BOUSSOD VALADON CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 30, 1895.)

No. 494.

1. CUSTOMS DUTIES—REVIEW OF THE DECISION OF THE BOARD OF APPRAISERS—EVIDENCE.
   A finding of the board of general appraisers, not sustained by sufficient proof, will be disregarded by the court.
2. SAME—PAINTING IMPORTED FOR EXHIBITION — ASSOCIATION FOR PROMOTION OF ART.
   A painting imported for exhibition by an association for the promotion of art, within Act Oct. 1, 1890, par. 758, providing for admission of works of art so imported, does not fall within the proviso of paragraph 759, that the privileges of paragraph 758 "shall not be allowed to associations engaged in or connected with business of a commercial character," merely because it is exhibited in the art rooms occupied by a copartnership engaged in selling works of art, some of whose members are connected with the association.
3. SAME—PROTEST—REFERENCE TO STATUTE NOT IN EXISTENCE.
   A protest which clearly points out the facts and reasons why certain goods should be admitted free of duty is not bad because it refers to a statute not in existence at the time, and such reference does not relieve the collector from proceeding under existing laws.

This was an application by the Boussod Valadon Company, the importer of a certain painting for exhibition, for a review of the decision of the board of general appraisers sustaining the decision of the collector of the port of New York assessing duty on said painting.

Eugene H. Lewis, for importers.
Jason Hinman, Asst. U. S. Atty.

COXE, District Judge (orally). I think that the painting in this case is directly within paragraph 758 of the tariff act of 1890. It is not within the proviso of paragraph 759 of the same act, first, because the proof is insufficient to sustain the finding of the board; and second, even if the finding were correct, it would not bring the case within the proviso, because the proviso clearly refers to importations by those engaged in business or connected with business of a private or a commercial character. It is safe to say that the lawmakers did not intend that provision to cover the case of a painting exhibited by a corporation in the art rooms occupied by a copartnership engaged in selling works of art, even though some members of the copartnership may be connected with the corporation.

The question of protest is more serious. It is, however, purely technical; no one has been misled, and I shall hold the protest good. The reference to a statute not in existence at the time was surplusage and did not relieve the collector from proceeding under existing laws. The protest was clear and explicit in pointing out the facts and the reason why the importer insisted that the painting should enter free of duty. The decision of the board of appraisers is reversed.

UNITED STATES v. MAYER et al.

(Circuit Court, S. D. New York. February 6, 1895.)

No. 1,878.

CUSTOMS DUTIES—CLASSIFICATION—GRAPES IN BARRELS—CORK DUST AND SAW DUST.

Certain grapes were imported from Spain in barrels of about two cubic feet capacity each. Duty was assessed upon them by the collector of customs at the port of New York at "60 cents per barrel of three cubic feet capacity, or fractional part thereof," under paragraph 299 of the tariff act of October 1, 1890, without any allowance for the cork dust and saw dust, which constituted nearly one-half of the cubical contents of the barrels. The importers protested that they should be allowed for the cork dust, saw dust, and other tare, under said paragraph 299, or that the grapes were duty free, under the provision for "Fruits, green, ripe or dried, n. o. p. f.," in paragraph 580 of the free list of the same tariff act. The board of general appraisers took evidence showing the quantity of cork and other dust contained in the barrels; also, that these latter were the ordinary, average barrels of grapes, and that such grapes are always sold in this market by the barrel, in the condition as imported, and that the weights on the trade catalogues include barrel, cork dust, and grapes. The board of general appraisers decided that the "barrel" applies to the standard of measurement, and not to the form of the package, and that, if the grapes are dutiable by cubic measure, then tare must be allowed for packing material beyond that which occupies the interstices between the grapes or bunches. By measuring the grapes, a correct estimate of their cubic measurement may be obtained. The board cited and relied upon the case Lead Co. v. Seeberger, 44 Fed. 258, and sustained the importers' protest that an allowance for the cork and saw dust should be made. *Held*, that the conclusion reached by the board of general appraisers was correct, and that the collector was not authorized to take duty upon the cork dust and saw dust.

At Law. Appeal by United States from decision of board of general appraisers reversing the action of the collector in assessing duty on certain Malaga grapes. Affirmed.

Wallace Macfarlane, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty.

W. Wickham Smith (of Currie, Smith & Mackie), for appellees.

COXE, District Judge (orally). The respondents in this cause are dealers in fruit. They imported into this country Malaga grapes, which were assessed for duty by the collector under paragraph 299 of the tariff act of October 1, 1890, taking duty not only upon the grapes but also upon the saw dust and cork dust in which they were packed. The importers protested, insisting that they were entitled to a deduction for tare by reason of the cork dust and saw dust. The practical question presented to the court is whether under the guise of assessing grapes, the collector is authorized to take duty upon saw dust. I do not think he is. It is true that the courts should not legislate, but if a construction consistent with common sense can be arrived at it is the duty of the court so to construe the act in question. I agree with the con-