STATE OF MINNESOTA | TAX COURT

COUNTY OF HENNEPIN[1] | REGULAR DIVISION

Employer Solutions Staffing Group II, LLC,

Appellant,

vs.

Commissioner of Revenue,

Appellee.

ORDER DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT AS TO INJUNCTIVE RELIEF

Docket No. 8445 R

Dated: October 22, 2013

This matter came before The Honorable Joanne H. Turner, Judge of the Minnesota Tax Court, on the motion of appellant Employer Solutions Staffing Group II, LLC, for summary judgment and for a permanent injunction barring the Commissioner (and any other agency of the State of Minnesota) from collecting state use taxes from it.

Rebecca J. Levine, Attorney at Law, represented appellant.

Jeremy D. Eiden and John R. Mulé, Assistant Minnesota Attorneys General, represented appellee Commissioner of Revenue.

Based upon all the files, records, and proceedings herein, the court now makes the following:

O R D E R

1. The motion of appellant Employer Solutions Staffing Group II, LLC, be, and the same is, denied.

[1] Appellant's moving papers bear a Ramsey County caption, but there is no dispute that ESSG's headquarters are in Edina.

2. Within 30 days of the date of this order, the parties shall file a joint statement of the case and a proposed scheduling order.

IT IS SO ORDERED.

BY THE COURT:

Joanne H. Turner, Judge
MINNESOTA TAX COURT

DATED: October 22, 2013

MEMORANDUM

Appellant Employer Solutions Staffing Group II, LLC, moves for summary judgment, claiming that "there is no genuine issue as to any material fact and that [it] is entitled to judgment as a matter of law." Appellant's Mot. Summ. J. at 1. The "judgment" ESSG seeks includes a permanent injunction barring the Commissioner of Revenue (and any other state agency) from collecting Minnesota use taxes under Minn. Stat. §§ 297A.63 and 297A.66 (2012) on purchases made by ESSG from out-of-state vendors. Appellant's Mot. Summ. J. at 2. In addition, ESSG seeks an order "that the injunction granted . . . shall continue to apply, even if a higher court overturns the injunction, with respect to any purchases that [ESSG] may make by means of the internet from out of state vendors for use in Minnesota while [the injunction] is in effect." Appellant's Mot. Summ. J. at 2. Finally, ESSG asks that it not be ordered to post a bond. Appellant's Mot. Summ. J. at 2. We deny all requested relief.

The facts of this matter are undisputed. ESSG is a Minnesota limited liability company headquartered in Edina. Peterson Aff. ¶ 4. Between September 1, 2008, and

December 31, 2011, ESSG purchased various goods and services from out-of-state vendors "by ordering such goods and services by electronically [sic] by means of the internet." Peterson Aff. ¶ 6.

Minnesota assesses a use tax on "the privilege of using, storing, distributing, or consuming in Minnesota tangible personal property or taxable services purchased for use, storage, distribution, or consumption in [Minnesota]." Minn. Stat. § 297A.63, subd. 1(a). The rate of tax is the same as the sales tax, and is imposed on the purchase price of the goods or services. *Id.* But no use tax is imposed if Minnesota sales tax is paid. Minn. Stat. § 297.63, subd. 1(b).

ESSG paid no taxes on its on-line purchases in any jurisdiction outside Minnesota. Peterson Aff. ¶ 10. Nor did ESSG pay any Minnesota sales tax on the goods and services. Peterson Aff. ¶ 11.

In January 2012, the Department of Revenue audited ESSG's books and records and, as a result of the audit, assessed ESSG use and other taxes under Minn. Stat. § 297A.63 totaling $2,926.50. Peterson Aff. ¶¶ 12, 13; Chris Levine Aff. Ex. A (Notice of Change in Sales and Use Tax). ESSG appealed the Commissioner's Order to our court, asserting that the imposition of Minnesota use tax on goods and services purchased electronically violates the United States Constitution. Not. App. In June 2013, ESSG moved our court for summary judgment, seeking various relief:

> 1. Entry of an order that the Commissioner be permanently enjoined from enforcing [Minn. Stat. §§] 297A.63 and 297A.66 against [ESSG], including referring any matter involving those sections and [ESSG] to the Attorney General or any other agency of the State of Minnesota for enforcement;
>
> 2. Entry of an order that the injunction granted in the preceding paragraph shall continue to apply, even if a higher court overturns the injunction, with respect to any purchases that [ESSG] may make by means of the

internet from out of state vendors for use in Minnesota while such order is in effect; and

3. Entry of an order that because [the Commissioner] will suffer no monetary loss that is not fully compensable later from the granting of this permanent injunction, [ESSG] shall not be required to post any bond.

Appellant's Mot. Summ. J. at 2. We address each part of ESSG's requested relief in turn.

1. Motion for permanent injunctive relief.

ESSG first requests that the Commissioner of Revenue "be permanently enjoined from enforcing [Minn. Stat. §§ 297A.63 and 297A.66] against [ESSG]." Appellant's Mot. Summ. J. at 2. Minnesota Statutes § 270C.25, subd. 1 (2012), bars all suits "to restrain assessment or collection of a tax, fee, penalty, or interest, imposed by a law administered by [the Commissioner], including a declaratory judgment action," except pursuant to express statutory provisions not applicable here. Subdivision 2 of section 270C.25, however, permits "[a]n action, otherwise prohibited under subdivision 1, that asserts a facial challenge to the constitutionality of a tax or fee imposed by a law administered by [the Commissioner]" under one condition: that the taxpayer demonstrate "by clear and convincing evidence that under no circumstances could the commissioner ultimately prevail and that the taxpayer or fee payer will suffer irreparable harm if the relief sought is not granted." Minn. Stat. § 270C.25, subd. 2 (2012). We conclude that ESSG has not met this high burden.[2]

a. Constitutionality of Minnesota's use tax. First, ESSG has not demonstrated by clear and convincing evidence that there are no circumstances under which the Commissioner

[2] Neither party addressed the impact of Minn. Stat. § 270C.25 in its initial briefing in support of and opposing ESSG's motion. Accordingly, this court requested supplemental briefing on the question, which was completed on August 5, 2013.

can ultimately prevail. In other words, ESSG has not demonstrated by clear and convincing evidence that Minnesota's use tax is unconstitutional.[3]

"All States that impose sales taxes also impose a corollary use tax on tangible property bought out of State to protect sales tax revenues and put local retailers subject to the sales tax on a competitive parity with out-of-state retailers exempt from the sales tax." *Nat'l Geographic Soc. v. California Bd. of Equalization*, 430 U.S. 551, 555 (1977). More than 75 years ago, the Supreme Court pronounced a state use tax "so common that its validity has been withdrawn from the arena of debate." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 583 (1937).

In *Silas Mason*, the Court upheld the constitutionality of a use tax imposed by the State of Washington. As the Court described the Washington taxation scheme:

> A use tax is never payable where the user has acquired property by retail purchase in the state of Washington, except in the rare instances in which retail purchases in Washington are not subject to a sales tax. On the other hand, a use tax is always payable where the user has acquired property by retail purchase in or from another state, unless he had paid a sales or use tax elsewhere before bringing it to Washington.

Id. at 581. The "practical effect" of the scheme, according to the Court,

> must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales.

Id. at 581.

The plaintiffs in *Silas Mason* were contractors and subcontractors hired to build the Grand Coulee Dam on the Columbia River, and who "brought into the state of Washington machinery, materials, and supplies, such as locomotives, cars, conveyors, pumps, and trestle

[3] On its own motion, the court initiated an *Erie* transfer, which was completed on August 6, 2013.

steel, which were bought at retail in other states." *Id.* at 579. The State of Washington assessed the plaintiffs a use tax of 2 percent, prompting the plaintiffs to charge that Washington's use tax violated the Commerce Clause. *Id.* at 579, 578; *see Assoc. Indus. of Missouri v. Lohman*, 511 U.S. 641, 545 (1994) ("it is well established that the [Commerce] Clause also embodies a negative command forbidding the States to discriminate against interstate trade.").

The Supreme Court disagreed, calling Washington's use tax a tax "upon the privilege of use after commerce is at an end," rather than a tax "upon the operations of interstate commerce." 300 U.S. at 582. The Court proceeded to characterize Washington's use tax as a property tax. *See id.* at 586 (calling a use tax "a tax upon property after importation is over"). The Court observed that items "acquired or transported in interstate commerce" may be subjected to a nondiscriminatory property tax once they are "within the state of destination." *Id.* at 582 (collecting cases). "For like reasons," the Court further stated, the same items "may be subjected, when once they are at rest, to a nondiscriminatory tax upon use or enjoyment," which use the Court characterized as "one attribute, among many, of the bundle of privileges that make up property or ownership." *Id.* at 582. A state may tax such attributes of property or ownership, the Court reasoned, "collectively" or "distributively." *Id.* at 582. And the Court reiterated what it had observed five years earlier, namely, that "a general property tax to which all those enjoying the protection of the state may be subjected" has neither "a direct burden upon interstate commerce" nor a "greater or different effect upon that commerce." *Id.* at 582 (citing *Eastern Air Transport, Inc. v. South Carolina Tax Comm'n*, 285 U.S. 147, 153 (1932)).

Turning to whether Washington's use tax was discriminatory, the Court concluded it was not:

> When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The

> one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. Equality exists when the chattel subject to the use tax is bought in another state and then carried into Washington. It exists when the imported chattel is shipped from the state of origin under an order received directly from the state of destination. In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local.

Id. at 584.

Since *Silas Mason*, the Court has pronounced the constitutionality of a state use tax, imposed on tangible property purchased out-of-state and designed to "put local retailers subject to the [state] sales tax on a competitive parity with out-of-state retailers," as "settled." *Nat'l Geographic Soc.*, 430 U.S. at 555; *see also Williams v. Vermont*, 472 U.S. 14, 24 (1985) ("A use tax is generally perceived as a necessary complement to [a] sales tax"); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963) ("the purpose of such a sales-use tax scheme is to make all tangible property used or consumed in the State subject to a uniform tax burden irrespective of whether it is acquired within the State . . . or from without the State.").

Nevertheless, ESSG contends: (1) that *Silas Mason* was wrongly decided; (2) that even if correctly decided, *Silas Mason* has been overturned by the Supreme Court's subsequent decision in *Williams v. Vermont*, 472 U.S. 14 (1985); and (3) that the facts of this case do not satisfy the test announced by the Supreme Court, post-*Williams*, in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996). We disagree on all counts.

(1) ***Silas Mason*.**

ESSG contends first that *Silas Mason* was wrongly decided:

> Although the items were situated within the taxing jurisdiction of Washington State at the time their use was taxed and, thus, the state had the *power* to levy a tax on the use of the items, it is not entirely certain that it also had the *authority* to levy such a tax under the negative Commerce Clause.

Appellant's Mem. at 11. We have no power to overturn a decision of the Supreme Court on a matter of constitutional law and, even if we did, we would not do so here.

ESSG contends that the Court erred in equating the purchase of an item out of state by a nonresident of the taxing state with the purchase of an item out of state by a resident of the taxing state. *See* Appellant's Mem. at 11-12. According to ESSG,

> The *Silas Mason* Court found that compensatory tax equality existed under either of two possible scenarios: "Equality exists when the chattel subjected to the use tax is bought in another state and then *carried* [by the purchaser] into Washington. It [also] exists when the imported chattel is *shipped* [by the seller] from the state of origin under an order received directly from the state of destination."

Appellant's Mem. at 11 (quoting *Silas Mason*, 300 U.S. at 584) (parentheticals in memorandum). But when a nonresident buys an item out of state and brings it into the taxing state, according to ESSG, "the taxable event (subsequent use of the property within the state) is both factually and logically disconnected from and independent of the separate and earlier sale/purchase event (in another state)." Appellant's Mem. at 11. In contrast, at least according to ESSG, when an item is shipped directly to a resident of the taxing state, "[t]he ordering and shipping are a seamless integrated whole process that makes up the sale transaction." Appellant's Mem. at 12. We disagree.

The context—and an accurate quotation—of *Silas Mason* decision demonstrate that the Court's comments were made solely on the issue of whether Washington's use tax was "so measured or conditioned as to hamper the transactions of interstate commerce or discriminate against them." 300 U.S. at 583. As the Court observed, Washington imposed a tax on use, "but subject to an offset if another use or sales tax has been paid for the same thing." *Id.* at 584. As a result, the Court concluded, "the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates," that is, the Washington resident. *Id.* Although the two pay on different events—the stranger upon use, the resident upon sale—"the sum is the same when the reckoning is closed." *Id.*

> Equality exists when the chattel subject to the use tax is bought in another state and then carried into Washington. It exists when the imported chattel is shipped from the state of origin under an order received directly from the state of destination. In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local.

Id. In other words, the Court was comparing the situation of a Washington resident who buys goods in Washington and pays Washington sales tax to that of someone ("the stranger from afar") who buys the same goods from another state. Whether "the stranger from afar" "carries" goods into Washington from another state or has them shipped directly to him in Washington, the Court reasoned, the tax (burden) is the same as that paid by the resident who buys the items locally.

ESSG contends that the sale of an item and its subsequent use are not substantially equivalent events:

> The *sale* of an item and the subsequent *use* of that item, while they may have a high correlation, are not substantially equivalent actions or events . . . . Unlike walking or running, selling/buyer [sic] and using an item are not interchangeable events or proxies for one another. Use must always follow sale/purchase of the item.

Appellant's Mem. at 21. The Supreme Court has repeatedly stated otherwise. *See, e.g.*, *Lohman*, 511 U.S. at 648 ("There is no dispute that sales taxes and use taxes such as those at issue here are imposed on substantially equivalent events.") (internal quotation omitted); *Maryland v. Louisiana*, 451 U.S. at 759 (describing a use tax as a "complement" to a sales tax because it is "a tax on a substantially equivalent event"); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 342-43 (1996) (*citing* Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 Tax Lawyer 405, 434 n.197, 458 (1986) (noting that sales and use taxes are strict functional equivalents for one another)).

(2) ***Williams v. Vermont.***

ESSG further argues that *Silas Mason* has been overturned by the Supreme Court's subsequent decision in *Williams v. Vermont.* Again, we disagree.

In *Williams*, the Court addressed Vermont's practice of charging a use tax on the registration of motor vehicles by "registrants who purchased their cars out-of-state when not Vermont residents . . . regardless of whether they already paid a sales tax in another jurisdiction on the same car." 472 U.S. at 19. At the same time, a Vermont resident "enjoy[ed] a credit for any sales tax paid to a reciprocating State, even if he registered and used the car there before registering the car in Vermont." *Id.* at 21. The Court struck down, as a violation of the Equal Protection Clause of the U.S. Constitution, the practice of imposing the use tax only on those who were not Vermont residents at the time they purchased the vehicle and paid sales taxes to the state of purchase. *Id.* at 22.

ESSG contends here that the Court's decision in *Williams* has overruled its previous decision in *Silas Mason.* Appellant's Mem. at 13 ("Thus, under the holding of *Williams v. Vermont*, the operative rationale for the decision of *Silas Mason* is undermined and delegitimized."). Nothing in the Court's decision in *Williams* expressly does so. Indeed, the *Williams* decision cites *Silas Mason* with approval. 472 U.S. at 24-25 ("A use tax is generally perceived as a necessary complement to the sales tax, designed to 'protect a state's revenues by taking away the advantages to residents of traveling out of state to make untaxed purchases, and to protect local merchants from out-of-state competition which, because of its lower or nonexistent tax burdens, can offer lower prices.' ") (citing *Silas Mason*, 300 U.S. at 581). More to the point, in *Williams* the Court expressly disavows any consideration of the case on Commerce Clause grounds: "We do not consider in what way, if any, the failure to give appellants a credit [for sales tax paid to another state] might burden interstate commerce. The

critical point is the Court's emphasis on the need for equal treatment of taxpayers who can be distinguished only on the basis of residence." 472 U.S. at 23 n.7.

ESSG's argument appears to rest on the facts of the two cases, specifically, that the plaintiffs in *Williams* and the plaintiffs in *Silas Mason* were both non-residents of the taxing state. *See Williams*, 472 U.S. at 15-16 (describing the plaintiffs as persons "who bought cars outside of Vermont before becoming residents of that State"); *Henneford v. Silas Mason Co.*, 15 F. Supp. 958, 959 (E.D. Wash. 1936) (describing the plaintiff contractors and subcontractors as "nonresidents of the state of Washington"). In striking down Vermont's registration tax, the *Williams* court reasoned:

> Applied to those such as appellants, the use tax exceeds the usual justifications for such a tax. A use tax is generally perceived as a necessary complement to the sales tax, designed to protect a state's revenues by taking away the advantages to residents of traveling out of state to make untaxed purchases, and to protect local merchants from out-of-state competition which, because of its lower or nonexistent tax burdens, can offer lower prices. This customary rationale for the use tax has no application to purchases made out-of-state by those who were not residents of the taxing State at the time of purchase. These home-state transactions cannot be seen as lost Vermont sales, and are certainly not ones lost as a result of Vermont's sales tax. Imposing a use tax on them in no way protects local business. In short, in its structure, this sales and use tax combination is exactly the opposite of the customary provisions: there is no disincentive to the Vermont resident's purchasing outside the State, and there is a penalty on those who bought out-of-state but could not have been expected to do otherwise. The first provision limits local commerce, the second does not help it.

472 U.S. at 24-25 (internal quotation omitted). ESSG contends, on the basis of this excerpt, that "the operative rationale for the decision of *Silas Mason* is undermined and delegitimized." Appellant's Mem. at 13. More specifically, according to ESSG, under the holding in *Williams* the imposition of a use tax on the plaintiffs in *Silas Mason* imposed a "penalty on those who bought out-of-state but could not have been expected to do otherwise." Appellant's Mem. at 13.

The plaintiffs in *Williams* were nonresidents with no apparent connection to Vermont when they bought the cars they sought to register—months or years later—and in that respect

"could not have been expected to do otherwise." 472 U.S. at 24. The contractors and subcontractors in *Silas Mason*, although incorporated elsewhere, were present and doing business in Washington when they purchased the materials and equipment used to construct the dam. Put more directly, the contractors and subcontractors in *Silas Mason* had a definite choice whether to purchase the necessary materials and equipment from Washington vendors (and incur sales tax) or from out-of-state vendors (and incur use tax). Not only was *Williams* decided on different constitutional grounds, it is distinguishable from *Silas Mason* on its facts.

(3) *Fulton Corp.*

Finally, ESSG argues that the facts of this case do not satisfy (what ESSG portrays as) the new test announced by the Supreme Court in *Fulton Corp*. Again, we disagree.

In *Fulton*, the Supreme Court summarized the "conditions necessary for a valid compensatory tax." 516 U.S. at 332. Only the third of these is in dispute here: "the events on which the interstate and intrastate taxes are imposed must be 'substantially equivalent'; that is, they must be sufficiently similar in substance to serve as mutually exclusive 'prox[ies]' for each other." *Id.* (*quoting Ore. Waste Systems, Inc. v. Dep't of Envtl Quality of Ore.*, 511 U.S. 93, 103 (1994)).

According to ESSG, a sale or purchase cannot be a proxy or substitute for later use because "use" cannot precede a sale. Appellant's Mem. at 22. But as the Supreme Court explains in *Fulton*, the objective of the equivalent-event requirement "is to enable in-state and out-of-state businesses to compete on a footing of equality." 516 U.S. at 340. The purchase of an item from an out-of-state vendor and its subsequent use in-state is therefore the substantial equivalent of the purchase of the same item from an in-state vendor and subsequent use in-state.

ESSG finally mounts what we construe as a frontal attack on the Supreme Court's Commerce Clause jurisprudence. According to ESSG, "the levying of use taxes, in general, by states on purchases made electronically in other states . . . runs squarely afoul of the Commerce Clause prohibition on burdening and interfering with interstate commerce." Appellant's Mem. at 22. Moreover, ESSG asserts, "[i]t is immaterial that local commerce is subjected to an equal encumbrance. To compare a state's treatment of its local trade with the exertion of its alleged authority against interstate commerce in the national domain is to compare incomparables." Appellant's Mem. at 23. ESSG rejects the justification for use taxes offered by the Supreme Court, namely, that such taxes are "designed only to make such commerce bear a fair share of the cost of the local government whose protection it is said to enjoy," with the observation that "revenue serves equally well no matter what its avenue of delivery." Appellant's Mem. at 24 (*citing Ore. Waste Systems*, 511 U.S. at 103). We consider ESSG's arguments so thoroughly discredited as to border on the frivolous. *See, e.g.*, *Silas Mason*, 300 U.S. at 582 (observing that "[t]he privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership," noting that "[a] state is at liberty, if it pleases, to take them all collectively, or to separate the faggots and lay the charge distributively," and collecting cases).

We therefore conclude that ESSG has failed to show by clear and convincing evidence that Minnesota's use tax is unconstitutional.

b. Irreparable harm. Moreover, ESSG has not demonstrated that it will suffer irreparable harm if the requested injunction is not granted.

ESSG argues that it will suffer irreparable harm "in and of itself" if it is required to pay a tax that ESSG contends is unconstitutional. Appellant's Memo. Supp. Grant. Perm. Inj. at 4. But the collection of a tax cannot be enjoined on the sole basis that the tax is illegal. *Laird,*

Norton Co. v. Cnty. of Pine, 72 Minn. 409, 412, 75 N.W. 723, 724 (1898). Put more generally, a taxpayer cannot sue in equity to enjoin the collection of a tax when there is an adequate remedy at law, namely, the ability to contest the collection of the tax. *Rosso v. Village of Brooklyn Center*, 214 Minn. 364, 368, 8 N.W.2d 219, 221 (1943).

ESSG further suggests that our refusal to grant ESSG's requested injunction would result in a "chilling effect on internet purchases by ESSG and other businesses and entities." Appellant's Memo. Supp. Grant. Perm. Inj. 4. Even if we agreed with ESSG's proposition, which we do not, ESSG, as a prospective *buyer* of goods and services on the internet, lacks standing to assert harm that may be suffered by prospective *sellers* of goods and services on the internet. *See Enright v. Lehmann*, 735 N.W.2d 326, 329 (Minn. 2007) (noting that in the absence of some legislative enactment granting standing, a plaintiff must have suffered some "injury in fact"); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (holding that an injury-in-fact requires "a concrete and particularized invasion of a legally protected interest). Nor has ESSG shown how such a "chilling effect" on prospective sellers, even if it exists, amounts to irreparable harm to ESSG as a prospective buyer.

We therefore conclude that ESSG has not met its burden under Minn. Stat. § 270C.25, subd. 2, to demonstrate "by clear and convincing evidence that under no circumstances could the commissioner ultimately prevail." Nor has ESSG shown that it "will suffer irreparable harm if the relief sought is not granted." *Id.* ESSG's claim for injunctive relief is statutorily barred, and we therefore deny ESSG's motion for summary judgment.

2. Permanent injunctive relief.

ESSG further asks that its requested injunction "continue to apply, even if a higher court overturns the injunction, with respect to any purchases that [it] may make by means of the

internet from out of state vendors for use in Minnesota while such order is in effect." Appellant's Mot. Summ. J. at 2. In other words, ESSG asks for a permanent tax holiday with respect to Minnesota's use tax during the pendency of these proceedings and any appeal, even if the constitutionality of the tax is upheld on appeal.

But ESSG offers no legal justification for an order of our court permanently relieving ESSG from the obligation to pay use taxes, even if the use tax is found to be constitutional. Nor does ESSG explain our ability to so bind the Minnesota Supreme Court, which would review this decision on certiorari. *See* Minn. Stat. § 271.10 (2012). Moreover, the purpose of a temporary injunction is solely to maintain the status quo until a decision is reached on the merits. *Pickerign v. Pasco Mktng., Inc.*, 303 Minn. 442, 444, 228 N.W.2d 562, 564 (1975). The issuance of a permanent injunction requires that ESSG have established *at trial* its right to permanent relief, *see Bio-Line, Inc. v. Burman*, 404 N.W.2d 318, 320-21 (Minn. App. 1987), and no such trial has been held. Therefore, even if we were to grant ESSG's requested injunction, we would decline to order that it apply to purchases made by ESSG during the pendency of the appeal, nor could we order that ESSG would never be required to pay use taxes on such purchases.

3. Bond.

Under Minn. R. Civ. P. 65.03(a),

> [n]o temporary restraining order or temporary injunction shall be granted except upon the giving of security by the applicant, in such terms as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

ESSG asks, however, that it not be required to post a bond, asserting that the Commissioner "will suffer no monetary loss [from the granting of an injunction] that is not fully compensable later." Appellant's Mot. Summ. J. at 2.

We cannot, however, reconcile ESSG's assertion that the Commissioner "will suffer no monetary loss" with its request that the injunction barring the Commissioner from collecting use tax on ESSG's internet purchases "continue to apply, even if a higher court overturns the injunction." Appellant's Mot. Summ. J. at 2. Under ESSG's requested relief, it would never be required to pay use tax on any purchase made while the requested injunction is in effect, even if the constitutionality of the use tax is upheld and the injunction is overturned on appeal. We do not see how this amounts to anything but a "monetary loss" to the Commissioner that would, under ESSG's motion, never be "fully compensable." Therefore, even if we were to grant ESSG's other requested relief (which we do not), we would necessarily require ESSG to post a bond of at least the amount of use tax that would be due on ESSG's projected internet purchases during the pendency of the case.

For all of the foregoing reasons, we deny ESSG's motion.

J.H.T.