No. SC88605

In the

Supreme Court of Missouri

MICHAEL JAUDES FITNESS EDGE, Inc.,

Appellant,

v.

DIRECTOR of REVENUE,

Respondent.

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

RESPONDENT'S BRIEF

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ATTORNEYS FOR RESPONDENT
DIRECTOR OF REVENUE

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JURISDICTIONAL STATEMENT

This case is a petition for judicial review from an Administrative Hearing Commission (AHC) decision, issued under the authority of § 621.050, RSMo 2000, denying Appellant's (Fitness Edge's) refund claim on sales taxes paid on hourly-based fees Fitness Edge charged its clients.

The issue in this case is whether Fitness Edge is entitled to a refund of $195,797.72 in sales taxes it collected from its clients and remitted to the Director beginning in the third quarter of 2002 and continuing until 2004. The sales tax at issue was collected on the hourly-based fees Fitness Edge's clients paid to use its fitness training center. Relying on this Court's decision in *Wilson's Total Fitness Center, Inc. v. Director of Revenue*, 38 S.W.3d 424 (Mo. banc 2001), the AHC determined that Fitness Edge was a place of recreation and that the hourly fees it charged clients were taxable under § 144.020.1(2), RSMo Cum. Supp. 2007, which taxes "fees paid to or in any place of amusement, entertainment or recreation." Resolution of this case, therefore, involves the construction of a state revenue law.

Jurisdiction is proper in this Court because this appeal involves the construction of one or more revenue laws of this state. MO. CONST. art V, § 3; § 621.189, RSMo Cum. Supp. 2007.

STATEMENT OF FACTS

Fitness Edge is a fitness training center.[1] Michael Jaudes, president of Fitness Edge, Inc., is a personal fitness trainer with certifications from national exercise and fitness organizations.[2] Before starting Fitness Edge, Mr. Jaudes provided private one-on-one fitness training to clients on an "appointment fee basis."[3] This training was conducted at a "third-party" location, usually the client's exercise or fitness club.[4] Mr. Jaudes opened Fitness Edge in response to his clients' complaints about their exercise clubs, such as overcrowded facilities, broken equipment, dirty locker rooms, and high membership fees that clients paid in addition to the personal training fee Mr. Jaudes charged.[5]

Fitness Edge's clients exercised in its 5000-square-foot "state-of-the-art personal training center" that was outfitted with a wide variety of exercise and fitness equipment.[6] Fitness Edge did not charge membership dues; instead, clients paid between $62 and $75

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[1] (L.F. 22).

[2] (L.F. 22; Tr. 8-10).

[3] (Tr. 9).

[4] (Tr. 9-10, 20-21).

[5] (Tr. 9-10, 20-21).

[6] (L.F. 22; Tr. 50; Pet's Ex. 2; Resp's Ex. C). Petitioner's website (Ex. 2) and brochure (Ex. C) stated that the size of the "training center" was 7000 square feet. Mr. Jaudes said this was a misprint. (Tr. 50).

per hour to Fitness Edge for a sixty-minute one-on-one exercise session with one of the twenty-three personal trainers employed full-time by the company.[7] Fitness Edge's brochure and website touted that its training staff was certified by national fitness and exercise organizations and that the staff's "combination of expertise and dedication translate into making your workout plan both fun and a success."[8]

New clients filled out a four-page personal-information and health questionnaire and met personally with Mr. Jaudes, who did a thorough physical-fitness and nutritional assessment of them.[9] Mr. Jaudes then developed a customized workout and nutrition plan for each client.[10] A customized and planned workout allowed clients to accomplish more than they would otherwise accomplish in other health clubs.[11]

When clients appeared for their scheduled appointments, they were met at the front door by a trainer who accompanied them to the exercise area.[12] This area contained a wide variety of cardiovascular and weightlifting equipment normally found in any health club or fitness center.[13] This equipment included upright and recumbent

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[7] (L.F. 22; Tr. 8-9, 18, 23, 27-28, 34, 38, 49-50).

[8] (Pet's Ex. 2; Resp's Ex. C).

[9] (L.F. 22-23;Tr. 22, 24, 31).

[10] (L.F. 23; Tr. 26, 29-30).

[11] (L.F. 23; Tr. 27-28).

[12] (L.F. 23; Tr. 27-28, 51).

[13] (Tr. 45-46).

Lifecycles (stationary bikes), Versa Climbers, treadmills, bicep machines, elliptical machines, step mills, "cross-robic" machines, resistance machines, and weights.[14]

The fitness trainer, who accompanied the client during the workout appointment, "coached" the client through the workout plan.[15] Clients' appointments were staggered to prevent overcrowding, which allowed clients to have access to the workout equipment they needed during their exercise session.[16] Clients who scheduled more than two exercise appointments per week could, without any additional charge, use the facility's cardiovascular equipment without a trainer.[17]

The workout area was equipped with several televisions that clients could watch while exercising.[18] The facility also had "luxurious locker rooms with showers, complimentary towel service, and toiletries."[19] Clients could also make purchases at the facility's "sport bar," which sold "supplements, sport drinks, and Fitness Edge logo workout apparel."[20]

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[14] (L.F. 22; Tr. 43-46).

[15] (L.F. 22; Tr. 28, 38).

[16] (Tr. 47-48).

[17] (L.F. 22; Tr. 38-39, 49).

[18] (L.F. 22; Tr. 43-44; Resp's Ex. C).

[19] (Pet's Ex. 2; Resp's Ex. C).

[20] (Tr. 50; Pet's Ex. 2; Resp's Ex. C).

Fitness Edge had between 400 and 500 clients, who were doctors, lawyers, CEOs, professional athletes, and other "high-profile" individuals, who spent between $5000 and $10,000 per year for personal-fitness training at the facility.[21] Other than its hourly-based fitness-training fees (and the relatively small amount of money derived from the sale of supplements, drinks, and other items), Fitness Edge had "no other form of revenue whatsoever."[22]

Fitness Edge filed a refund claim with the Director seeking the return of $195,879.72 in sales taxes that its clients paid on appointment-based fees charged in the third quarter of 2002 through the end of 2004.[23] After the Director denied the refund claim, Fitness Edge appealed to the AHC.[24] Relying on this Court's decision in *Wilson's Total Fitness v. Director of Revenue*, 38 S.W.3d 424 (Mo. banc 2001), the AHC determined that Fitness Edge was a place of recreation, that its appointment-based hourly

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[21] (Tr. 19, 33-35, 49).

[22] (Tr. 34, 50; Pet's Exhibits 4 and 5; Resp's Exhibits A and B).

[23] Fitness Edge actually filed two separate claims. The first was for $18,438.10 in sales taxes paid during the third quarter of 2002. (L.F. 21, 24). The other was for $177,441.62 in sales taxes paid in the fourth quarter of 2002 and for the years 2003 and 2004. (L.F. 21, 24). The AHC later consolidated both claims into one case. (L.F. 21).

[24] (L.F. 21, 24).

fees were subject to sales tax, and that it was not entitled to a refund of the sales taxes charged on those fees.[25]

[25] (L.F. 28).

ARGUMENT

I (Fitness Edge is a place of recreation).

The AHC properly denied Fitness Edge's refund claim for the sales taxes its clients paid on the fees Fitness Edge charged for fitness training and use of its exercise facility because under this Court's decision in *Wilson's Total Fitness v. Director of Revenue,* all exercise or fitness clubs are considered places of recreation and the fees they charge are subject to sales tax. (Responds to Appellant's Points I and II.)

In *Wilson's Total Fitness v. Director of Revenue,* 38 S.W.3d 424 (Mo. banc 2001), this Court held that all exercise or fitness clubs are places of recreation under the sales tax law and that the fees paid to them are subject to tax. Although Fitness Edge claims that it is not a place of recreation because its fees were charged for fitness-training services, the record supports the AHC's decision in that it shows that the fees Fitness Edge charged did not simply pay for the services of a fitness trainer, but paid for the clients' use of Fitness Edge's extensive exercise facility. The fact that Fitness Edge combined fitness-training services with access to, and use of, its fitness and exercise center makes it no less a place of recreation than the facilities held to be places of recreation in *Wilson's Total Fitness*.

A. Standard of review.

"This Court's review of the AHC's decision is limited." *Kanakuk-Kanakomo Kamps, Inc. v. Director of Revenue*, 8 S.W.3d 94, 95 (Mo. banc 1999). The AHC's decision "shall be upheld" when authorized by law, supported by competent and

substantial evidence upon the record as a whole, and not clearly contrary to the reasonable expectations of the General Assembly. *Id.*; § 621.193, RSMo 2000. Under this standard this Court essentially adopts the AHC's factual findings. *See Concord Publ'g House v. Director of Revenue*, 916 S.W.2d 186, 189 (Mo. banc 1996). This Court views the evidence "in a light most favorable to the [AHC's] decision, together with all reasonable inferences that support it." *Kanakuk*, 8 S.W.3d at 95.

B. Sales tax applies to all fees paid to a place of recreation.

State law authorizes a tax "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." Section 144.020.1, RSMo Cum. Supp. 2007. The legislature intended to broadly tax all sales of tangible personal property or taxable services and to identify specific tax rates applicable to particular types of sales: "Considered in context, the statute as a whole evinces a legislative intent to tax all sellers for the privilege of selling tangible personal property or rendering a taxable service." *J.B. Vending Co. v. Director of Revenue*, 54 S.W.3d 183, 188 (Mo. banc 2001). Section 144.020.1 divides sales into eight categories relating to sales of either personal property or taxable services and applies a specific tax rate for each category. *Id.* One of these categories is the so-called amusement tax, 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;

Section 144.020.1(2), RSMo Cum. Supp. 2007.

Authority for this tax is also found in the statutory definition of "sale at retail," which includes "[s]ales of admission tickets, cash admissions, charges and fees to or in places of amusement, entertainment and recreation, games and athletic events." Section 144.010.1(10), RSMo Cum. Supp. 2007. Sellers are required to pay sales tax on their gross receipts, which is composed of "the total amount of the sale price of the sales at retail." Section 144.021, RSMo Cum. Supp. 2007.

This Court has held that the "simple general language" of the amusement tax "is not limited or qualified in any way." *Blue Springs Bowl v. Spradling*, 551 S.W.2d 596, 599 (Mo. banc 1977). "It applies to *all* such fees paid to or in" places of amusement. *Id.* (emphasis in original); *see also Bally's LeMan's Family Fun Centers, Inc. v. Director of Revenue*, 745 S.W.2d 683, 685 (Mo. banc 1988) ("Section 144.020.1(2) . . . expresses a legislative intent to tax all fees paid in places of amusement . . . .").

Consequently, to find a transaction taxable under the amusement tax only "two elements are essential, —that there be fees or charges and that they be paid in or to a place of amusement." *L & R Distrib., Inc. v. Missouri Dep't of Revenue*, 529 S.W.2d 375, 378 (Mo. 1975). A location in which amusement or recreational activities "comprise more than a *de minimis* portion of the business activities" occurring at that location is considered a place of amusement or recreation under the sales tax law. *See Spudich v. Director of Revenue*, 745 S.W.2d 677, 682 (Mo. banc 1988); *Wilson's Total Fitness*, 38 S.W.3d at 426.

C. Fitness Edge is a place of recreation.

The issue in this case is controlled by this Court's decision in *Wilson's Total Fitness*, which unequivocally held that "[a]thletic and exercise or fitness clubs are places of recreation for the purposes of section 144.020.1(2) [the amusement tax] and the fees paid to them are subject to sales tax." *Wilson's Total Fitness*, 38 S.W.3d at 426. Although Fitness Edge recognizes the holding in *Wilson's Total Fitness*, it nevertheless contends that the fees it charged clients were not subject to sales tax.

Fitness Edge does not dispute that its facility constitutes a location or place under the sales tax law or that it charges its clients fees to participate in activities occurring in its facility. Instead, it argues that it is charging fees for personal-fitness training, which it claims is not recreational in nature, and, thus, its fees do not fall under the amusement tax. Although Fitness Edge claims that it is not asking this Court to overrule *Wilson's Total Fitness*, its arguments amount to nothing more than an attempt to beguile this Court into reestablishing the previously rejected primary-purpose test first established in *Columbia Athletic Club v. Director of Revenue*, 961 S.W.2d 806 (Mo. banc 1998). What Fitness Edge overlooks is that the distinction in the law it seeks to establish in this case was comprehensively and indisputably rejected by this Court in *Wilson's Total Fitness*, which expressly overruled *Columbia Athletic Club*. *See Wilson's Total Fitness*, 38 S.W.3d at 426.

The notion that exercise "has both health-related aspects and recreation-related aspects" and that this "dual nature of exercise poses a dilemma when attempting to determine whether an exercise facility is subject to sales tax" was first discussed in

Columbia Athletic Club. 961 S.W.2d at 810. The argument advanced in that case was that fees paid for exercise that was primarily recreational were subject to the amusement tax, but fees paid for exercise that was undertaken primarily to benefit one's health were not. Thus was born the primary-purpose test, which sought to draw a line between the primary and incidental purposes of exercise. Under this test, if the primary purpose of an exercise facility was to provide health benefits, the fees charged to use such a facility were not taxable.

But in *Wilson's Total Fitness*, this Court rejected the idea that Missouri sales tax law recognized a distinction between the health and recreational aspects of exercise. In expressly overruling *Columbia Athletic Club*, the court in *Wilson's Total Fitness* abandoned the primary-purpose test and "reinstated" the *de minimis* test first enunciated in *Spudich*. *Wilson's Total Fitness*, 38 S.W.3d at 427. Under that test, a location is considered a place of recreation under the sales tax law if more than a *de minimis* portion of the business activities conducted at that location involves recreation. *See Spudich*, 745 S.W.2d at 682. The court in *Wilson's Total Fitness* noted that whether the distinction between health-related and recreational-related exercise was valid in theory was of no moment because that distinction was "unworkable" in practical terms. *See Wilson's Total Fitness*, 38 S.W.3d at 426. The court reached this conclusion based on the anomalous results produced by the primary-purpose test: "in the same community, one health and fitness center's membership fees are subject to state sales tax, while another health and fitness center's membership fees are not." *Id.*

Fitness Edge attempts to dismiss the clear holding of *Wilson's Total Fitness* by arguing that it is not a "dual-nature" facility, that recreation is not a "significant or primary" part of its business, and that it is not an exercise or fitness "club" selling memberships. But these arguments were implicitly rejected when this Court decided *Wilson's Total Fitness*. If this Court had intended to establish a sales-tax distinction between health- and recreational-related exercise it surely could have done so in *Wilson's Total Fitness*. Despite the fact that the exercise facility described in *Columbia Athletic Club* was distinguishable from the facility in *Wilson's Total Fitness* in the same manner that Fitness Edge claims it is, the court in *Wilson's Total Fitness*—despite the urging of the concurring opinion in that case—refused to find that such a distinction exists under Missouri sales tax law. *See Wilson's Total Fitness*, 38 S.W.3d at 426-27. Instead, this Court established a bright-line rule holding that all athletic or exercise clubs are considered places of recreation under the sales tax law. *Id.*

The fallacy of Fitness Edge's arguments can be seen when one recognizes that the exercise facility described in *Columbia Athletic Club* was functionally identical to the one Fitness Edge operated. In *Columbia Athletic Club*, the facility offered aerobics, strength training, and cardiovascular training, which included the exercise equipment needed to accomplish these tasks. *Columbia Athletic Club*, 961 S.W.2d at 807. Also offered was nutrition and weight-control training through the facility's nutritional program. *Id.* The facility did not offer any facilities for activities traditionally considered recreational, such as tennis, racquetball, basketball, or swimming. *Id.*

In *Columbia Athletic Club*, new members typically met with a membership coordinator who completed a personal performance analysis of the member and formulated an exercise plan to meet that member's goals. *Id.* Members generally worked out on an individual basis, and certified trainers assisted members during workouts and encouraged members to increase the frequency and intensity of their workouts. *Id.* The facility played upbeat background music and had televisions in the cardiovascular area for members to watch. *Id.*

The fitness center in *Columbia Athletic Club* did not operate "as a social club." *Id.* Its "major focus [was] improving health through physical exercise." *Id.* Many members were referred to the facility by a physician and some even received reimbursement of the fees charged from their health insurers.[26] *Id.* Monthly or yearly membership dues allowed a member access to the facility, use of the equipment, and assistance of the training staff. *Id.* Members paid extra, however, for the services of "personal trainers." *Id.*

The concurring opinion in *Wilson's Total Fitness* suggested that this Court could find that the facility described in *Columbia Athletic Club* was distinguishable, for sales tax purposes, from the facility in *Wilson's Total Fitness*, which offered activities traditionally considered recreational, such as swimming, massage, basketball, volleyball, racquetball, and tennis. *Wilson's Total Fitness*, 38 S.W.3d at 427 (Limbaugh, J.,

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[26] Fitness Edge's president testified that some of its clients were referred to it by doctors. (Tr. 22-23).

concurring). But, despite the fact that the record in *Wilson's Total Fitness* showed that the "primary purpose" of the facility was ostensibly recreational, while the "primary purpose" of the facility in *Columbia Athletic Club* was not, the court in *Wilson's Total Fitness* unequivocally refused to draw this distinction.

Fitness Edge argues that it is simply charging fees for fitness-training services and not for access to, or use of, its exercise facility. This argument might have some traction if all Fitness Edge did was assess its clients' physical abilities and exercise goals and then develop an exercise and fitness program for them to follow. But Fitness Edge does much more than that. It not only develops exercise programs for its clients, it also provides a complete exercise facility for its clients to use. In fact, the record shows that while many clients were already paying Mr. Jaudes's for personal-fitness training in other health clubs, Fitness Edge was founded to join personal-fitness training with a fitness center that was not overcrowded, dirty, or outfitted with broken exercise equipment.[27] Fitness Edge's clients were tired of paying "premium" fees for a personal trainer only to have their exercise regimen thwarted when they were effectively denied access to exercise equipment because of overcrowding or disrepair.[28]

Moreover, clients also benefited by paying a single hourly-based fee to Fitness Edge for both personal-fitness training and use of the exercise facility, rather than separately paying for both a membership fee to an exercise facility or fitness center and a

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[27] (Tr. 9-10, 20-21).

[28] (Tr. 47).

separate fee to Mr. Jaudes for personal-training services. Tellingly, all fees were payable to Fitness Edge, Inc., not to the individual fitness trainers.[29]

Fitness Edge's argument that its clients are simply paying for fitness-training services and not for access to the exercise facility founders on this record. The evidence showed that Fitness Edge was opened so that clients could combine personal fitness training with the use of operable exercise equipment in a facility that was not overcrowded or dirty.[30] Moreover, Fitness Edge charged hourly-based fees that correlated with a sixty-minute workout session using the facility's exercise equipment while accompanied by a fitness trainer. Access to the facility and use of the exercise equipment went hand-in-glove with the fitness training services. Nothing in the record showed that any client paid fees solely for personal training services without using the exercise equipment.

The fact that Fitness Edge's clients were accompanied by a fitness trainer during their workout appointments does not alter its character as a place of recreation. *Compare Kanakuk*, 8 S.W.3d at 98 (holding that "the presence or absence of skilled coaching during the performance of sports activities does not change the nature or purpose" of the taxpayer's summer camp as a place of recreation). In fact, clients purchasing two or

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[29] (Tr. 38).

[30] (Tr. 9-10, 20-21).

more training sessions per week could use Fitness Edge's cardiovascular equipment at other times on their own without an appointment with a trainer.[31]

Nothing in this Court's opinion in *Wilson's Total Fitness* suggests that the taxability of fees paid to a place of recreation turns on the manner in which the facility collects its fees, whether they are "membership" dues or hourly-based fees. Simply because Fitness Edge chose to charge hourly-based fees to its clients for their use of its exercise facility has no bearing on the taxability of those fees under the sales tax law. Fitness Edge's president implied that many fitness centers charge a monthly-based fee simply to generate income.[32] The fact that Fitness Edge can generate substantial income because it has clients willing to pay hourly-based fees for exercise while accompanied by a fitness trainer does not transform it into something other than a place of recreation.

Fitness Edge is basically an exercise or fitness club for people who can afford to pay more for the privilege of combining personal-fitness training with an accessible, "upscale personal private" exercise facility.[33] Fitness Edge's president testified that his clients (doctors, lawyers, CEOs and professional athletes), whom he described as "high-profile individuals" and the "best of the best," paid an average of $5000 to $10,000 per year to use Fitness Edge's facilities.[34] He also described Fitness Edge as an "upscale

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[31] (L.F. 22; Tr. 38-39).

[32] (Tr. 33).

[33] (Tr. 10).

[34] (Tr. 18-19, 33-35).

unique environment in the world of health and fitness" and as the "Ritz-Carlton of fitness."[35] But the sales tax law contains no tax breaks for people who pay more for a particular taxable service than what others may be willing to pay. Even the Ritz-Carlton is responsible for collecting and remitting sales tax on the charges it makes.

Although it denies that it is seeking to overturn *Wilson's Total Fitness*, Fitness Edge is simply resurrecting the argument already rejected by this Court in that case. Fitness Edge offers no compelling legal or policy reasons why this Court should revisit its decision in *Wilson's Total Fitness* and return to the days in which the taxability of the fees charged by an exercise facility turned on idiosyncratic evidentiary details like whether the facility had tennis or basketball courts or whether the facility's operators or patrons intend health-related, rather than recreational, exercise. This assumes, of course, that such a distinction can be objectively proved through the self-serving testimony of the patrons who actually pay the sales tax and the facility operators who would reap the windfall of any tax refund. *See Kanakuk,* 8 S.W.3d at 98 (holding that a taxpayer's "self-serving and subjective" claims that its sales are not taxable is "suspect" and may be rejected by the AHC); *Bolivar Road News, Inc. v. Director of Revenue,* 13 S.W.3d 297, 302 (Mo. banc 2000) (the AHC could properly reject the taxpayer's "self-serving and subjective" claims that it did not operate a place of amusement).

This Court has repeatedly rejected similar claims made by taxpayers who suggested that the fees they charged were not taxable under the amusement tax because

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[35] (Tr. 18).

the services provided patrons with something beyond just recreation or amusement. *See Surrey's on the Plaza, Inc. v. Director of Revenue*, 128 S.W.3d 508, 510 (Mo. banc 2004) (rejecting the claim that fees charged for horse-drawn carriage rides were not taxable because the rides were educational); *Bolivar*, 13 S.W.3d at 302 (rejecting the claim that fees paid to view pornographic videos in private booths were not taxable because patrons were simply previewing videos before purchasing); *Kanakuk*, 8 S.W.3d at 98 (rejecting the claim that summer camp fees were not taxable because athletic instruction was provided); *Fostaire Harbor, Inc. v. Director of Revenue*, 679 S.W.2d 272, 273 (Mo. banc 1984) (rejecting the argument that fees for helicopter rides were not taxable because the rides were educational);

This Court in *Wilson's Total Fitness* recognized the untenable results produced by the health- vs.-recreational-exercise theory and appropriately created a bright-line rule consistent with the taxing statute that provides clear guidance to both taxpayers and the Director alike. This Court should refuse the invitation to erase that bright line, absent some action by the legislature. Since more than a *de minimis* portion of Fitness Edge's business activities related to exercise and the use of Fitness Edge's fitness center, the AHC properly determined that Fitness Edge was a place of recreation and that the fees it charged for access to its facility were subject to sales tax.

D. Fitness Edge's remaining arguments are unconvincing.

Fitness Edge argues that if this case is decided against it, any location containing exercise equipment, such as a physical therapist's office, would be considered a place of recreation under the sales tax law. But the difficulty in separating the health- and

recreational-related aspects inherent in a commercial exercise facility or fitness center, which led this Court to the bright-line rule in *Wilson's Total Fitness*, is simply not present in the physical-therapy situation. "Physical therapy" involves examination and treatment "to assess, prevent, correct, alleviate, and limit physical disability, movement dysfunction, bodily malfunction and pain from injury, disease and any other bodily condition." Section 334.500(4), RSMo 2000. Moreover, while licensed physical therapists may develop fitness or wellness programs for healthy individuals, they may not examine or treat any person without a prescription or order from a physician, chiropractor, dentist, or podiatrist. Section 334.506, RSMo Cum. Supp. 2007. Consequently, the treatment by a physical therapist of a patient through the use of exercise equipment has no recreational aspect within normal contemplation.

Next, Fitness Edge argues that it is not a "club" like the facilities at issue in *Columbia Athletic Club* and *Wilson's Total Fitness* because the hourly fees its clients pay are for personal services. But, as mentioned above, whether Fitness Edge charged hourly fees or monthly dues does not alter its character as a place of recreation. The fact that the facility in *Columbia Athletic Club* was not considered a "social club" did not save it from the bright-line rule established in *Wilson's Total Fitness*. Although the facility at issue in *Wilson's Total Fitness* charged "membership fees," nothing in that opinion suggested that it operated as a "social club" or that its patrons had any ownership interest in the facility. The character or manner of the fees charged by a fitness or exercise facility does not determine whether they are taxable. Rather, the focus is on the service being provided in

return for those charges. Here, the services Fitness Edge provided made it a place of recreation under the sales tax law.

To support its argument that its hourly-based fees are for non-recreational activities outside the scope of the sales tax law, Fitness Edge relies on two inapposite cases in which this Court held that certain highly-particularized fees paid to places of amusement or recreation were not subject to the amusement tax. *See Six Flags Theme Parks, Inc. v. Director of Revenue*, 179 S.W.3d 266 (Mo. banc 2005); *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999); *Meramec Valley Owners' Ass'n, Inc. v. Director of Revenue*, 936 S.W.2d 794 (Mo. banc 1997); *Old Warson Country Club v. Director of Revenue*, 933 S.W.2d 400 (Mo. banc 1996). But *Meramec Valley* and *Old Warson* dealt with fees levied for non-recreational activities against members holding an equity interest in the business. *See Meramec Valley*, 936 S.W.2d at 796; *Old Warson*, 933 S.W.2d at 403-04. And *Six Flags* and *Westwood* involved a conflict between the amusement tax and a specific exemption contained within the lease tax that occurred when places of amusement or recreation leased personal property to its patrons. *See Six Flags*, 179 S.W.3d at 277-79; *Westwood*, 6 S.W.3d at 889. Nothing in the record of this case suggests that Fitness Edge's clients had any equity ownership in the business or that Fitness Edge charged a fee to lease equipment.

Fitness Edge's next argues that imposing sales tax on its fees is contrary to legislative intent because fitness training is not included in the enumerated list of services subject to sales tax found in § 144.020. Since the language imposing a tax on fees paid to places of amusement was adopted by the legislature seventy-five years ago in 1933, and

was expanded two years later in 1935 to include places of entertainment or recreation, it is not surprising that fitness clubs are not specifically mentioned. 1933-1934 Mo. Laws Extra Session 157; 1935 Mo. Laws 415; *see also Columbia Athletic Club*, 961 S.W.2d at 812 (Benton, J., dissenting). But then again, neither are amusement parks, golf courses, movie theaters, bowling alleys, or a whole host of other locations that are considered places of amusement or recreation under the sales tax law. Under Fitness Edge's argument, no location could be considered a place of amusement or recreation under the sales tax law unless it was specifically identified in the statute. This is certainly not what the legislature intended, and this Court's cases construing the sales tax law do not support such an argument.

The more compelling legislative-intent argument rests on two well-established canons of statutory construction. First, construction of a statute by this Court becomes part of the statute as if it had been amended by the legislature. *See Dow Chemical Co., Inc. v. Director of Revenue*, 834 S.W.2d 742, 745 (Mo. banc 1992). Second, when the legislature, after a statute has received a settled judicial construction by a court of last resort, reenacts the statute, or carries it over without change, it will be presumed that the legislature knew of and adopted the construction. *See Blue Springs Bowl*, 551 S.W.2d at 600-01. Although this Court decided *Wilson's Total Fitness* in March 2001, the legislature reenacted the statutory provisions taxing fees paid in or to places of recreation in 2001 and 2005, yet it made no changes to undo this Court's holding that exercise or fitness clubs are considered places of recreation under the sales tax law. *See* 2005 Mo. Laws 810; 2001 Mo. Laws 1441 (definition of "sale at retail").

Finally, Fitness Edge relies on a draft rule never enacted by the Director of Revenue and a notice the Director issued advising taxpayers of this Court's decision in *Wilson's Total Fitness* to support its argument that the denial of its claim constitutes a change in policy change that should only apply prospectively under § 32.053, RSMo 2000, which provides:

> 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, RSMo 2000.

Appellant does not explain how a rule never enacted by the Director constitutes a policy change. In fact, Appellant has failed to demonstrate that even if the Director has a particular policy not to tax certain fees charged by a place of amusement which are not related to amusement activities, that this alleged policy represented any *change* in policy. Moreover, "the incidence of taxation is determined by statute and the Director has no power, through regulations or otherwise, to change the force of the law." *May Dept. Stores Co. v. Director of Revenue*, 791 S.W.2d 388 (Mo. banc 1990). Finally, to the extent that a decision by this Court construing the sales tax laws can be described as a "change in policy," this "change" occurred in 2001 when this Court decided *Wilson's Total Fitness*. That decision was handed down more than a year before the tax periods at issue in this case.

II (Constitutional claim—tax uniformity).

The AHC's decision in this case does not offend the uniformity requirement contained in article X, section 3 of the Missouri Constitution because the fees charged by Fitness Edge are subject to sales tax in the same manner as the fees charged by any other exercise or fitness facility. (Responds to Appellant's Point III.)

Fitness Edge claims that the denial of its refund claim violates the Missouri Constitution's uniformity requirement on the levy of taxes:

> 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. All taxes shall be levied and collected by general laws and shall be payable during the fiscal or calendar year in which the property is assessed. Except as otherwise provided in this constitution, the methods of determining the value of property for taxation shall be fixed by law.

MO. CONST. art X, § 3.

The constitution does not, however, bar distinctions to the degree Fitness Edge suggests. Its effect is more limited. "The states have . . . considerable freedom in making classifications in order to produce reasonable systems of taxation." *Gammaitoni v. Director of Revenue*, 786 S.W.2d 126, 131 (Mo. banc 1990). "The state . . . is not prohibited from treating one class of taxpayer differently from others." *McKinley Iron, Inc. v. Director of Revenue*, 888 S.W.2d 705, 708 Mo. banc 1994). "It is only necessary that there be a reasonable basis for the . . . differentiation and that all persons similarly

situated . . . be treated alike." *Bopp v. Spainhower*, 519 S.W.2d 281, 289 (Mo. banc 1975). "The test is whether the difference in treatment is an invidious discrimination." *McKinley Iron*, 888 S.W.2d at 709 (quoting *Bopp*, 519 S.W.2d at 289). "Clearly, there can be no invidious discrimination where two parties are not similarly situated, or the law is applied to them in the same manner." *Id.*

Although Fitness Edge does not directly challenge the taxing statute itself, the General Assembly's decision to tax fees or charges paid in, or to, places of amusement, entertainment, or recreation is not unreasonable. Fitness Edge is apparently challenging the AHC's decision finding that Fitness Edge was a place of recreation subject to sales tax. But this decision is supported by substantial evidence in the record. The fact that the amusement tax does not apply to other businesses that are not places of recreation does not violate the constitution's uniformity requirement. *Compare Gammaitoni*, 786 S.W.2d at 131 (holding that the uniformity requirement was not violated by an AHC decision finding that the taxpayer was not entitled to a tax exemption when the evidence showed that the taxpayer was neither a broadcast station nor advertising agency).

Fitness Edge's claim is similar to one rejected by this Court in *Gammaitoni*. There, the taxpayer argued that the uniformity requirement was violated when its business was subject to sales tax while other businesses conducting "the same commercial activity" were not. *Id.* at 130. This Court held that it was not unreasonable for the General Assembly to enact a sales tax exemption for sales of advertising by broadcast stations and advertising agencies, but not sales made by other entities. *Id.* at 131. This Court rejected the constitutional claim because the record supported the

AHC's finding that the taxpayer was not entitled to the tax exemption since the evidence showed that it was a production house, not a broadcast station or advertising agency. *Id.* at 130-31.

Fitness Edge's claim is even less compelling than the one rejected in *Gammaitoni*. Here, Fitness Edge relies on the AHC decision in *Wild Horse Fitness, LLC v. Director of Revenue*, No. 04-1443 (Admin. Hearing Comm'n Oct. 4, 2005) to argue that the sales tax is not being uniformly levied. But in *Wild Horse Fitness*, the AHC determined that fees patrons paid to a fitness center for the services of a personal trainer are subject to sales tax.[36] This holding is entirely consistent with the AHC's decision in this case.

Undaunted, Fitness Edge relies on a "finding" contained in the AHC's decision in *Wild Horse Fitness* which observed that the parties had stipulated that if the fees were paid directly to the personal trainer for training in the patron's home or if the patron brought their own trainer to the fitness center with them, the fees for personal training services would not be subject to tax. Setting aside the fact that this stipulation did not constitute either a conclusion of law by the AHC or a necessary finding for the AHC to decide the case (L.F. 29), the stipulation simply recognizes that the amusement tax does not apply to fees that are not paid in or to a place of amusement or recreation. In other words, fees paid directly to a personal trainer who does not operate a place of recreation would not fall under the amusement tax. But, on the other hand, personal training fees paid to a place of recreation, like the fees at issue in *Wild Horse Fitness*, would be subject

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[36] (L.F. 28).

to the amusement tax. Instead of proving Fitness Edge's constitutional claim, the decision in *Wild Horse Fitness* demonstrates that the sales tax law is being uniformly applied.

CONCLUSION

The AHC's decision denying Fitness Edge's refund claim was authorized by law and supported by substantial evidence, and it should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 6722 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 7th day of January, 2008, to:

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APPENDIX