenue. (Tr. p. 58-59). Appellant believes that if 12 CSR 10-108.100(3)(A) and 12 CSR 10-108(3)(D) represent policies of the Director of Revenue that the Director should have based its review on Appellant's refund claim not on Appellant's presumed status as "a place of amusement" but rather on the taxability of the individual services that Appellant renders to its clients in its facility. As stated above, these services are akin to personal services that involve teaching, instruction and guidance. None of the services that are provided by Appellant to its clients would be considered taxable under §144.020, and none of the services are "themselves an amusement and do not facilitate participation in or admission to an amusement." Accordingly, proper application of the Director's policies as illustrated by 12 CSR 10-108.100 should have resulted in the Director's grant of Appellant's refund claim at the agency level.

Thus, the Director's denial of Appellant's claim should be deemed a "result of a change in policy or interpretation by the department." It is self-evident and patent that such policy or interpretation change affects all business that are, or potentially could be viewed, as operating "a place of amusement or recreation," including Appellant. Section 32.053 provides as follows:

Any final decision of the department of revenue which is a result of a change in policy or interpretation by the department effecting a particular class of person subject to such decision shall only be applied prospectively. Section 32.053 mandates that the Department cannot make such a policy change and give it retroactive effect. Pursuant to §32.053, Respondent's denial of

Appellant's refund claims should be deemed improper, and Appellant's refund claims for the tax periods at issue should be granted.

III. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN RULING THAT APPELLANT WAS NOT ENTITLED TO A REFUND OF SALES TAXES PAID ON APPELLANT'S PERSONAL TRAINING FEES BECAUSE THE DENIAL OF APPELLANT'S REFUND CLAIM WOULD BE VIOLATIVE OF MO. CONST. ART. X, SECTION 3, THE UNIFORMITY CLAUSE, IN THAT OTHER BUSINESSES THAT PROVIDE SUBSTANTIALLY SIMILAR PERSONAL TRAINING SERVICES ARE NOT SUBJECT TO AN IMPOSITION OF THE SALES TAX.

Violation of Missouri Uniformity Clause

Appellant believes that its business model, and the services that it renders to its clients, is no different from other similarly situated businesses that provide personal services in exchange for consideration. For example, there are other businesses that provide personal training services related to health and physical screenings and evaluations, strength training instruction and program development, nutritional counseling and lifestyle advice. Some of these other businesses provide services in facilities or geographic locations that are different than the facility used by Appellant in the course of providing its services. It is commonplace for other businesses that provide personal training services related to health and physical screenings and evaluations, strength training instruction and program development, nutritional counseling and lifestyle advice to operate out of

a more “traditional” office or to provide services at a client’s home, office or other location designated by a client.

Based on its past acts and positions, it is apparent that Respondent does not assert that the personal training services provided by such other similarly situated businesses from more “traditional” office spaces or at a client’s home, office or other location designated by a client are subject to tax pursuant to §144.020.1(2). For example, in a recent Administrative Hearing Commission case, *Wild Horse Fitness, LLC v. Director of Revenue*, Case No. 04-1443 RS (Mo. Admin. Hearing Comm’n, April 6, 1995), the Commission recognized in its decision that the act of personal training is itself a non-taxable service. In paragraph 7 of its “Findings of Fact” in the opinion, the Commission stated the following:

The amount paid by a consumer for personal training services that would be paid directly to a personal trainer for training at the consumer’s home, and not paid to Wild Horse, would not be subject to sales tax. Similarly, if a member of Wild Horse brought a personal trainer to Wild Horse and paid the personal trainer directly, such personal training services would not be subject to sales tax.

This particular “Finding of Fact” was made by the Commission based on a partial stipulation of fact agreed to by Respondent. Please note that we are not citing to this Administrative Hearing Commission decision for its precedential value in this Court. Rather, we are citing to this particular passage in order to show that the Respondent has taken the position in a factually similar case to ours

that personal training services are not taxable if provided in a client's home or other non-fitness center environment. We believe that this is indicative of Respondent's policy on this issue. In addition, the draft regulation that was not formally promulgated as an effective regulation discussed on pages 51-52 above, 12 CSR 10-108.100 Amusement, Entertainment and Recreation, supports the proposition that Respondent had a policy to not tax amount paid for instruction and amounts paid for services that are not themselves an amusement. (Appellant's Ex. 8; Tr. p. 58-60).⁴

We believe that the above discussion of *Wild Horse Fitness, LLC* and the proposed regulation 12 CSR 10-108.100 are sufficient to show that Respondent does not seek to impose sales tax on other service businesses that offer personal training and instructional services outside the scope of the tax imposition of §144.020. The disparity in the tax treatment of Appellant's services, as represented by the denial of its refund claims, as compared to the tax treatment of other providers of similar types of classes of personal training and instructional services is violative, as applied, of the Missouri Uniformity Clause set forth in Mo. Const. art. X, §3, which provides in relevant part:

⁴ Again, upon direct questioning, Mr. Farmer, a policy making employee of the Department of Revenue, stated that 12 CSR 10-108.100, including sections (3)(A) and (3)(D), represent "policies" of the Department of Revenue.

Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax.

Test Required by Uniformity Clause

Article X, §3, the uniformity clause, does not require absolute uniformity of taxation, but it does prohibit unreasonable or arbitrary taxation of the same class. *508 Chestnut, Inc. v. City of St. Louis*, 389 S.W.2d 823 (Mo.). Under this reasonableness standard, the proposed application of a statute will be sustained in the state legislature reasonably could have concluded that the challenged tax classification would promote a legitimate state purpose. See *Associated Industries of Missouri v. Director of Revenue*, 857 S.W.2d 182 (Mo. banc 1993). In *State v. Bates*, 224 S.W.2d 996, 1000 (Mo. banc 1949), the Court described the reasonableness standard as follows:

There is no precise yardstick as to reasonableness of classification and the rule of equality of necessity often tends to practical inequalities. Taxation is not an exact science and the tax acts are not to be condemned merely because unavoidable inequalities may result. But the classification cannot be “palpably arbitrary.”

In the instant case, we ask the Court to address the following question: what legitimate state purpose is being promoted by an interpretation of §144.020.1(2) that results in taxation of personal training services provided in Appellant’s business facility while substantially similar personal training services

being provided by other businesses in traditional office or home locations are not being taxed? We can propound no rational or reasonable basis for interpreting §144.020 in such a manner. In fact, an interpretation of §144.020.1(2) that results in taxation of Petitioner's personal training services is exactly the type of arbitrary or capricious result that should be prevented by application of Missouri's uniformity clause. *Southwestern Bell Telephone v. Morris*, 345 S.W.2d 62 (Mo. banc 1961). The uniformity clause is violated when a statute is applied in a manner that taxes transactions involving the same class or subclass of property or services differently based on the geographic location of the transactions where the location has no genuine relation to the purpose of taxation. *State ex inf. Dalton v. Metropolitan St. Louis Sewer District*, 275 S.W.2d 225 (Mo. banc 1955). If personal training services, including health and physical screenings and evaluations, strength training instruction and program development, nutritional counseling and lifestyle advice, are not taxable when rendered by businesses in client homes or other business offices, then interpreting §144.020.1(2) broadly enough to subject Appellant's personal training services to the Missouri sales tax would be unconstitutional as applied pursuant to the uniformity clause of the Missouri Constitution.

CONCLUSION

In view of the foregoing, we believe that the refund claims filed by Appellant with Respondent are proper and should be granted. Accordingly, we request that this Court reverse the decision of the Administrative Hearing Commission, find in favor of Appellant and grant the sales tax refunds for the July 1, 2002 – September 30, 2002 tax period in the amount of \$18,438.10 and for the October 1, 2002 – December 31, 2004 tax periods in the amount of \$177,441.62, plus statutory interest as calculated pursuant to section 144. 170.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that on October ____, 2007 two true and correct copies of the foregoing brief, as well as a labeled disk containing the same, were mailed postage prepaid to:

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The undersigned further certifies that the foregoing brief complies with Rule 55.03 and with the limitations contained in Rule 84.06(b) in that it contains 11,629 words, excluding the cover, certificate of service, certificate required by Rule 84.06(c), signature block and appendix.

The undersigned further certifies that the labeled disk filed contemporaneously with the hard copies of this brief has been scanned for viruses and is virus-free.

Scott R. Riley