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those obligations are projected to grow faster than the overall economy, making the crisis in Social Security finances worse with each passing year. Properly constructed, Social Security reform should slow the growth of unfunded statutory obligations and perhaps even tap new sources of revenue. Together, those changes should reduce the size of the system's unfunded statutory obligations in relationship to the overall economy, lessening the burden of our public pension system on future generations and leaving fiscal capacity to deal with other pressing problems like skyrocketing Medicare costs.

Finally, a reformed Social Security system should have adequate and clearly identified sources of liquidity to meet its statutory obligations over the next 75 years, the traditional time horizon for the long-term actuarial balance of social insurance programs. While it is possible that the trust funds may need to engage in temporary borrowing for some of that period to finance the transition to individual accounts, that borrowing should be repaid in full and the system's actuarial balance should be restored within the 75-year time frame.

If the president's plan measures up on these four financial yardsticks, the plan will make fiscal sense notwithstanding substantial transfers to individual accounts over the next few years.

## How the IRS Can Close the Online Auction Tax Gap

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### Introduction

There is a very large tax gap caused by taxpayers who either underreport or simply fail to report their income. A portion of the tax gap could easily be closed if businesses, such as Internet auctioneers and traditional consignment sellers, were required to report their customers' gross income on Form 1099. Unfortunately, the current regulations do not require these types of businesses to file Form 1099s.

This article will demonstrate that IRC section 6045 is broad enough to require Internet "brokers" and traditional consignment sellers to report their customer's sales to the IRS. It then explains that reporting is not currently required because the regulations restrict the definition of a broker so that information reporting is not required by anyone that is not a traditional stock or commodities broker. Finally, it suggests that the regulations be amended to cover Internet auction and non-Internet consignment sales. Once those sales are reported to the IRS, the tax gap will be reduced and a more level playing field will exist between traditional businesses and some cyberspace businesses.

### The Tax Gap and Internet Sales

Yahoo, eBay, and other Internet auction sites<sup>1</sup> allow millions of people to sell their products either as a hobby or as an actual business.<sup>2</sup> Entrepreneur®.com reports that, according to Forrester Research, online auctions will

<sup>1</sup>Most of the following discussion concerning Internet auction or Internet auctioneers would also apply to live auctions and auctioneers.

FTPplanet.com under "online auction guide" lists numerous Internet auction sites. Under top sites it lists Auction Universe, eBay, FirstAuction, Onsale atAuction, and Yahoo! Auctions. It lists more than 50 other sites at [http://www.ftplanet.com/auction/auction\\_sites.htm](http://www.ftplanet.com/auction/auction_sites.htm) (last visited on Sept. 23, 2004).

<sup>2</sup>Most Internet auction sites would probably argue that they are not really auctions. In fact, their contracts make it clear that they are not auctions but are instead venues.

As part of their contract with users, eBay says:

3. eBay is a Venue.

3.1 eBay is not an Auctioneer. Although we are commonly referred to as an online auction Web site, it is important to realize that we are not a traditional "auctioneer." Instead, the Site acts as a venue to allow anyone to offer, sell, and buy just about anything, at anytime, from anywhere, in a variety of pricing formats, including a fixed price format and an auction-style format commonly referred to as "online auctions" or "auctions."

Yahoo's Web site states:

(Footnote continued on next page.)

account for almost \$48.5 billion in sales by 2006.<sup>3</sup> It is hard to quantify how much of that income is being reported to the IRS.<sup>4</sup>

One industry spokesperson has estimated that more than 430,000 people generate most of their incomes selling on just the major Internet auction site.<sup>5</sup> The IRS must have had some suspicion that some of those sellers and other users of the Internet were not reporting all of their income, because it performed an extensive study of income tax reporting by Internet business. The 2000 study by the IRS Upstate New York District found that 12 percent of business owners of Web sites could not even be identified on the IRS databases. It determined that 17 percent of retail and wholesale business service Web sites could not be identified and that 5 percent of the Web sites selected for the study were inactive within 45 days of being identified.<sup>6</sup> The study also found that 10 percent of commercial Web sites, 12 percent of C corporations, and 13 percent of sole proprietorships failed to file their 1997 tax returns.<sup>7</sup> When it could find the sellers, the study determined that the median amount of unreported income was \$15,000 and the average amount was \$87,000, and that was without taking into account a very large change that would distort the average.<sup>8</sup> Those figures also don't include unpaid employment taxes, with a median of \$2,799 and an average of \$2,415 for those who failed to file a tax return.<sup>9</sup> It seems fair to assume that of those estimated 430,000 Internet business sellers, there is a large tax gap of both unreported and underreported income.<sup>10</sup>

Taxpayers just don't seem to be very frightened by the chance that they may get caught by the IRS.

### IRS Response

Almost five years ago one article reported that the IRS had audited some large Internet vendors. It then speculated that the IRS could develop tracking systems to

detect Internet sales.<sup>11</sup> It does not appear that the IRS has done this on a large scale; if it has, it's a well-kept secret. The IRS Web site states: "One of the Internal Revenue Service's priorities is to identify individuals who are filing tax returns but not reporting all taxable income. In addition to increasing the resources devoted to this key area, the IRS has implemented a broad strategy to address these cases."<sup>12</sup> The Web site lists document matching as one part of the IRS strategy.<sup>13</sup>

The IRS Web site says that it will close the tax gap through document matching. But that only works if there is a document to match and if the taxpayers believe the tax returns and documents will be matched.<sup>14</sup> For example, taxpayers believe the IRS can match W-2 and reported wages, resulting in a compliance rate of almost 99.5 percent.<sup>15</sup> The compliance rate drops to below 50 percent when taxpayers believe the IRS is not matching documents such as with partnerships and S corporations.<sup>16</sup> It may even be worse than that when there is no Form 1099 reporting at all, such is the case with many self-employed taxpayers. That is exactly the situation with Internet sellers. There is currently no reporting of their gross sales.

### Internet Sites Don't Report Customers' Sales

A search of the Internet on Google did not find one instance in which an Internet auction site notified sellers that Form 1099 would be issued. Another indication that none will be filed is that registration forms don't request a taxpayer ID number. One registration form simply asks for name, address, telephone number, date of birth, and e-mail address.<sup>17</sup> The basis for not having to report is clearly that no reporting is required under the regulations.

<sup>11</sup>Sandra Bloc, "USA Today's Your Money," Nov. 2, 1999. <http://www.usatoday.com/news/opinion/colyrmn/yrnm079.htm>.

<sup>12</sup>"Initiatives to Identify Unreported Income," Headliner vol. 78, dated Apr. 7, 2004, <http://www.irs.gov/businesses/small/article/0,,id=122608,00.html>.

<sup>13</sup>Publication 1415 (Rev. 4-96) states:

Our estimates of the gross individual income tax gap for tax year (TY) 1992 range from \$93.2 to \$95.3 billion. Of this amount, the nonfiling gap accounts for an estimated \$13.5 to \$13.8 billion. The underreporting gap is estimated to account for another \$71.3 to \$73.1 billion, while our estimate of the underpayment gap is \$8.4 billion. We estimate total "true" individual income tax liability to be \$550.2 to \$552.3 billion for TY 1992. <http://www.irs.gov/pub/irs-soi/p141596.pdf>.

<sup>14</sup>Leandra Lederman, "Tax Compliance and the Reformed IRS," 51 *Kansas L. Rev.* 971, 976 (2003).

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

<sup>17</sup>This is the eBay registration for buyers, which is used to create a seller's account. See [https://scgi.ebay.com/ws/ebayISAPI.dll?RegisterEnterInfo&siteid=0&co\\_partnerid=2&UssingSSL=1](https://scgi.ebay.com/ws/ebayISAPI.dll?RegisterEnterInfo&siteid=0&co_partnerid=2&UssingSSL=1) (last visited on Oct. 21, 2004).

Also, as Yahoo is acting only as a venue, Yahoo is not responsible for the collection and remittance of any federal, state or local taxes. Buyers and sellers are responsible for all tax related issues that may arise.

<sup>3</sup>Corey Rudl, "Profiting From Online Auction Sites, You can create a bidding frenzy and sell more products on large online auction sites if you follow this eight-step plan from our Internet marketing expert," October 6, 2003, <http://www.entrepreneur.com/article/0,4621,311268,00.html> (last visited Sept. 23, 2004).

<sup>4</sup>Albring, Mills, and Plumlee, "Beanie Baby Billions? Unpaid Taxes on Internet Auctions," *Tax Notes*, May 22, 2000, p. 1153.

<sup>5</sup>Nick Wingfield, "Boss Talk: Auctioneer to the World; Projecting Continued Growth, eBay's Whitman Says Site Innovates by Heeding Users," *The Wall Street Journal*, Aug. 5, 2004, p. B1.

<sup>6</sup>Electronic Commerce Challenges and Opportunities, Research Project 50.31, Research & Analysis Division, IRS Upstate New York District, October 2000, p. 13.

<sup>7</sup>*Id.* at 16.

<sup>8</sup>*Id.* at 25.

<sup>9</sup>*Id.* at 10.

<sup>10</sup>Internal Revenue Service Restructuring and Reform Act of 1998, section 1203.

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That is obvious from a review of a similar situation: The tax treatment applicable to "brick-and-mortar" consignment sellers. The IRS concluded that those sellers are not required to file Form 1099s when they make sales for their customers.<sup>18</sup> If anything, Internet auctioneers are not nearly as involved in the sale as are consignment houses. Accordingly, even without much analysis, if brick-and-mortar businesses don't have to report, it seems obvious that the same result should apply to Internet auctioneers.

### The Basis for Not Filing Form 1099: Section 6041?

The IRS did not provide a legal analysis for its conclusion that consignment sellers were not subject to Form 1099 reporting. However, the conclusion is probably based on section 6041,<sup>19</sup> which requires a business to file Form 1099 if it pays more than \$600 for services to one person during the year. Reporting is not required if the payment is for products. Because consignment and Internet sellers sell products rather than services, section 6041 doesn't appear to apply to them.<sup>20</sup>

### What About Section 6045?

Even if section 6041 doesn't apply, what about using section 6045 to require Internet auctioneers and both Internet and brick-and-mortar consignment sellers to file Form 1099s to report the gross sales of their customers?

Section 6045 is a fairly simple statute. It allows (but does not require) the IRS to require "brokers" to report sales by their customers to the IRS on Form 1099. Most of us are familiar with this provision because it's why stockbrokers report their customers' gross sales of stocks and bonds to the IRS on Form 1099 each year.<sup>21</sup>

Section 6045 states in part:

#### (a) GENERAL RULE

Every person *doing business* as a broker shall, when *required by the Secretary*, make a return, in accordance with such regulations as the Secretary may prescribe, showing the name and address of each customer, with such details regarding gross proceeds and such other information as the Secretary may by forms or regulations require with respect to such business.

#### (b) STATEMENTS TO BE FURNISHED TO CUSTOMERS

...

<sup>18</sup>In discussing sales by artists through consignment galleries, the IRS has stated: "It is difficult to monitor compliance by artists because galleries selling art works on consignment are not required to report the sales via information returns (Forms 1099)." MSSP35, IRS Market Segment Specialization Paper (Artists and Art Galleries) Training 3147-109 (4/97) TPDS 85726F.

<sup>19</sup>All section references are to the Internal Revenue Code of 1986, as amended.

<sup>20</sup>Alternatively, maybe the reason is that in the Internet situation, no payment is being made between the Internet company and the seller.

<sup>21</sup>The regulations seriously restrict the meaning of the statute. This section simply analyzes the statute as written.

### (c) DEFINITIONS

For purposes of this section —

#### (1) BROKER

The term "broker" includes —

(A) a dealer,

(B) a barter exchange, and

(C) *any other person who (for a consideration) regularly acts as a middleman with respect to property or services.*

...

#### (2) CUSTOMER

*The term "customer" means any person for whom the broker has transacted any business. . . ."*<sup>22</sup> (Emphasis added.)

Could section 6045 apply to Internet auctioneer and consignment sellers if the IRS were to write enabling regulations? The following discussion reviews each of the highlighted requirements above to determine if the statute covers those entities.

To be covered, the entity must be "doing business." There is no question that Internet auctioneers and consignment houses are doing business. That part of the definition is met.

The business must also be a "broker."<sup>23</sup> Section 6045(c)(1)(C) defines a broker to include "any other person who (for a consideration) regularly acts as a middleman with respect to property or services." (Emphasis added.)

All four requirements highlighted in the preceding paragraph appear to be met by an Internet auctioneer or a consignment seller.

1. Persons: Person is defined to "include an individual, a trust, estate, partnership, association, company or corporation."<sup>24</sup> Virtually all of those third parties are corporations and those who do business as sole proprietors or as a partnership would also be included in the definition of "person."

2. Consideration: With the exception of free bulletin boards, virtually all third parties charge for posting on an Internet auction site. Thus, there is consideration between the seller and the third-party middleman.

3. Middleman: Is there any question that Internet "auctions" and consignment sellers serve as a "middleman" between the seller and the prospective buyer? That is really the main feature of the Internet auction. It allows buyers to find sellers and sellers to find buyers? Also, the third party provides Web-based software used by the buyer and

<sup>22</sup>Section 6045.

<sup>23</sup>Section 6045(a)(1).

<sup>24</sup>Section 7701(a)(1).



seller to exchange information about the product, the seller, the terms of the sale, and the auction bids.<sup>25</sup>

4. Property or services: Does an Internet auctioneer act as a middleman "with respect to property or services"? Since something is being sold, there must be either a product or a service. But does the auctioneer serve as a middleman? Does it matter that no property changes hands between the seller and the auctioneer, that the middleman simply supplies offers and acceptance between two of its clients? Certainly it doesn't deliver the property. But the picture or description of the product or service is posted on the middleman's Web site. So, it does act as a middleman by furnishing information about the product.

The last requirement is that the broker has a "customer."<sup>26</sup> To be a customer the statute requires that the broker and the customer "transact business." Is there any doubt that the auctioneer and the seller transact business? The auctioneer lists the seller's product and often charges a minimal fee for that listing in addition to a percentage fee once the sale is completed. That is far more than would be required to conclude that the seller and the third-party auctioneer or consignment seller transact business. Simply allowing someone to post a product on a Web site for a nominal fee (similar to classified advertising in a newspaper) is clearly transacting business. So, the bid-and-ask part of the services is just additional evidence that the seller and third party are transacting business.

It therefore appears that all the elements necessary to conclude that Internet middleman and brick-and-mortar consignment sellers are brokers as defined in section 6045 are met and that accordingly, if "required by the Secretary," they must furnish a Form 1099 reporting the gross sales of their customers to the IRS.

### So Why Isn't Form 1099 Reporting Required?

If the statute is so clear on its face (that Internet auctioneers and consignment sellers are included in the definition of brokers under section 6045), why are they not reporting sales by their "customers"? The reason is that the regulations define "brokers" in such a restrictive manner that they do not include Internet auctioneers and traditional consignment sellers. How did that happen?

The IRS waited more than 40 years to issue section 6045 regulations.<sup>27</sup> In 1982 one author stated: "The Treasury Department is apparently reluctant to prescribe regulations at this late date because of concern that brokers will strongly oppose the imposition of any type of reporting requirements by regulation."<sup>28</sup>

In defining the term "broker" the regulation states:

(1) The term broker means any person [. . .] that, in the ordinary course of a trade or business during the calendar year, stands ready to *effect sales* to be made by others.<sup>29</sup> (Emphasis added)

It must be noted that the term "sales" is not present in the definition of a broker in section 6045.<sup>30</sup> It is a requirement that has been added by the regulations.

In defining "sale" the regulation provides:

(9) The term "sale" means any disposition of securities, commodities, regulated futures contracts, or forward contracts for cash, and includes redemptions of stock, retirements of indebtedness, and entering into short sales.<sup>31</sup>

According to the regulations, a business can be a broker only if it effects sales, and it effects sales only if what it sells are: securities, commodities, regulated futures contracts, or forward contracts for cash.

The thrust of the regulation is therefore to limit reporting under section 6045 to stock and commodity brokers and some banking transactions and similar entities.<sup>32</sup> Because most of the items sold on the Internet do not include securities or commodities, reporting is not required under the regulations.<sup>33</sup>

Even if the regulations were to broaden the types of sales that are covered by the statute, reporting still would not be required because of the manner in which the regulations define "effect." The regulations define effect as:

(10) The term "effect" means, with respect to a sale, to act as —

(i) An agent for a party in the sale wherein the nature of the agency is such that the agent ordinarily would know the gross proceeds from the sale; or

(ii) A principal in such sale.<sup>34</sup>

Clearly, an Internet auction site is not an agent for either party. It is not a principal of either party either. The statute does not require such a relationship. The Internet seller would often know the gross proceeds. So, if reporting is desired, the relationship between the seller and the Internet auction site needs to be included either by removing the agency requirement or expanding the regulation to nonagency relationships.

Another part of the current regulations that is more restrictive than the statute is the definition of a "customer." The regulation states:

<sup>29</sup>Reg. section 1.6045-1(a)(1). Emphasis added.

<sup>30</sup>The word sale is used in the context of a "short sale" and "principal residence."

<sup>31</sup>Reg. section 1.6045-1(a)(9).

<sup>32</sup>Separate provisions under section 6045 apply to real estate sales and to payments to attorneys.

<sup>33</sup>What about sales of stocks and other securities made on an Internet auction site? It would appear that they are covered by the regulations.

<sup>34</sup>Reg. section 1.6045-1(a)(10).

<sup>25</sup>See the discussion *infra* regarding swap meets and newspaper advertisements.

<sup>26</sup>Section 6045(c)(2).

<sup>27</sup>John S. Nolan, "Comments on the Tax Compliance Act of 1982," *Tax Notes*, May 31, 1982, p. 699.

<sup>28</sup>*Id.*

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(2) The term "customer" means, with respect to a sale effected by a broker, the person (other than such broker) that makes the sale, if the broker acts as:

- (i) An agent for such person in the sale;
- (ii) A principal in the sale; or
- (iii) The participant in the sale responsible for paying to such person or crediting to such person's account the gross proceeds on the sale.<sup>35</sup>

Nothing in the statute requires that the business be an agent or a principal and nothing requires that it be the middleman that handles the cash. In fact, the code simply requires that the broker "transacted any business" for the person (seller). But even under the regulations, eBay would still meet the definition in the regulations in some cases, because it often collects the money for the seller. It does that when the customer uses PayPal, an eBay subsidiary, or when the seller uses Half.com, an eBay company in which the sales proceeds are collected by eBay and paid over to the seller.

### What Does the Code Require?

As stated above, section 6045 simply requires that brokers report sales by their customers. It defines a broker to include:

- (A) a dealer,
- (B) a barter exchange, and
- (C) any other person who (for a consideration) regularly acts as a middleman with respect to property or services.

One dictionary's definition of a broker is similar to the regulations, but only if you don't use its second definition. Its primary definition is much more supportive of a less-restrictive interpretation. *Merriam-Webster OnLine* defines broker as "one who acts as an intermediary: as *a*: an agent who arranges marriages *b*: an agent who negotiates contracts of purchase and sale (as of real estate, commodities, or securities)."<sup>36</sup>

*Encyclopedia Britannica Online* also gives a very broad definition. It states that "Manufacturers may use brokers and agents, who do not take title possession of the goods, in marketing their products. Brokers and agents typically perform only a few of the marketing flows, and their main function is to ease buying and selling — that is, to bring buyers and sellers together and negotiate between them. Brokers, most commonly found in the food, real estate. . . ."<sup>37</sup>

### The Regs Are More Restrictive Than Section 6045

The regulations are clearly much more restrictive than the statute. The regulations assist (even if indirectly) those in the underground economy avoid tax reporting, because the IRS is not very good at finding unreported

and even underreported income. It is time for the secretary to realize that the only way to close the tax gap is to require more "voluntary compliance" by the current underground economy. That will only happen if the IRS either substantially increases the number of audits (which it is unlikely to do) or alternatively if the definitions of brokers and customers in the regulations are amended to include anyone who hires another to provide services that match buyers and sellers where the offer and acceptance flows between the parties through the third party or the third party's software or Web site.<sup>38</sup> That is a much closer definition to that in the statute, which states that a customer is "any person for whom the broker has transacted any business. . . ." The statute is broad enough to cover Internet and other auctioneers as well as traditional consignment sellers. Amending the regulation to require reporting by those types of businesses would be a start at closing the tax gap.

After so many years, can the IRS amend the regulations to substantially broaden their coverage and win the inevitable lawsuit filed by these businesses? The Supreme Court has stated that a regulation has "particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent."<sup>39</sup> But a regulation does not have to be contemporaneous to be valid.<sup>40</sup> The Supreme Court has also "rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question."<sup>41</sup> Courts therefore allow the IRS to change regulations ". . . in light of administrative experience."<sup>42</sup> A regulation is less persuasive if it is not contemporaneous, but one court held that it could not invalidate a regulation unless it unreasonably construed the statute and its legislative history.<sup>43</sup> So, even though amended regulations may be promulgated years after the statute was enacted, as long as they are supported by the statute they should be upheld if challenged.

### What Should Be Covered by a New Regulation?

Numerous issues arise if reporting is required by middlemen such as Internet auctions that would not be present if a similar transaction was undertaken in real space rather than in cyberspace.

<sup>38</sup>The regulation would have to be written to distinguish classified advertising and swap meets from Internet auctions. But the distinction seems to be that the newspaper and the swap meets allow the buyer and sellers to act directly with no use of the third party. Thus, in the case of a newspaper ad, the buyers and sellers use phone or e-mail to contact each other. In the case of a swap meet, it is face to face. In the case of an Internet "auction," the third party is there to facilitate the actual sale by posting bids on a continuing basis.

<sup>39</sup>*National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477, 99 S. Ct. 1304, 1307, 59 L. Ed.2d 519 (1979).

<sup>40</sup>*Id.* at 484-86.

<sup>41</sup>*Rust v. Sullivan*, 111 S. Ct. 1759, 1769 (1991).

<sup>42</sup>*National Muffler*, *supra* note 39, 440 U.S. at 485.

<sup>43</sup>*Pacific First Federal Savings Bank v. Comm.*, 961 F.2d 800, 804-08 (9th Cir. 1992).

<sup>35</sup>Reg. section 1.6045-1(a)(2).

<sup>36</sup><http://www.m-w.com/cgi-bin/dictionary?va=broker> (last visited on Oct. 14, 2004).

<sup>37</sup><http://www.britannica.com/eb/article?tocId=27252&query=broker&ct> (last visited on Oct. 14, 2004).

*Verifying sellers.* When a seller signs up for an Internet auction his identity may be a problem. Social Security numbers should be required and be verified with an IRS database, just as is done with new employees. As a backup, some other form of verification should be required, such as a bank account or a credit card with the same name and identification number.

### Determining Sales Prices

How will the "venue" know the amount of gross income to report? In many cases, the venue knows exactly what the seller and the buyer have agreed to because it monitors that information to collect its fee, which is based on a percentage of the selling price. If the seller does not receive the selling price, because, for example, the buyer's check bounces, it can always report the gross proceeds and take a deduction for "bounced checks."

When the venue's software does not capture the sale price, reporting of gross proceeds may be impossible. That does not mean that the venue should not be required to report. Instead, there should be a box on Form 1099 that says "Check here if unable to determine amount of gross receipts." The form could further ask the venue to estimate the number of sales made and possibly the average asking price or some similar information that would help the IRS to identify underreporting.

### Personal Gains

Reporting personal rather than business sales could cause extensive reporting by taxpayers who are simply selling a few items from home, sort of as an online garage sale. That could be handled by providing an exception to the reporting requirement for those sellers who are not in business. It does not seem fair that those who have a garage sale on a real street will not be reported to the IRS on Form 1099, but those who have an Internet garage sale would receive a Form 1099<sup>44</sup> especially because most items sold at a garage sale actually result in — personal,

<sup>44</sup>Obviously, fairness has never been a hallmark of the tax law. There are numerous examples of similar transactions being subject to different reporting requirements. Thus, gambling winnings are reported to the IRS not based on the dollars won but on the odds of winning. Thus, a person who bets \$10,000 in blackjack and wins \$10,000 will not be reported to the IRS because the odds were less than 300 to 1 (section 3402(q)), but if a \$2 bet on the pick six wins \$10,000 the bettor will be reported to the IRS. Both people won \$10,000 but only one was reported to the IRS. The distinction here is that the statute provides for this different reporting treatment. The tax law requires both individuals to report their income, but it is fairly certain that the blackjack winner will not report his winnings because the IRS has no way of knowing about it and often the person will not even realize he has taxable income.

nondeductible losses.<sup>45</sup> An exception should therefore be provided for minimal sales that are likely to represent personal sales.

The IRS has demonstrated that it has the ability to create nonstatutory exemptions under section 6045. In the case of required reporting by a barter exchange, the IRS exempted reporting of transactions that are less than \$1.<sup>46</sup> A similar ruling or the regulations could exempt reporting by sellers who tell the venues that they are not in business and are not selling at a profit. Reporting should be required, however, if the quantity or value of sales exceeds amounts that might raise suspicion that the seller could be subject to income tax reporting. What those numbers should be is best left to the IRS and the industry to determine, but a good starting point might be mandatory reporting if there are more than 50 sales per year and at least \$2,000 of sales per year. Thus, a single car, even sold at \$15,000, would not require reporting and neither would 100 sales of CDs at \$11 each, unless both occurred in the same year.

### Newspaper Ads and Swap Meets

The Internet venue industry may ask: How do you distinguish Internet auctions and consignment sales from either newspaper advertisements or swap meets, which I don't believe should be covered by section 6045. The difference is that the Internet venue actually functions as a middleman. It is the software that handles all aspects of the transaction between the buyer and seller from bids to sales. Swap meets and newspaper advertisements simply facilitate the meeting between the buyer and the seller. At that point the buyer and seller negotiate directly with each other and the third party is no longer involved. Newspapers and swap meets simply help buyers and sellers find each other.

### Conclusion

All taxpayers should pay their fair shares of taxes. The system breaks down when a large percentage of businesses fail to report their income. Fairness dictates that the IRS crack down on those who don't report their income, especially if that can be done easily by amending outdated regulations so that gross income of many businesses would be reported to the IRS. Section 6045 appears to provide that answer for some businesses that sell over the Internet and for others that sell their products through traditional consignment sales. Unfortunately, if reporting is required, some nonbusiness sellers might get caught in the net and might have to explain to the IRS that their sales were personal and therefore not taxable. They should be able to handle that. It's a small price to pay compared to the cost of not closing the tax gap.

<sup>45</sup>Section 262.

<sup>46</sup>Notice 2000-6, 2003 IRB 315, Doc 2000-984, 2000 TNT 4-3.