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C. BRANCUSI v. UNITED STATES

T. D. 43063

UNITED STATES CUSTOMS COURT, THIRD DIVISION

54 Treas. Dec. 428; 1928 Cust. Ct. LEXIS 3

November 26, 1928, Decided

DISPOSITION: [*1] Reversed.

CORE TERMS: sculpture, work of art, sculptor, importation, bird, bronze, metal, gold, artist, customs, stone, terminates, platinum, statuary, silver, block, schools of art, natural objects, reproduction, drawings, breadth, sketches, solid, per centum ad valorem, composed wholly, original production, increases in size, manufactured, cylindrical, imagination

COUNSEL: Charles J. Lane, M. J. Speiser, and Curie, Lane & Wallace (Thomas M. Lane of counsel) for the plaintiff.

Charles D. Lawrence, Assistant Attorney General (Marcus Higginbotham and Reuben Wilson, special attorneys), for the United States.

JUDGES: Before WAITE, YOUNG, and CLINE, Justices.

OPINION BY: WAITE

OPINION

WAITE, Justice: The importation in this case is invoiced as a bronze bird and mentioned in the record as "Bird in flight." It was entered as a work of art in the form of a sculpture and claimed to be entitled to entry free of duty under paragraph 1704 of the tariff act of 1922. It was assessed by the collector of customs at 40 per cent ad valorem as a manufacture of metal under paragraph 399 of the same law.

The respective paragraphs are as follows:

PAR. 399. Articles or wares not specially provided for, if composed wholly or in chief value of platinum, gold, or silver, and articles or wares plated with platinum, gold, or silver, or colored with gold lacquer, whether partly or wholly manufactured, 60 per centum ad valorem; if composed wholly or in chief value of iron, steel, lead, copper, brass, nickel, pewter, zine, aluminum, or other metal, but not plated with platinum, gold, or silver, or colored [*2] with gold lacquer, whether partly or wholly manufactured, 40 per centum ad valorem.

PAR. 1704. Original paintings in oil, mineral, water, or other colors, pastels, original drawings and sketches, in pen, ink, pencil, or water colors, artists' proof etchings unbound, and engravings and woodcuts unbound, original sculptures or statuary, including not more than two replicas or reproductions of the same; but the terms "sculpture" and "statuary" as used in this paragraph shall be understood to include professional productions of sculptor only, whether in round or in relief, in bronze, marble, stone, terra cotta, ivory, wood, or metal, or whether cut, carved, or otherwise wrought by hand from the solid block or mass of marble, stone, or alabaster, or from metal, or cast in bronze or other metal or substance,

or from wax or plaster, made as the professional productions of sculptors only; and the words "painting" and "sculpture" and "statuary" as used in this paragraph shall not be understood to include any articles of utility, nor such as are made wholly or in part by stenciling or any other mechanical process; and the words "etchings," "engravings," and "woodcuts" as used in this paragraph [*3] shall be understood to include only such as are printed by hand from plates or blocks etched or engraved with hand tools and not such as are printed from plates or blocks etched or engraved by photochemical or other mechanical processes.

The importation appears to be a production in bronze about 4 1/2 feet high supported by a cylindrical base about 6 inches in diameter and 6 inches high. It is highly polished and burnished brass or bronze, symmetrically constructed with a top between 1 and 2 inches in diameter. It terminates at the top in a point which might be caused by the cutting of the piece diagonally across and upward until it terminates in an edge. It increases in size as it descends with a slight curve to the middle, from which point it decreases and terminates about 10 inches from the pedestal, where it is cylindrical, and from that point it increases in size in a conical shaped base which rests upon the pedestal.

Exhibit 2, a photographic representation of the importation is made a part of this decision, as it is difficult to describe it with sufficient accuracy to convey to the mind of one who has not seen it its actual appearance. Assuming the view shown in Exhibit 2 to be [*4] a view of the back of the figure, a side view reveals a crescent shape, that in Exhibit 2 being the back or cord of the crescent.

The piece is characterized, as stated above, as a bird. Without the exercise of rather a vivid imagination it bears no resemblance to a bird except, perchance, with such imagination it may be likened to the shape of the body of a bird. It has neither head nor feet nor feathers portrayed in the piece. As stated above, it is entirely smooth on its exterior, which is a polished and burnished surface.

Considerable testimony was produced on both sides. On the part of the plaintiff the testimony of the sculptor was taken and of one other who claimed to be and probably was a professional artist. Other witnesses were produced who have been familiar with art and art works in their study and in museums and as artists and writers upon art. All of these declared the production to be a piece of sculpture and a work of art, the work of a professional artist and sculptor, Brancusi.

Two witnesses were produced on the part of the Government who have had experience in art and sculpture, who were, in fact, under the accepted definition, sculptors. These pronounced the importation [*5] to be neither a work of art nor sculpture.

There is no question in the mind of the court but that the man who produced the importation is a professional sculptor, as is shown by his reputation and works and the manner in which he is considered by those competent to judge upon that subject. We also find it is an original production.

The requirements of the paragraph under which this is claimed to be entitled to free entry provide for original sculptures, the works of a professional sculptor, with the further proviso that the term shall not be understood to include any articles of utility. The term "works of art," which originally appeared as the heading of the predecessor of this paragraph (par. 717 of the act of 1909), was dropped there-front in the enactment of the 1913 law (par. 652), and the latter was reenacted, practically without change, as paragraph 1704 of the present tariff law. Nevertheless, this court has held that to be entitled to free entry under said paragraph 1704, articles must be works of art. (See our decision in protests 17195-G, etc., reported in Abstract 1792.)

Having found that this is the work of a professional sculptor, and that it is original, the question then [*6] for us to determine is as to whether it conforms to the definition given under the law for works of art. It must be conceded that what have been determined to be works of art under the decisions of recent years, would, under the more remote, decisions of the courts, not only the customs courts but the United States Supreme Court, have been rejected as not falling within that term. We think that under the earlier decisions this importation would have been rejected as a work of

art, or, to be more accurate, as a work within the classification of high art. Under the influence of the modern schools of art the opinion previously held has been modified with reference to what is necessary to constitute art within the meaning of the statute, and it has been held by the Court of Customs Appeals that drawings or sketches, designs for wall paper and textiles, are works of art, although they were intended for a utilitarian purpose. (See *American Colortype Co. v. United States*, 9 Ct. Cust. Appls. 212, T. D. 38046; *MacLoughlin v. United States*, 10 Ct. Cust. Appls. 37, T. D. 38261; *Cheney Bros v. United States*, 12 Ct. Cust. Appls. 195, T. D. 40172.)

Government counsel in support of the contention [*7] that this impartation is not sculpture, cites the case of *United States v. Olivotti* (7 Ct. Cust. Appls. 46; T. D. 36309). In defining the term "sculpture" the court there said:

Sculpture as an art is that branch of the free fine arts which chisels or carves out of stone or other solid material or models in clay or other plastic substance for subsequent reproduction by carving or casting, imitations of natural objects, chiefly the human form, and represents such objects in their true proportions of length, breadth, and thickness, or of length and breadth only. *Standard Dictionary*; *Century Dictionary*; *United States v. Downing & Co.* (6 Ct. Cust. Appls. 515; T. D. 36197); *Stern v. United States* (3 Ct. Cust. Appls. 124, 126; T. D. 32381); *United States v. Baumgarten* (2 Ct. Cust. Appls. 321, 322; T. D. 32052),

This decision was banded down in 1916. In the meanwhile there has been developing a so-called new school of art, whose exponents attempt to portray abstract ideas rather than to imitate natural objects. Whether or not we are in sympathy with these newer ideas and the schools which represent them, we think the fact of their existence and their influence upon the art world as recognized [*8] by the courts must be considered.

The object now under consideration is shown to be for purely ornamental purposes, its use being the same as that of any piece of sculpture of the old masters. It is beautiful and symmetrical in outline, and while some difficulty might be encountered in associating it with a bird, it is nevertheless pleasing to look at and highly ornamental, and as we hold under the evidence that it is the original production of a professional sculptor and is in fact a piece of sculpture and a work of art according, to the authorities above referred to, we sustain the protest and find that it is entitled to free entry under paragraph 1704, supra. Let judgment be entered accordingly.