

**CECI N'EST PAS UN OISEAU – THE JUDGE AS A CRITIC
AND THE WORK OF ART CONCEPT IN TAX LAW¹**

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ABSTRACT: “Work of Art” is an elusive and mutable concept, object of dispute within philosophy and the theory of art. Law regulates the practices and objects involved in artistic activities, and in order to perform its functions – protecting interests and settling disputes in a complex society –, it has to adopt operational and binding art definitions. Based on these premises, the *Brancusi v. United States* case serves as a paradigm for a tax law study, with the aim of investigating the existence of the legal concept of “work of art”, identifying areas in which distinctive legal protection is bestowed upon objects classified as art and the tensions between the ever enlarging contemporary art definition and law’s need for certainty.

KEYWORDS: art law; tax law; import tax over works of art; art theory.

“L’art dit non figuratif n’a pas plus de sens que l’école non enseignante, que la cuisine non alimentaire, etc.”
(René Magritte)

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INTRODUCTION

At first, law and art seem to be bound to conflict: the former is a lord of bureaucracy and practical matters, and the latter is commonly defined as a realm of contemplation unconcerned with reality. Such view is not correct: art usually deals with reality, not aiming at recreating it literally, but criticizing it, expanding its possibilities, reproducing its dynamics. As any other aspect in social life, art is subject to legal regulation, and the limitations set by such regulations influence directly on the practical aspects of production and reception of art.

In present days, legal regulations display the characteristics of Modern Law (Adeodato, 2012, p. 248-252 [kindle]), seen as a specific form of producing Law, based on autopoiesis (that is, self-referentiality), and characterized by the function of neutralizing – instead of “solving”, as the solutions are often precarious and the cases can frequently be revised – the conflicts of a complex society by granting the monopoly of decisions to the State.

Self-referentiality of legal concepts and the need of regulating several objects, including the artistic ones, creates a fundamental and indissoluble tension between art and law. In attempt of regulating the most diverse aspects of art work, law creates its own concepts – an example is “work of art” –, which seldom correspond to what is used in the artistic world.

The creation of legal concepts alone is a complex activity – and, even if it is completely self-referential, such production must relate to the real-life aspects it applies. And when reality data are controversial, elusive – for example, when artists, critics or scholars cannot reach an agreement on what is art and what is not, and the definitions in vogue tend to change, to evolve or to be substituted completely as time goes by –, the complexity level increases even more. Similarly to law, art can be seen as a self-referential world, a layer of social life that creates its own reality. This similarity is not new: medieval Italian jurists considered the poet to have similar authority over his work to the one of the monarch and the judge over the people and law, all authorities derived from God (Kantorowicz, 1961, p. 267-279).

Considering such theoretical thoughts, this paper aims at investigating the definition of art by Law – specifically, by Tax Law, regarding import taxes. Such definition includes other elements of importance, as the artist and the work of art. What are the characteristics of art of Law? Which legal techniques are used to regulate it? Which arguments have been used by judges to decide in controversial cases? How does Law define the concepts from the artistic world?

These questions will be analyzed together with the *Brancusi vs. The United States* trial, one of the most famous cases in the history of art and Law, as it created a legal and public debate about the definition of art. Besides, this paper attempts to show how current and relevant the case has become regarding the discussion on the definition of art, by analyzing the current customs legislations in Brazil and in the world, and the recent relevant decisions that became innovative and paradigmatic or controversial.

THE BRANCUSI VS. UNITED STATES CASE

In October, 1926, the steamboat “Paris” docked in New York. Not only did the ship bring Marcel Duchamp, controversial artist, but also a precious and peculiar cargo he had been in charge of escorting. The strangeness of the load was promptly noticed by the American customs supervision, whose administrative officer, looking at the apparently unconnected objects – disks, eggs and objects in the shape of flames made out of carved wood, polished metal and smooth marble (Giry, 2002) –, did not consider the customs declaration that defined them as works of art and applied a different tax classification. The items were categorized under “medical objects, kitchenware or unidentified metal articles”, with application of import duty on ad valorem rate of 40%.

The cargo was a set of artworks by Romanian sculptor Constantin Brancusi, destined to an exposition at the renowned Brummer Gallery. The administrative classification deprived them of the current tax exemption in US law on the subject at the time, the *Tariff Act*, from 1922. The decision of the administrative authorities was considered just and fair (Kearns, 1998, p.

160), so the stakeholders were left with the option of taking judicial proceedings. As he was not favorable to the exhibition, the Romanian sculptor did not get involved in the entire “brouhaha” the case created. Conducted by a group of people interested on the favorable decision – Marcel Duchamp, Gertrude Whitney (future founder of the Whitney Museum, in New York) and her attorney, as well as Edward Steichen, photographer, admirer of Brancusi and owner of the symbol of the court case, the sculpture *Bird in space* –, the case quickly gained the media and the public (Mann, 2011), as they got entertained by the heated debate on whether a polished bronze stick should represent a bird and be considered a work of art, or not.



Bird in space, Constantin Brancusi, France, 1923. Sculpture in polished bronze, 185.42 × 15.24 × 12.7cm. Available at: <http://collections.lacma.org/sites/default/files/remote_images/piction/ma-1315437-WEB.jpg>. Access: Feb. 10, 2016.

The written law: the definition of art in the *Tariff Act* of 1922

Concerning tax law and import taxes specifically, the most relevant characteristic of the legally regulated objects is that they go under the merchandise circulation category and, thus, their financial and asset value is of great importance. The *Tariff Act* was an economically protectionist legislation, created in order to tax the incoming products at the maximum rate, as a means of guaranteeing competitive advantage of the industrial production of America within the country's territory (Berglund, 1923, p. 14-33).

The legal device of the *Tariff Act* which ensured tax exemption for works of art was paragraph 1704, *in verbis*:

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 sculptors 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 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* (emphasis added).

The law prevents defining art in a theoretical or abstract manner, preferring a material description, and the features that are part of this description serve both to include a list of traditional art forms and to ensure that the benefit of the tax exemption is not granted to any manufactured product, no goods which could compete with domestic products the internal market. In short, art is defined by exclusion rather than by artistic criteria: art is that which is not a mere commodity (Kearns, 1998, p 162.). In

addition to the list of artistic raw materials, the text may indicate that the qualities that make an artistic object are "professionalism", as well as craftsmanship, originality and the exclusion of a utilitarian character.

**The characteristics of a work of art:
analysis of *Bird in space* and its adequacy to legal criteria**

A contemporary observer looking at the *Bird in space* and considers the Paragraph 1704 of the *Tariff Act* may be surprised by the administrative decision of denying tax exemption to Brancusi's sculpture. The object in dispute fulfilled all the requirements prescribed by law in order to be considered a work of art, an easily verifiable fact for both the American administrative authorities and the judges of the American Customs Court. The question of interpreting the law "literally" had to be considered by the magistrates. The fact that such "literal" interpretation was not applied by the administrative authority indicates, though, that legal interpretation does not have a ready, univocal, previously established sense.

a) The "professionalism" criterion

Brancusi was a professional artist, studied at the School of Fine Arts of Bucharest, in his home land Romania, was considerably famous in Europe and his works had been exhibited in the United States before (Giry, 2002) when the cargo with his collection was taxed 40% of its value. The concept "professional artist", as not defined by legislation, gives room for subjective interpretation. However, commonly aspects concerning the exercise of professional activities – such as professional qualification, regularity of production and subsistence from the work produced – were not discussed in court. Instead, the sculptor was questioned as a professional artist; his personal characteristic of artist was overlooked because what he produced was not considered art. For the state authorities, a stick of polished bronze was not the type of figure a professional artist would produce.

b) The "craftsmanship" criterion

"Craftsmanship" is hereby understood as the demands for the work of art to be produced by hand, with no chemical, industrial or photomechanical processes. Both Brancusi and Edward Steichen were

summoned to court to testify about the confection of the statue. The artist admitted he did not do the bronze foundry itself, a stage he considered as the least important of the process. He emphasized, though, that he had provided the bronze alloy and carved the plaster casts of crude bronze. Afterwards, he made the cuts and did the polishment of the brute piece, a part he considered the most important one, equivalent to the recreation of the object whose result is the materialization of the artistic conception (Edelman, 2011, p. 86-87). Steichen stated he saw this process in person, as the bronze piece decreased in size until it reached a fifth size and acquired a completely different texture (Giry, 2002).

c) The originality criterion

The originality criterion demands the work of art to be an original conception, as opposed to a copy or a reproduction. It is true that *Bird in space* was not the first work by Brancusi inspired by and called “*Bird*”: two other older pieces also represented birds, with even more elements that resembled the image of birds, such as beaks or feathers. However, as Brancusi cleared out, these sculptures are variations of a single theme. The last one, *Bird in space*, was the final version, an improved one, which, for the artist, reached the ideal form of a bird (Giry, 2002).

d) The exclusion of the utilitarian character

The exclusion of any utilitarian character first appeared in the 19th century and is a form of distinguishing “great arts”, more noble, from minor arts, which substituted the medieval distinction between noble arts and craftsman arts (Eco, 1989, p. 136). The distinction between fine arts and applied arts is a fruit of the Industrial Revolution: art becomes the opposition of the universe of utilitarian objects produced in scale. Even when accepting such distinction as a valid one, it is difficult to use it to justify the demand of taxes: the practical inutility of the *Bird in space* is so noticeable that the very agent of customs categorized it using a very generic classification.

Considerations: interpreting beyond what is literal

During the trial, the strategy of the United States' attorney and the questions of the president of the Customs Court, judge Waite, pointed at the same direction: beyond a mere verification of the fulfillment of legal requirements, it was an attempt from a public and a Court who were very little familiar or receptive to modern art (Edelman, 2011, p. 17-24) of understanding why a bronze stick could be a work of art.

The origin of the opposition seems to be the fact itself that the *Bird in space* was not recognizably in the shape of a bird, and not the fulfillment of law requirements. The demand for a pictographic accuracy, however, only leads to contradiction: first of all, the participation of the artist in the making of the object was questioned, since no real artist would bother polishing a stick of metal. In the view of the attorney, the outstanding polishing was the only merit – exclusively technical, not artistic – of the object.

Following to that, the case attempted, as contradicting as it may be, to reduce Brancusi to the position of a simple technician, since only a craftsman would take the effort, as if to show love for technique, of polishing an object made out of metal with no identifiable shape. Here, the intellectual capacity of the artist is put in check: the conception effort, a fundamental feature of art production, is completely ignored.

In summary, this point of view ignores two aspects of the reality of artistic production, mainly regarding Brancusi. He would never describe his own work using the oppositions the State attorney used, such as conception/handicraft, form/material, art/utility, representation/invention. In his press declarations, he stated that the objective of the artist is to create as nature creates, instead of imitating its appearance, materializing objects with life and characteristics of their own characteristics which enable them to offer the same sensations that nature offers (Edelman, 2011, p. 16). Thus, the artist is able to transcend appearance and reach the real essence of things (Shanes, 2010, p. 108-114). Based on this view, there is a unity between thinking and materialization. Matter is an element with life on its own, ready to reorganize and give life to form.

**Unfavorable precedent:
the *olivotti&co. Vs. United states case***

If the criteria of the written law did not determine the decision taken by the customs court regarding the *Bird in space* entirely, which legal substrate did the attorney of the United States use to argument? The answer lies in the Olivotti&Co. vs. United States case, of 1916, when the same customs court decided (Demarsin, 2013, p. 133), in a restrictive interpretation, that the tax exemption from the *Tariff Act* should only regard “liberal arts”, which are something beyond ornamental and decorative pieces and imitate natural objects as seen by the artist, raising emotions exclusively via visual aspects.

If the *Tariff Act* text defends, even if covertly, a conception of art – either by the choice of traditional materials, or by the opposition to industrial products –, never does it demand content and form established by restrictive interpretation in the precedent of the Olivotti&Co. vs. United States case. Modern law, in its neutralizing function, avoids the adoption – expressly, at least – of value judgments as legal criteria. However, the mentioned precedent clearly adopts a very specific and strict definition of art, a distorted simplification of the idea of art as mimesis.

The idea of art as mimesis goes back to Plato, who said that nature is the imperfect image of Idea, and art, which imitates nature, is, at most, the imperfect image of the imperfect image. The problem of this line of thinking is that it undermines the autonomous value of art, which becomes a mere tool used to get to know a version of truth, not really different from philosophy, science or other cognitive activities. Even so, the concept of Idea is fundamental for the history of art: starting from Cicero, it absorbs a different meaning and starts to be described as a model of internal creation of the artist, of a transcendental or empirical order (Panofsky, 1994, p. 16-17).

Following to that, such subjective model of artistic creation, which takes elements from nature but does not imitate it, is materialized in the art work. This materialization is not, however, a copy: the artist selects elements from the model and gives them meaning, with emphasis to one over the others in order to adapt to the raw material, by making them

abstract. Painting abstracts dimensions, sculpture abstracts textures and, in an extreme demonstration of this process, Brancusi's sculpture abstracts the physical appearance of the bird in order to evoke the flight (Gombrich, 1999, p. 12). The word "evoke" is used on purpose: the work of art has no communicative value and does not represent the flight of the bird; neither does it have explicit or fixed meaning, because the public's interpretation happens similarly to artistic creation. Even if the intention of the artist is taken into account, the observer also selects and abstracts elements in order to fill them with personal and unrepeatable meaning.

In this sense, the idea of perception (Philippopoulos-Mihalopoulos, 2003, p. 20-21) is useful, meaning a consciousness of present originated from a projection, outwards, of the subjective modifications made on the object. The artist works from his or her perception of the object in production and the perception of the public's expectations and reactions. The public itself has individual perception about the work of art and the artist. If the *Bird in space* is considered a communicative object, destined to transmit information about other objects, the sculpture becomes meaningless. If, however, it is seen as the result of Brancusi's perception of the flight of a bird (or the idea of the flight of a bird, as the sculptor would probably state) and the psychological projection of meanings from the observer, its evoking value might be appreciated. As the pipe of Magritte, which was not really a pipe, the *Bird* was not really a bird. Within this perspective, the witnesses testified in court and contributed to the innovative decision of the case.

**The experts testify:
the importance of opinion from authority**

Beyond the unprecedented public debate about the definition of art, the relevance of the Brancusi case also lies in the never-before-seen participation of experts of the artistic world. Since the facts of the case were notorious, the discussion became rather theoretical, focusing the classification of the *Bird in space* as art. That is why both the state and the plaintiffs brought to court artists, critics and other personalities from the artistic world.

Having a considerable reputation at the time (Delavaux; Vignes, 2013, p. 16), Thomas Jones and Robert Aitken, sculptors, firmly rejected Brancusi's sculpture. For Jones, it was "too abstract", a perversion of formal sculpture (Giry, 2002), and, for both, deficient in beauty (Edelman, 2011, p. 124-125). These responses were not of use for Judge Waite: he could not, in theory, decide what abstraction or beauty level makes an object a work of art.

The witnesses of Brancusi were questioned firstly about the relation name-form, which was, in the view of the State, a form-content relation. Steichen, photographer and owner of the sculpture, summoned to give new declarations, acknowledged the artist's authority over his work by stating the sculpture is a bird because the artist chose to call it so. The reason given by the owner of the object in order to consider it art is the sensation of quick flight, the suggestion of a momentum towards the sky (Edelman, 2011, p. 132). Jacob Epstein, a British sculptor, inquired by the same line of thought, listed several positive artistic characteristics in the sculpture: the sense of pleasure and beauty it brought, having been made by the sculptor and, above all, being a beautiful object (Edelman, 2011, p. 92).

The same questions were repeated to other witnesses – Watson Forbes, editor of the magazine *The Arts*, Frank Crowninshield, editor of *Vanity Fair* and William Henry Fox, director of the Brooklyn Museum of Art. Their responses confirmed: yes, they called the sculpture a bird because that was the name given by the artist and they did not think it could represent a different animal had the name been changed. Watson Forbes was responsible for bringing back the focus of the discussion: it did not matter the name of the work, as it did not alter its meaning. It was the suggestion of the flight of a bird that really mattered. Frank Crowninshield went on with the same line of thought: the sculpture suggested grace, velocity linked to force, strength, and the beauty of a bird's flight. William Henry Fox agreed, as follows his summarized opinion: the object in question is artistic because it is expressive, it has a suggesting form that represents the flight of the bird in an original manner (Edelman, 2011, p. 132-133; p. 138-141). Fox assures he would exhibit the sculpture at the Brooklyn Museum of Art, simply by the artistic merit of the work and its author (Edelman, 2011, p. 134-136). If the curator of a renowned museum

was considering Brancusi an artist worthy of an exhibition, based on what argument should a court deny such status? Tired of the repetition of questions and the reinforcement of similar arguments, the president judge of court saw himself obliged to admit (Mann, 2011) that there was no law that demanded works of art to represent objects of nature literally.

The final decision

The final decision of the case put the judiciary officers under the scrutiny of a sharp-tongued artistic community and a public who was suspicious of vanguards, facing the decision of what is art and being prohibited to do so based on arbitrary aesthetical judgements of value. As the legal investigation showed that the Olivotti standard was unsustainable, the sentence had also to establish a new one in order to substitute the precedent case and justify the classification of the *Bird in space*. The decision, said by the president of court, Judge Waite, was as follows:

Since Olivotti, [...] a so-called new school of art has been developing, whose exponents seek to portray abstract ideas instead of imitating natural objects. Whether we sympathize or not with these new ideas and schools that represent them, we consider that the fact of their existence and their influence over the world of art, in a way also acknowledged by courts, should be taken into consideration. [...] The object now under consideration... 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, in the terms of paragraph 1704 previously referred to. (Waite apud Burr; Duboff; Murray, 2010, p. 12).

The sentence acknowledges the fact demonstrated during the judicial investigation: the *Bird in space* fulfills every requirement of the work of art described in the *Tariff Act*. However, in order to supplant the decision of the Olivotti case and establish a new understanding, judge Waite based his argument on the existence of a “new school of art”, and artistic environment, as defines Mann (2011), coherent and logically organized. The limitations of such fundamentation are noticeable: the hierarchy and the organization of the artistic landscape are not homogeneous and are

constantly under discussion and modification, so much that some vanguard movements were only accepted by the establishment long after their appearance. Even though the literalness of the name-fame, word-thing relation was left out, the list of artistic forms protected by law was still very limited to traditional art – painting, sculpture, illustration –, whilst the development of art in the 20th century was marked by the creation of completely new forms that challenged all expectations.

It sounds unfair, though, to accuse the decision about the *Bird in space* of not establishing the ultimate legal concept of art: not even art theory is able to do so, and the judge could not have been able of predicting all the practical and theoretical changes that art would go through. However, a judge has to decide in a predictable way for the average citizen, within previously defined legal limitations and without the (excessive) use of personal judgments of value. In this view, the appeal to the authoritative opinion of some experts is a curious mechanism for establishing dialog between Law and a non-legal area of life: it grants the existence of previous criteria to acknowledge what is art, and, facing the prohibition of judging based on value, gives this task for a group that has the credentials to do so. Authority, a dear concept of Law and recognizable by it in different areas of life, grants legal force of decision.

Considerations: from the so-called neutrality of law to the will of the judge

The Brancusi case may be seen as a misunderstanding caused by old-fashioned interpretations, of administrative or legal order, within a legislation that was perfectly neutral and accepting of Contemporary Art protection. This was not necessarily incorrect: the legislation of the *Tariff Act* was modern to the extent of not differing much of the nowadays legislation on the same topic. The legislative option of describing objects that are legally considered art, avoiding theoretical discussions on the matter, grants neutrality and objectivity looks to the legal text and is an attempt of conceiving the benefit of tax exemption to the biggest amount of objects possible, within the limits of customs legislation and its protectionism.

Although the scope of the legislation is comprehensive, it cannot be said that the legal text is "neutral" or "objective". The mere distinction of art forms, of traditional materials and techniques crystallizes an art definition that, in the 1920s, was already old-fashioned: artistic movements such as futurism or the *Bauhaus* school were developing an obsession for industrial production. Besides, a pretentiously neutral legislation cannot hinder the work of art to receive legal protection based on administrative authorities or judges' will, as what happened in the precedent *Olivotti & Co.* An incompatible definition of art in relation to the real world of artists is possible in Law, either because of the possibility of manipulating the concepts that legally define it – such as the “professional artist” argument – or because of teleological restrictive interpretations.

As for the Brancusi case, the participation of the witnesses of the complainant, acknowledged as experts in the artistic world, was crucial for the favorable decision. As Law is recommended not to emit judgement of value, the judge delegated this task to a group that had the credentials to do so – after all, the very distinction between art and non-art grants something special, worthy of protection, to a certain object. Even though, personal value given by the judge – who admitted the work was beautiful, symmetrical and ornamental – could not avoid being relevant for the decision.

THE GLOBALIZATION OF THE DEFINITION OF ART IN TAX LAW: THE HARMONIZED SYSTEM

Almost 100 years have passed since the Brancusi case, and the decision is still relevant both for theory and the practice of artistic law. Even if not only Brancusi but also all the vanguards of the 20th century have already been righteously canonized in the pantheon of history of art, new similar cases constantly show up. The basic outline is always the same: a case in which the established patterns by Law are not able to accompany the transformations of the world of art.

It is not as if Law has been immutable during all this time. The legal frame within those questions are dealt with nowadays is the Harmonized Commodity Description and Coding System (Harmonized System - HS). Developed by the World Customs Organization (WCO), this merchandise

classification method, based on a structure of numerical codes and their respective descriptions – in which every commodity corresponds to an identification number –, was adopted by over 200 countries. The adoption of a regional version of the HS is possible, such as what happens within the European Union (Demarsin, 2013, p. 14-146).

There is a set of interpretative general rules, destined at solving classificatory conflicts between different positions in the System. Each chapter also accounts with a group of interpretative notes determined by its signatories. Besides, the WCO issues binding interpretative notes (WORLD CUSTOMS ORGANIZATIONS, 2010). In case there are complaints as for the classificatory decision of the national administrative authority, the questions are taken to local courts. Since the adoption of the System can be in groups of nations, following the patterns of regional deals, it is possible for regional commissions to issue binding interpretations as what happens in the European Union (Demarsin, 2013, p. 144-146). Brazil adopted the System together with Argentina, Uruguay and Paraguay, under the name Nomenclatura Comum Mercosul (Common Nomenclature of Mercosur), which is the guidelines for these countries to adopt a Common External Tariff of tax standardization (Latitude, 2013, p. 58).

The works of art are categorized and described on Chapter 97 (Table 1) of the Harmonized System, composed by positionings and explaining notes:

Section XXI
OBJECTS OF ART, COLLECTION PIECES AND ANTIQUES
Chapter 97
Works of art, collection pieces and antiques

Notes.

1.- The present chapter does not include:

- a) Postal stamps, tax stamps, postcards and similar objects, unused, numbered 49.07;
- b) Paintings for theater backgrounds, studio backgrounds or similar uses (numbered 59.07), safe when they can be classified in position 97.06;
- c) Natural or cultivated pearls and precious or semi-precious stones (numbered from 71.01 to 71.03).

<p>2.- “Original engravings, prints and lithographs” are considered as number 97.02, defined as the impressions produced directly, in black and white or in color of one or of several plates executed entirely by hand by the artist, whatever the technique or material used, excluding any mechanical or photomechanical process.</p> <p>3.- Are not included in position 97.03 the sculptures with a commercial character (such as series reproductions, moldings and craft works), even if they had been created or conceived by artists.</p> <p>4.- A) Safe by the observations in Notes 1, 2 and 3, articles susceptible to be classified in this chapter and in other chapter of the nomenclature, are classified in this chapter. B) Susceptible articles to rank in the position 97.06 and in heading 97.01 to 97.05 are to be classified in heading 97.01 to 97.05.</p> <p>5. Frames around paintings, drawings, collages and similar decorative plaques, engravings, prints or lithographs are to be classified with those articles when their characteristics and value are compatible with those articles. Frames whose characteristics or value are not compatible with the devices referred to in this note are to be classified separately.</p>		
CODE	DESCRIPTION	TAX(%)
97.01	Pictures, paintings and drawings made entirely by hand, other than drawings of heading 49.06 and manufactured articles decorated by hand; collages and similar decorative plaques.	
9701.10.00	- Pictures, paintings and drawings	4
9701.90.00	- Others	4
9702.00.00	Original engravings, prints and lithographs.	4
9703.00.00	Original productions of statuary art or sculpture, of any material.	4
9704.00.00	Postal stamps, revenue stamps, postmarks, first day envelopes (first-day covers), postal and similar, obliterated, or unused, except goods of 49.07 position.	4
9705.00.00	Collections and specimens for collections of zoological, botanical, mineralogical, anatomical, presenting historical, archaeological, paleontological, ethnographic or numismatic interest.	4
9706.00.00	Antiques over 100 years.	4

Table 1 – Chapter 97 of the MERCOSUR Common Nomenclature. Drawn from the data appearing on the website of the Ministry of Development, Industry and Foreign Trade. Available in <<http://goo.gl/VqKqbC>>. Access: Feb. 10, 2016.

From the analysis of this legal provision, it is possible to notice the similarity of the contemporary legislation with the Paragraph 1704 of the *Tariff Act*. In Chapter 97, techniques, forms and traditional art materials are described and works made by hand by the artist are protected, with the express exclusion of those obtained by photochemical or photomechanical

processes or sculptures with commercial character. These provisions go against the trends of the vanguard of modern art of the twentieth century and contemporary art of the century, such as the obsession with industrialization, dematerialization and personalization (Demarsin, 2013, p. 108).

This gap between the law and the world naturally results in the emergence of court cases in which the application of tax over unconventional works of art is questioned - since, even if they are not always completely free of them, works of art usually enjoy tax benefits. In Europe, the proliferation of cases results in the establishment of an extensive jurisprudence and the consolidation of paradigmatic decisions. Aiming at analyzing the ways used by contemporary courts to neutralize the conflict between art and law, some relevant decisions, paradigmatic, cited repeatedly by the doctrine and the subsequent case law - whether innovative or not - will be analyzed.

Favorable jurisprudence: law recognizes vanguard

In paradigmatic cases with favorable decisions to the complainants, extensive interpretation – which enhances the sense of norm beyond the written law (Ferraz Júnior, 2003, p. 297) – is the mechanism found by judges to expand the definition of work of art when the novelty of artistic forms is not included on Chapter 97 of the System, and the classification under another position seems wrong.

In the Reinhard Onnasch v. Berlin-Packhof case, an embossed wall made of polystyrene and coated with oil painting was considered, by ultimate decision of the European court, as a sculpture, even if it was not created from traditional techniques as predicted by the System. According to court, the word “sculpture” should be understood including “every three dimensional art production, regardless of the techniques used in the making” (Demarsin, 2013, p. 134-136). The decision was based on the European Commission's position, crystallized in the explanatory note in Chapter 97 - with an equivalent in the Mercosur Common Nomenclature (item 4-a) Table 1) - in case of doubt in classification under Chapter 97 or another, the former prevails.

Also in Germany, the *Gmurzynska v. Bundesfinanzhof* case expanded the framework concept of handmade collages and similar decorative plaques. The work in question was the *Telefonbild*, by Hungarian artist Laszlo Moholy-Nagy, a steel plate coated with colored porcelain pieces. The production of the work followed a very particular way: the artist asked, by phone, a set of enameled porcelain tablets and described his project to the director of paintings, who on the other side of the line tried to follow the instructions. The authority has classified it as "ornamental object in common metal" (heading 83.06). The complainant argued the statutory art classification, based on the decision of the *Onnasch* case. The court, however, observed the two-dimensional structure of *Telefonbild* and considering the materials irrelevant for classification purposes, classified the work between the frames "handmade by the artist", "collages" and "similar decorative plaques", specifying that the latter comprises the elements of organization of different materials, resulting in a pictorial or decorative motif set over a support (Demarsin, 2013, p. 136-138). The fact that the object was not performed by the hand of the artist was ignored for the decision.

Unfavorable jurisprudence: the literality of law

Not always do judges apply evaluative interpretation, above all when there is no doubt regarding the classification of the art form in another chapter different from number 97. In such cases, even if the articles may function as works of art, the classification of immediate appearance prevails, because the "objective and ostensible" aspects of the objects should be used by the tax revenue officers to make a decision.

Photography is the art that suffers the most because of this rigor, even if it is more globally accepted as an art form than a big part of contemporary art. In the *Ingrid Raab v. Hauptzollamt Berlin-Packhof* case (Kearns, 1995), the complainant, purchaser of photographs by American artist Robert Mapplethorpe, attempted the classification under the original engravings, lithographs and prints category, as the pieces are made in reduced numbers and signed by the artist and the essentiality of its artistic character should be enough in order to assure its fitting in Chapter 97. The request was

denied because of the existing taxes for photographs under another category in the HS.

In the *Farfalla Flemming und Partner v. Hauptzollamt Munchen-West* case, a group of “paper weights” – collector’s items of a limited series, signed by famous artist – was classified under position 70.13 (“glass articles of decoration and similar uses”). The classification under Chapter 97 demanded in court was denied, under the justification that note 3 of the referred chapter excludes the classification of strictly commercial character and that the tax classification operates from objective and ostensive elements of the article, excluding considerations like the finality and artistic concerns, which are impossible to verify by the authorities or by the Law (Kearns, 1994). However, if there is an art category in the legislation, the judges should obviously accept artistic appreciations, and identifiable elements such as the artists’ signature, the characteristics of the purchaser and the difference of the value of the object and the raw material should offer safe criteria to do so.

The most recent case, which caused fury in the artistic community, was the *Haunch of Venison v. Her Majesty's Commissioners of Revenue*, in which the claimant in court was rated as art and got tax exemption for the components of the works of its artists represented - the set of lights by Dan Flavin and video devices by the video artist Bill Viola. After the decision of the case, however, the European Commission issued the regulation No. 731/2010, with the aim of standardizing the interpretation of the HS. The regulation stated that the customs classification should be stipulated by the component parts, given the inability of the supervisory authorities of analysing non-objective characteristics (Demarsin, 2013, p. 138-146). Again, however, objective criteria such as the value of the goods and the fact that the importer is a gallery were not taken into consideration. The Commission also considered that the works of art were not the components themselves, but the result of its operation, and that, moreover, those had not been modified (Delavaux; Vignes, 2013, p. 19). In practice, the Commission determined that a considerable tax rate (20%) was applied to the high-value electronic components as such, even if no one would ever buy the works of Flavin or Viola to use as lamps or DVDs.

Considerations: creative jurisprudence and the predominance of appearance

The analysis established from the Harmonized System guidelines jurisprudence shows both the relevance of Brancusi case in present days and the failures of the main contemporary legal text which provides for import taxes or exportation of works of art. If a text like the *Tariff Act* already kept the possibility of tension with artistic movements that were then avant-garde, nowadays these tensions become even more problematic: the movements that used to be innovative are already consolidated in the production and artistic movement.

The instrumental role of law to resolve conflicts, however, requires that these tensions are resolved when taken to courts. Where the dispute comes down to fitting in Chapter 97 an object that does not match the literal description of the law, but there is no certainty as to the possibility of establishing a different classification, the technique of broad interpretation (Ferraz Junior, 2003, p. 296- 301) is used without embarrassment, through the selection of relevant features (such as three-dimensionality) and even ignoring requirements of the law, as is the case *Telefonbild*. When it comes to filling an apparent gap in Law, concepts and interpretations become flexible.

The same flexibility is not the case when there is a conflict of laws, that is, when the object can be classified in more than one position of the Harmonized System. In such situations, often the "objective characteristics" of the object shall prevail even if they do not function otherwise than artistically. Ironically, Law gives more importance to appearance than art, which should be the primary domain of this quality. It is ignored, thus, the existence of other objective criteria which, taken and analyzed together, objectively indicate that the object is a work of art. Examples are the declared value of the object and the information on exporters and importers – such as renowned art galleries. This jurisprudence ignores the expansion carried out in the 20th century, of the number of things in life that are considered art: currently, the discussions don't concern the intrinsic artistic quality of the object, but the conditions (time, place, context etc.) in which it works as art (Cabay, 2013, p. 66).

FINAL THOUGHTS

The analysis of Brancusi case and the contemporary jurisprudence on art in Tax Law shows that the definition of art by the legal world is based less on artistic criteria than the interests protected by law. In the field of taxation and, more specifically, import taxes, these interests are patrimonial and are related to the objects' circulating goods status. In this path, tax benefits are granted to art because of its particular off-balance sheet value, in order to differentiate it from common commercial goods, industrialized or produced in series. Although such differentiation is justified, putting it into practice involves a number of problems: the law uses supposedly objective and neutral descriptions, with the aim of ensuring predictable decisions and guaranteeing that the rights of the defendants won't depend on the sheer will of decision makers. These claims are, as it can be seen in the case studies analyzed, flawed: the conflicts often end up being decided case by case, and each individual decision crystallizes a definition of art and therefore a rudimentary theory of art. The intended legal certainty is a shot that backfires.

This is because Law adopts a definition of art out of step with the artistic definition of art. This is an example of the freedom and the artificiality of the legal world, and at the same time, its limitations. It is true that the regulatory function is also creative: regulation at some point becomes reality, prescribing the reality is also recreating it. In other words, Law, like art, can create an autonomous reality with its own operation, and problems between the two worlds derive from both their similarities and their differences. This similarity is not new: both Law as art can be considered as *ars*, practices, areas of human activity based on rules and practice, operations searching for a result (Eco 1989; 130-133.).

The differences between the two branches of life are nevertheless obvious. Art is necessarily reflective. Aware of the role of the artist and the public on the significance of the work, art admits the lack of communication in the perceptions of both; the form, as an unit of distinction between art

and non-art, is always aware of the environment and the importance of it to the projection of meanings (Philippopoulos-Mihalopoulos, 2003, p. 21-26). The definition of art accepts and incorporates uncertainties, surprises and expectations, knowing that its relationship with the set of objects which it embraces is a dialogical one – the modifications of the former always rebound over the latter, and vice-versa; so it shows itself to be flexible enough to admit that anything in the proper context could be art. In short, art admits uncertainty as a constitutive element.

Law, in turn, is rigid in its self definition. It includes new objects in order not to change itself, but to expand its imperative power. The distinction between legal and non-legal acts is rigid and pays little regard to the uncertainties arising from the reception of standards by those who are subject to them. Law merely selects the defensible or indefensible subject matter, without further considerations on the context and the expectations of the recipients. This rigidity is justified by the will to issue reasonably foreseeable decisions – Law understands that its job is communication, transmission of rational decision criteria. Difficulties arise because, in its eagerness to reduce uncertainty, Law runs the risk of being at the mercy of will and interpretation, when the meaning of its texts is, like the meaning of art, elusive.

One should not, however, condemn interpretation as a completely arbitrary activity. In the absence of legal and institutional measures needed for a closer approach between legal definitions and real practices of production and reception of art – changes such as the addition of an undetermined category of art objects in the Harmonized System or interpretation notes with lists of examples and circumstances that indicate how artistic an object that does not fit any category can be –, it is interpretation that does this job, on a case by case basis. Interpretation is the moment of legal application in which the peculiarities of the real situation – that is, the projections and expectations of the subjects involved – are taken into consideration.

By mediating the elements of reality with state law, the judge creates and expands the legal reality, coming as close as possible to the artist. This mediation would be favored by more artistic knowledge and judgments

about art - that is, greater insight into the specific technical problems of the protection of art by law and autonomous value of art when faced with opposing legal values – on the part of law enforcers. But if the law allows creativity in interpretation, artists and other interested parties in the production and circulation of art should be concerned about legal knowledge, should become interested in legal knowledge, in order to manipulate it as a tool in the advocacy of their interests.

Conflicts of a complex society demand answers, even if temporary, innovative, specially in the context of a constitutional system with broad and generic principles which require a relevant interpretive effort in order to be fulfilled. And who better to test and question limits - especially when these concern art - than artists?

Having specific goals, Law imposes a concept of art, even if it does not concern the reality of the artistic world. Based on that, one could consider that Law can decide who is an artist or not. By manipulating typically legal instruments, the artist takes part on decisions and, thus, acquires a sovereignty that only the State and Modern Law are able to provide.

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