

OPINIONS OF THE SUPREME COURT OF OHIO

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Narmac, Inc., Appellant, v. Tracy, Tax Commr., Appellee.  
[Cite as Narmac, Inc. v. Tracy (1993), Ohio St.3d .]  
Taxation -- Sales tax -- Assessments -- Test check, if properly conducted and applied, can form the basis for a sales tax assessment -- R.C. 5739.10.

(No. 92-1261 -- Submitted January 14, 1993 -- Decided July 14, 1993.)

Appeal from the Board of Tax Appeals, No. 88-Z-1062.

Narmac, Inc. ("Narmac"), appellant, pursues only two of the issues raised in its notice of appeal to this court. It contends that the "test check" procedure utilized by the Tax Commissioner under R.C. 5739.10 was invalidly applied in this case because it was not conducted for a representative period. It also contends that the commissioner's assessment cannot be accepted because it was based merely on a mathematical application of two days' actual sales transactions to the entire audit period.

During the audit period, September 1, 1983 to June 30, 1986, Narmac owned the Tower City McDonald's, a McDonald's restaurant located in a food court in Cleveland's Terminal Tower. Employees of the Tax Commissioner, who ate at the Tower City McDonald's, noticed that Narmac was not collecting sales tax on all food consumed on the premises and prompted the commissioner to conduct a test check of Narmac's sales.

The test check was done on two days selected by the commissioner, after consulting with representatives of Narmac. During the test check, Narmac employees were instructed to ask customers whether the purchase of food was "for here" or "to go." The Tax Commissioner's agents stationed near the cash registers, noted manually whether the sale was for consumption on or off the premises. At the same time, Narmac's registers electronically recorded all sales made and the tax collected thereon. Since the manual results were within two percentage points of the electronic results, Narmac's records of sales and tax collected for the two test days were accepted by the commissioner. Based on these records, Narmac was assessed sales taxes of \$35,603.99 plus penalty because the test checks showed a lower ratio of exempt sales to non-exempt sales than

had been reported for the audit period. The commissioner rejected Narmac's petition for reassessment.

On appeal, in lieu of an evidentiary hearing at the Board of Tax Appeals ("BTA"), the parties stipulated into evidence the depositions of several witnesses and, based upon those depositions and the statutory transcript, the BTA affirmed the assessment.

The cause is now before this court upon an appeal as of right.

Abrams, Anton, Robbins, Resnick & Schneider, P.A., and Stanley D. Gottsegen; McDonald, Hopkins, Burke & Haber Co., L.P.A., and William J. O'Neill, for appellant.

Lee I. Fisher, Attorney General, and Lawrence D. Pratt, Assistant Attorney General, for appellee.

Per Curiam. It is fundamental that a test check, if properly conducted and applied, can form the basis for a sales tax assessment. *Cherry Street Corp. v. Porterfield* (1971), 27 Ohio St.2d 260, 56 O.O. 2d 156, 272 N.E.2d 124. For the following reasons, we find that the assessment in this case was based upon a valid test check.

R.C. 5739.02 imposes a tax on each retail sale made in this state except, as provided in R.C. 5739.02(B)(2), for "[s]ales of food for human consumption off the premises where sold." All vendors are required by R.C. 5739.11 to "keep complete and accurate records of sales, together with a record of the tax collected on the sales." However, "no vendor shall be required to maintain records of \* \* \* sales of food for human consumption off the premises where sold[.] \* \* \* [W]here a vendor does not have adequate records of receipts from \* \* \* sales of food for human consumption on the premises where sold, the tax commissioner may \* \* \* determine the proportion that taxable retail sales bear to all [the vendor's] retail sales" by conducting "test checks of the vendor's business for a representative period." R.C. 5739.10(B).

In *King Drug Co. of Dayton v. Bowers* (1961), 171 Ohio St. 461, 463, 14 O.O. 2d 318, 320, 172 N.E. 2d 3, 4, we stated:

"Whether a test check covers 'a representative period' is a factual question to be determined by the board \* \* \*." See, also, *McDonald's of Springfield, Ohio, Inc. v. Kosydar* (1975), 43 Ohio St.2d 5, 72 O.O. 2d 3, 330 N.E.2d 699.

Narmac bears the burden of proving error on the part of the commissioner. *Cherry Street Corp.*, supra. While arguing that the days chosen for the test check were not "representative," Narmac has not presented any evidence that sales on the test check days were unusual or differed in any way from sales under normal business conditions. Thus, this argument must fail.

Narmac's second contention is that the commissioner erred in basing the assessment, not on the test check results, but on Narmac's own sales records for the two test days. Narmac asserts that R.C. 5739.10 "mandates that the tax commissioner use only the results of the test checks to determine 'the proportion that taxable retail sales bear to all [the vendor's] sales.'" However, R.C. 5739.10(B) expressly permits the commissioner to rely on "other information relating to the

sales made by such vendor" in making that determination.  
Narmac has not demonstrated that the commissioner's reliance on  
Narmac's own records was improper or that the BTA's affirmance  
of the assessment was unreasonable or unlawful.

The decision of the BTA is affirmed.

Decision affirmed.

Moyer, C.J., A.W. Sweeney, Douglas, Wright and F.E.  
Sweeney, JJ., concur.

Resnick and Pfeifer, JJ., dissent.