Neutral Citation: [2023] UKFTT 00963 (TC)

Case Number: TC08987

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2020/03192

EXCISE – seizure of Rolex watches worth $59,000 declared as "precision instrument parts" worth $500 – refusal to restore – whether misdeclaration caused by mistake – held, no – appeal dismissed

Heard on 12 October 2023
Judgment date: 6 November 2023

Before

TRIBUNAL JUDGE ANNE REDSTON
MR LESLIE BROWN

Between

WATCH TRADING CO

Appellant

and

THE DIRECTOR OF BORDER REVENUE

Respondents

Representation:

For the Appellant: Mr Jeremy Spicer of Middleweeks Solicitors

For the Respondent: Mr Rupert Davies of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

Introduction

1. The Watch Trading Co ("the Appellant") is a US company which trades in second-hand or "pre-sold" luxury watches. Mr Jeremy Thomas ("Mr Thomas") works for the Appellant but has also set up his own company in Los Angeles, which buys watches from the Appellant and on-sells them to customers in the Los Angeles area.

2. On 23 April 2020, the Appellant sent a parcel to Mr Thomas's father, Mr Michael Thomas ("Mr Mike Thomas") in the UK. The air waybill ("AWB") for that parcel stated that it contained "precision instrument parts" valued at $500. The parcel was intercepted on arrival at Stanstead and found to contain five Rolex watches ("the Rolexes") valued at $59,000; it was seized by the Border Force.

3. The Appellant applied for restoration on the basis that the parcel had been sent to Mr Mike Thomas by mistake. The Border Force refused, on the grounds that there had been "a deliberate attempt to evade import duties". The Appellant appealed.

4. We found much of the evidence given on behalf of the Appellant to be unreliable and inconsistent. We agreed with the Border Force that there had been a deliberate attempt to evade import duties, and upheld the decision not to restore. The appeal is therefore refused.

The law

5. The relevant law was not in dispute. In summary, Finance Act 1994 s 16(4) and Schedule 5 s.2(1)(r) gives the Tribunal jurisdiction to review the Border Force's decision not to restore the watches. Section 16(4) provides that in exercising that jurisdiction, the Tribunal must decide whether the Border Force's decision was reasonable.

6. The appropriate test to be applied when determining that question is whether the Border Force Officer acted in a way in which no reasonable officer could have acted; if he took into account an irrelevant matter or disregarded something to which he should have given weight, (see the judgment of Lord Lane in *C&E Commrs v JH Corbitt (Numismatists) Ltd* [1980] STC 231.

7. In *John Dee* [1995] STC 941, Neill LJ gave the only judgment with which Roch and Hutchison LJJ both agreed. He first outlined the principles in a similar fashion to Lord Lane, but went on to acknowledge at p 953:

> "It was conceded by Mr Engelhart, in my view rightly, that where it is shown that, had the additional material been taken into account, the decision would *inevitably* have been the same, a tribunal can dismiss an appeal…I cannot equate a finding 'that it is most likely' with a finding of inevitability."

8. In assessing reasonableness, the Tribunal may also consider evidence that was not before the decision maker, and may reach factual conclusions based on that evidence, see *Gora v C&E Commrs* [2003] EWCA Civ 525.

The evidence

9. The Tribunal was provided with a Bundle containing 121 pages, including the correspondence between the parties. Officer Ian Cox provided a witness statement adopting the evidence of Officer Brenton, who had issued the review decision relating to the Rolexes, but who has since retired. Officer Cox also gave evidence in chief, but Mr Spicer declined to cross-examine him. We found Mr Cox's evidence to be entirely reliable.

10. Mr Mike Thomas provided a witness statement, gave evidence in chief led by Mr Spencer, was cross-examined by Mr Davies and re-examined by Mr Spicer. Some of his evidence was inconsistent, see §17. and §54. below, and he was sometimes reluctant to give a straightforward answer, see §15.. However, his evidence about the conversation with the Border Force after receipt of the Rolexes was similar to the Officer's near-contemporaneous account, and we also accepted Mr Mike Thomas's unchallenged evidence about the lack of customs duty on a second parcel.

11. Mr Thomas provided a witness statement, gave evidence in chief led by Mr Spencer, was cross-examined by Mr Davies and answered questions from the Tribunal. We found him to be an unreliable witness in relation to the key issue in dispute, namely whether the Rolexes had been sent to Mr Mike Thomas by mistake. The part of our decision below headed "whether there was a mistake" sets out the various points Mr Thomas made at different times, and identifies the inconsistencies.

12. Mr Thomas sought to blame these contradictions on his poor command of written English. We do not accept this. The Bundle included a number of communications from him, and we also had his witness statement. Although those documents include some spelling errors, such as "boarder force", the language is clear and there is no ambiguity or obscurity. Moreover, Mr Thomas also gave contradictory evidence from the witness box despite being entirely fluent in oral English, his mother tongue.

FINDINGS OF FACT

13. We make our findings of fact on the basis of the evidence, taking into account our finding on credibility.

Mr Mike Thomas

14. Mr Mike Thomas lives in the UK. He has a business buying and selling cars. He described himself as a "watch enthusiast" and the Grounds of Appeal similarly say that he was "an avid watch fan".

15. During cross-examination Mr Davies referred Mr Mike Thomas to the part of those Grounds which stated that the Rolexes "have no commercial value in the UK", and asked him to agree this was incorrect. Mr Mike Thomas initially avoided giving a direct answer, but when the question was repeated, he said it was "of course" not true that the Rolexes had no commercial value in the UK.

16. Mr Mike Thomas currently possesses four or five watches, and has owned up to three Rolexes at any one time, although he currently has only one. He buys second hand watches, for instance at car boot sales, and he also refurbishes second-hand watches. When asked by Mr Davies if he sold watches, Mr Mike Thomas said he "would never advertise" a watch for sale, but he sometimes purchases a car in exchange for cash together with a watch: in other words, a watch is handed over as part payment for a car which becomes part of his trading stock. Mr Davies invited us to find that Mr Mike Thomas "deals in watches" as part of his business, and Mr Spencer accepted in closing that he had "bought and sold some watches". We find that he did so as part of his business.

17. Mr Mike Thomas's evidence about the value of his watches was inconsistent. He stated that the watches he had owned were "of no real value", but also said:

(1) he had purchased his first watch for £800 and it had subsequently increased in value; and

(2) he had taken £6,000 from an inheritance to add to other money in order to buy a particular watch.

18. We do not accept that the watches Mr Mike Thomas owned were "of no real value". A watch costing over £6,000 is plainly valuable, and it is not credible that business customers would accept a watch in part-exchange for their cars unless those watches too were valuable. We find that the watches in which he deals are valuable.

Mr Thomas

19. Mr Mike Thomas passed on his enthusiasm for valuable watches to his son. Mr Thomas worked for a while in Europe, sourcing watches for the Appellant, an established dealer in second-hand luxury watches based in Miami, which is owned by Mr Mike Dawson and his wife Heather.

20. Mr Thomas moved to the US to work for the Appellant "a long time ago", and in February 2020, while continuing to work as the Appellant's Director of Operations in Los Angeles, he also set up his own company WTC LA Inc; this company identifies buyers and sellers for second-hand watches in Los Angeles and operates in partnership with the Appellant.

The Rolexes are despatched

21. On 23 April 2020, the parcel containing the Rolexes was despatched from Miami using FedEx. The Appellant was the consignor and Mr Mike Thomas the consignee. The parcel was sent out using "Ship for Insure", a process operated by Wexler Insurance ("Wexler") in conjunction with FedEx. Wexler provided the insurance for the goods in the parcel.

22. The following information was on the paperwork:

(1) The AWL stated that the parcel had a customs value of $500; the box headed "commodity information" had been completed with the words "precision instrument parts".

(2) A related commercial invoice issued by Wexler repeated that information, as well as stating that there were five units in the package, each with a unit value of $100. The harmonised system ("HS") tariff code was given as 9114104000. The duty was stated to be payable by the consignee.

(3) The supplementary declaration acceptance advice repeated both the value and the description, but gave a different the tariff code, namely 9114100090; it also stated that the duty (including VAT) payable by the consignee was £103.94.

23. At the relevant time 9114 was the HS code for "clock or watch parts not otherwhere specified", the remaining digits varied depending on the type of part. The HS code for watch straps began with the digits 9113; the remaining digits varied depending on the material from which the strap was made.

The seizure

24. On 23 April 2020, the parcel arrived at Stanstead Airport, and Officer Raymond Neil selected it for examination. He found the Rolexes and identified online that they were each worth between £10,000 to £15,000. They were seized on the basis that an "untrue declaration" had been produced to Customs, because they had been incorrectly described as "precision instrument parts" and also because the valuation was "untrue".

25. On 28 April 2020, Officer Neil sent Mr Mike Thomas a "Notice of Seizure", which stated that the Rolexes had been seized and set out the above reasons for the seizure. Mr Mike Thomas received that letter a day or two later and immediately called Officer Neil. On 27 May 2020, Officer Neil made a note of that call in which he recorded Mr Mike Thomas as having said:

> "He was the father of the consignor and was worried that he would get into trouble for trying to import this consignment of which he had no prior knowledge. He claimed that his son had sent him the watches without him knowing about it and that he would be speaking to his son to ask him never to do that again. He could offer no satisfactory explanation as to why his son had done this."

26. Mr Mike Thomas said in his witness statement:

> "I spoke to an officer and explained who I was and that I was not expecting parcel, I explained that my son, Jamie works in the watch business and I was shocked that a parcel of that value would have been sent without prior notification."

27. Mr Mike Thomas's evidence that he did not know the Rolexes were arriving in the UK was not challenged in cross-examination and we accept it. We also find that Mr Mike Thomas made the other statements recorded in Officer Neal's near-contemporaneous account.

28. Mr Mike Thomas telephoned his son the same day and told him about the seizure. Some three weeks later, Mr Thomas called Officer Neal and said that "the wrong sticker was put on the wrong box", and that the parcel sent to Mr Mike Thomas "should have only contained parts". Officer Neal asked Mr Thomas to clarify the nature of his relationship with Mr Mike Thomas, and Mr Thomas said he was "a client". Officer Neal asked the same question later in the conversation, and Mr Thomas repeated that Mr Mike Thomas was "one of his clients".

The restorations application and the decision under appeal

29. The seizure was not challenged in the magistrate's court. On 20 May 2020, the Appellant applied for restoration of the Rolexes, on the basis that they were "due to be shipped internally to one of our other offices within the USA" and had instead been mistakenly sent to Mr Mike Thomas. Mr Thomas later clarified that the "other office" was his own company in Los Angeles. Whether or not the Rolexes had been sent to Mr Mike Thomas "by mistake" was the key issue in dispute, and we consider the evidence and make findings separately at §33.ff below.

30. Restoration was refused on 5 June 2020, and Mr Thomas asked for a review of that decision. On 5 August 2020, Officer Brenton issued his review decision, refusing restoration on the basis that "this was a deliberate attempt to evade import duties".

31. The Appellant appealed to the Tribunal. A hearing was listed for January 2023 before Judge Baldwin, but this was discontinued because Mr Thomas was giving evidence from the USA and the "evidence from abroad" position had not been clarified in advance. Mr Mike Thomas and Mr Thomas subsequently filed and served their witness statements.

32. The hearing was relisted before us; we had none of the oral evidence given at that earlier hearing and were unaware that it had occurred until informed by the parties. This hearing was thus carried out afresh, ie on a *de novo* basis, with Mr Thomas giving evidence from the UK.

WHETHER THERE WAS A MISTAKE

33. We set out below the evidence relating to whether the Rolexes were imported by mistake, and make findings of fact. As will be clear from the following paragraphs, the evidence changed over time and contained many inconsistencies.

Mislabelling before despatch?

34. Mr Thomas informed Officer Brenton that "all outgoing shipments look identical" because they are all packaged in the same FedEx boxes. He then said:

> "from this stage a handwritten label with the surname attached to the sealed FedEx box. Once sealed these boxes are taken to the Fed ex depot where the shipping paperwork is then placed within a sticky label bag and the label bag is placed onto the box.
>
> It is at this point where the 'error' has been made…The error was carried out at the point of labelling the box due to taking the incorrect label for the parcel named THOMAS. The labels destined for a parcel of parts for Mr Mike Thomas had been placed on the parcel of watches intended for Mr James Thomas in LA."

35. The Appellant's Grounds of Appeal say that the labelling was carried out by Mrs Heather Dawson, the Appellant's co-owner, and that she had "prepared many Air Way Bills that day for pending and upcoming shipments" and that, upon printing, there was "an AWB for Mr J Thomas and an AWB for Mr M Thomas", but as a result of "human error" the AWB for Mr Mike Thomas's parcel was attached to Mr Thomas's parcel.

36. The Grounds continue by saying that the parcel intended for Mr Mike Thomas contained "some old straps and parts" which had been "taken off pre-owned inventory when being replaced with fresh parts". In the rest of our decision, we have called this the "Straps Parcel".

37. The Bundle included a letter from Mrs Dawson dated 9 January 2020; this included the following statements:

> "I personally created all the labels in this day, one label was for James Thomas, another label was for Mike Thomas. We sent out multiple parcels that day and I can confirm that the label was incorrectly placed on the parcel due to be shipped to WTC LA in California…The error was made at the point of shipping in the FedEx depot after all the shipping documents had been made. Due to only placing surnames on the outgoing parcels, we had 2 shipping labels with the surname Thomas and the label for Mr M Thomas was incorrectly placed on the parcel for Mr James Thomas."

38. When Mr Thomas entered the witness box, he similarly said there were "two parcels out of 30 to 50 sent out at the same time" by the Appellant. Mr Mike Thomas's oral evidence was that the two parcels had been "labelled up wrong", with the Rolexes coming to him while the Straps Parcel had "arrived with Jamie in California". When asked how he knew the Straps Parcel had been sent to California in error, he said that when he called his son to tell him about the seizure "he told me the girl in Miami had labelled these up wrong".

39. In summary, this evidence is that there were two parcels, one intended for Mr Thomas containing the Rolexes and one intended for Mr Mike Thomas containing "old straps and parts"; both parcels were labelled "Thomas", and the labels were switched by mistake. There are, however, a number of difficulties with that scenario, as explained below.

No supporting evidence for the Straps Parcel having been sent to Mr Thomas

40. The first difficulty is that, as Mr Davies said in submissions, if there had been a simple mistake which consisted of swapping two labels, it would have been an easy matter to provide the label and packaging for the Straps Parcel which had been incorrectly sent to Mr Thomas. But no such evidence was provided. There is no FedEx documentation, no insurance documentation, and no photographs of the parcel itself or of the "old straps and parts" allegedly contained within it.

The timing of Mr Thomas's realisation

41. The second difficulty is that if the two parcels had been FedExed at the same time, one to the UK and one to California, the latter could be expected to arrive before, or at the same time, as that sent to the UK.

42. The Rolexes were despatched on 23 April 2020 and arrived in the UK the following day. Had Mr Thomas received the wrong parcel at or around the same time, he would have realised the error and contacted his father. He would therefore have known about the "mistake" well before he received the Notice of Seizure from Officer Neal on 29 or 30 April 2020. That did not happen: instead, when Mr Mike Thomas contacted Officer Neal, around a week after the Rolexes had been sent out, he knew nothing about them and was "shocked".

43. When asked in cross-examination about the timing issue, Mr Thomas said that FedEx parcels mostly arrived within 1-2 days, but that during Covid it could take as long as three to seven days. However, taking into account the time taken to deliver the Rolexes to the UK, we find on the balance of probabilities that had the Straps Parcel been sent to Mr Thomas at the same time as the Rolexes were despatched to Mr Mike Thomas:

> (1) Mr Thomas would have received the Straps Parcel *before* his father received the Notice of Seizure;
>
> (2) Mr Thomas would have immediately realised there had been a mix up and would have contacted his father; and
>
> (3) Mr Mike Thomas would then not have been "surprised" by the seizure, but would have been able to explain the position to Officer Neal.

44. The fact that Mr Thomas did not inform his father about the "mistake" is consistent with the Straps Parcel not having been despatched to him at the same time as the Rolexes were sent to his father.

Contact with FedEx

45. The Grounds say that Mr Thomas realised there had been an error when "the shipment did not arrive in LA", and that FedEx were contacted to stop the parcel sent to Mr Mike Thomas.

46. However, that evidence is contradicted by the email sent to FedEx from Mrs Dawson. That is dated 1 May 2020, so after Mr Mike Thomas had informed his son that the Rolexes had been seized by the Border Force. We find as a fact that Mr Thomas did not take any action to contact FedEx "when the goods did not arrive in LA" but only after he had been told of the seizure.

The Straps Parcel had not been put together

47. The fourth and most fundamental difficulty with this "swap" scenario is that the Grounds of Appeal also say that at the time the Rolexes were despatched "the parcel for Mr M Thomas had not been put together yet". In other words, according to the Grounds of Appeal, there were not two parcels waiting for despatch at the same time, both bearing the label "Thomas", with the wrong documentation being attached to each of them. Instead, there was only one parcel, that containing the Rolexes.

48. When asked in cross-examination about this discrepancy, Mr Thomas gave two conflicting explanations.

> (1) He first said that it was possible to type a label but it would not be "active", although he also separately confirmed that Mrs Dawson generated the labels by reference to the parcels which were to be shipped each day. We also noted that Mrs

Dawson did not say in her letter that one of the labels was for an actual parcel to be sent out to Mr Thomas, and one for a parcel which did not yet exist, to be sent to Mr Mike Thomas.

(2) Mr Thomas then changed his evidence and said that the two parcels had been sent out at the same time; that he had received the Straps Parcel and had sent it back to the Appellant in Miami. This was new evidence, given for the first time under cross-examination; it contradicted all previous explanations of how the "mistake" happened. None of the documents or correspondence says that Mr Thomas sent the Straps Parcel back to Miami. Moreover, Mr Thomas did not explain why, if he *had* received the Straps Parcel, he did not simply forward it to his father rather than sending it back to the Appellant.

49. We reject Mr Thomas's evidence as unreliable and find as a fact that only one parcel was despatched on 21 April 2020; that parcel was addressed to Mr Mike Thomas and contained the Rolexes. We come to that finding because:

(1) the evidence that there was a second parcel in existence at the same time to which the incorrect documentation had been attached "by mistake" was inconsistent with other evidence given by Mr Thomas and with the Grounds of Appeal;

(2) no copies of the documentation which would have accompanied the Straps Parcel on its alleged journey to Los Angeles had been provided, and there is no related internal paperwork;

(3) Mr Thomas did not contact his father to tell him that there had been a mix-up, as he would have done had the Straps Parcel been despatched to him at the same time as the Rolexes were sent to Mr Mike Thomas;

(4) Contrary to the Appellant's case, FedEx were not contacted when the Straps Parcel did not arrive in Los Angeles, but only after Mr Thomas had been informed of the seizure; and

(5) Mr Thomas's evidence on this issue changed several times.

50. That the above conclusion is correct is further supported by our findings about the documentation attached to the parcel containing the Rolexes, see §60. below.

The Straps Parcel sent to Mr Mike Thomas

51. We next consider the evidence and make findings about the Straps Parcel.

Previous parcels?

52. According to Mr Mike Thomas's witness statement, he had received "the occasional parcel of watch links or spare parts that Mr Thomas would have collected over a period of time and he sends them over", and this was repeated in his evidence-in-chief.

53. However, under cross-examination, he initially said that he had received "no parcels from him [Mr Thomas] since he was in America".

When was it sent out?

54. Mr Mike Thomas's evidence as to when he received the Straps Parcel was also inconsistent:

(1) On 20 May 2020, around three weeks after he received the Notice of Seizure, he wrote to the Border Force and said "I have now received the goods I was expecting as Watch Trade sent them out when they had realised the error".

(2) Under cross-examination, he initially said that he had "never actually received" the Straps Parcel.

(3) Later in the cross-examination, he said that the Straps Parcel had arrived "a couple of months" after the seizure, but also said that "it sat on Jamie's desk" and he couldn't remember "the exact date" but that it had arrived "at some point".

55. Mr Thomas's evidence on this point was also inconsistent. On 3 August 2020 he said the Straps Parcel was sent "as soon as we noticed the error", but in his witness statement said it was "eventually" shipped to Mr Mike Thomas.

56. It was difficult to evaluate the shifting sands of this evidence, but on balance we accepted that the Straps Parcel had been delivered to Mr Mike Thomas some months after the parcel containing the Rolexes was despatched.

What was in the Straps Parcel?

57. None of the Appellant, Mr Thomas or Mr Mike Thomas had retained any of the documentation or labels used for the Straps Parcel, or taken pictures of the items within it, even though it was clear that this parcel formed a key part of the Appellant's case.

58. Mr Mike Thomas's oral evidence was that the Straps Parcel contained "two leather straps, a cloth one and some Rolex links", although he was unable to remember the number of links; that evidence was not challenged and we find as a fact that the Straps Parcel contained three watch straps and some Rolex links.

59. It was common ground that its contents had a "very nominal value" or "no value". Mr Mike Thomas said he did not have to pay any duty on the Straps Parcel when it arrived, because the value of its contents was "so low", and we accepted that evidence.

The documentation

60. It was the Appellant's case that the documentation attached to the Rolexes had been created for the Straps Parcel. Mr Davies submitted that this was not credible, for the following further reasons (in addition to the points already considered above):

(1) Had the documentation attached to the Rolexes been created for the Straps Parcel, it would have used the customs code for watch straps, but that was not what had happened: instead, the code used was for "clock or watch parts not otherwhere specified". That code matched the description of "precision instrument parts", and it was the Border Force's case that the use of that code and the related description was part of the attempt to disguise the true nature of the goods.

(2) Had the documentation had been intended for the Straps Parcel, the value given for the contents would have been nominal, to reflect the fact that straps and links had negligible value. Instead, the documentation said that the contents were worth $500.

(3) The documentation stated (correctly) that the parcel contained five items, being the five watches, but there was no reliable evidence as to the number of items in the Straps Parcel: although Mr Mike Thomas had said it contained three watch straps and a number of links, he could not remember how many.

61. Mr Thomas was unable to explain the customs code, but in relation to the valuation, he said that the Wexler insurance system which produced the commercial invoices had a minimum unit value of $100 per item contained within a package; as there were five items, the minimum value was $500, and this was also the value for customs purposes. Mr Davies submitted that this was not credible, and it was also inconsistent with the fact that when the

Straps Parcel eventually arrived in the UK, Mr Mike Thomas did not have to pay any duty on it.

62. We agree with Mr Davies, and find as a fact that the documentation attached to the parcel containing the Rolexes were not created for the Straps Parcel.

The WhatsApp messages

63. The Appellant relied on WhatsApp messages to support its case that the Rolexes had been pre-sold to a customer of Mr Thomas's company in Los Angeles.

64. The first WhatsApp exchange has no sender name and is dated 21 April 2020: it reads "possible have it sold for £17k if not don't worry I understand. Please send pics of each watch and if there is another 116520 I'll take it". Under a date of 22 April is a picture of four watches and part of a fifth. The text then reads:

> "Hi pal the day date has been sold a few days again and not been updated. Looking for another one for you. Obviously Mike doesn't do ship with payment so I'm going to the bank now to pay this upfront for you. Then we can drop them off in the shop with you."

65. We agree with Mr Davies that no reliance can be placed on these messages. The other party to the conversation is unknown and there is no geolocation or other data. There is also a gap between the two messages: the first message asks for pictures, while the second refers to banking a payment and says he will "drop them off", so there is no message confirming that the other party had purchased the watches in the picture.

66. The Appellant also relied on a second WhatsApp exchange dated 22 May 2020. An unidentified person asked "can you tell me if these watches are coming or not if they aren't for whatever reason please let me know we've sold every one of them with deposits I'm looking bad. I rather give the deposits back". There is a similar message dated 24 May 2020 about "the delivery of the watches we were buying". The reply says:

> "Hi pal the goods are still with fed ex. I'm in the hands of fed ex as mentioned and I cant get them until they release them. I've submitted everything to them requested but its via the post. So its like 10-14 days response time its obscene. Its like going back 20 years they need proof of ownership."

67. The Appellant's case is that these messages showed the alleged purchaser chasing WTC LA for the delivery of the Rolexes. However, these exchanges took place some three weeks after the Rolexes had been seized by the Border Force, so they were not "still with fed ex", and the problem was not "proof of ownership". On the balance of probabilities we find that these messages refer to a different delivery, and place no reliance on them.

The paying-in slip and invoices

68. The Appellant also sought to rely on:

(1) four invoices it had issued[1]; the value of the watches on these invoices totalled $128,875, and one of those was for five Rolex watches which together cost $59,000. The invoices all state that payment was to be made to the Appellant's bank account, which ended 5040;

(2) a bank paying in slip dated 23 April 2020 for $128,875 paid into an account ending 5040; and

(3) a bank account showing a payment of $128,875 to an account ending 5040.

[1] It was unclear why the Appellant had issued invoices in addition to the commercial invoices created by Wexler, but this was not explored by the parties and we make no related finding.

69. It was the Appellant's case that the invoice of $59,000 was for the Rolexes; that it had been paid by WTC LA together with the three other invoices issued around the same time, and this showed that the Rolexes had been sent by mistake to Mr Mike Thomas instead of being sent to WTC LA.

70. On the basis of the paying-in slip and invoices, we accepted and find as facts that:

(1) $128,875 was paid to the Appellant on 23 April 2020;

(2) this was in settlement of the four invoices; and

(3) one of the invoices was for the Rolexes.

71. We make those findings despite noting that the *total* on the invoices was not $128,875 but instead $128,975. The $100 difference of was made up of two $50 charges for delivery. In the normal course of business transactions, payment would be for the total sum shown on the invoice. For some unexplained reason, that did not happen in this case, but we have placed no weight on that discrepancy.

72. Nevertheless, for the reasons explained below, we did not accept that the $128,875 had been paid from WTC LA's bank account and we also did not accept that the Rolexes were to be delivered to that company in Los Angeles.

Bank account used for payment

73. Mr Thomas provided a bank statement showing a payment of $128,875. However, that document has no header giving the identity of the account holder, and it thus fails to prove that it was WTC LA which paid that sum to the Appellant.

Billing and shipping address

74. Two of the four invoices (those dated 17 April 2020 and 20 April 2020) gave the billing and delivery address as "James Thomas" at an address in Bowdon, UK. The invoices were thus addressed to Mr Thomas as an individual and not to his company, and the watches were shown as delivered to the UK rather than to Los Angeles.

75. Mr Thomas sought to explain this by saying that it was "an old address from the UK as I used to supply the mini-office from the UK" and that the Appellant "never updated the address in the system", although it was "updated…later".

76. However, we agreed with Mr Davies that this was not credible. Mr Thomas moved to the US "a long time ago" and had set up his company two months before. We did not accept that the Appellant had continued incorrectly to address all invoices to Mr Thomas at an address in the UK throughout the period up to and including 20 April 2020.

77. That this is the correct conclusion is supported by a QuickBooks extract included in the Bundle showing an invoice sent to "WTC LA Inc" dated 13 April 2020, earlier than the two invoices dated 17 April 2020 and 20 April 2020. In other words, the Appellant's billing system had identified Mr Thomas's company as a client before it issued the two invoices dated 17 and 20 April to Mr Thomas at an address in the UK.

78. Thus, two of the four invoices paid out of the bank account provided were not addressed to WTC LA and the related watches were not delivered to Los Angeles. That is consistent with our finding above that there is no evidence that the payment of $128,875 in settlement of all four invoices was made by WTC LA.

Lack of delivery address

79. Although the two invoices dated 17 April 2020 and 20 April 2020 discussed above give a delivery address, the other two, including that showing the Rolexes does not; it simply says

“Bill to Jamie, Watch Trading Company LA”. The invoice therefore does not state that the Rolexes were to be delivered to Mr Thomas’s company in Los Angeles.

Conclusion

80. The evidence therefore not show (a) that the Rolexes were purchased by Mr Thomas’s company, or (b) they were to be delivered to Los Angeles.

The different documents

81. One of the reasons Mr Brenton gave for his decision was that false declarations as to the value and content of the parcel containing the Rolexes had been made on the label; the AWB; the supplementary declaration and the commercial invoice, and it was unlikely that the labeller would have made a genuine administrative error on all four documents.

82. Mr Thomas’s evidence was that the software used by the Appellant required the consignor to generate a single shipping document; the other documentation relating to each parcel was automatically generated, and attached by FedEx at the depot prior to shipment. Mr Thomas was unable to explain why, if this was the case, the tariff code on the commercial invoice was 9114104000 while that on the supplementary declaration was 9114100090, see §21..

83. However, as it was the Appellant’s case that the alleged “mistake” arose from attaching the wrong label to the parcel containing the Rolexes, rather than from an error made in drafting the accompanying documents, we decided it was not necessary to make a finding as to whether those documents were automatically generated.

Finding on “mistake”

84. We have already found as a facts that:

(1) when the parcel containing the Rolexes was labelled and despatched, the Straps Parcel had not been made up, so there was no confusion between that parcel and the one containing the Rolexes;

(2) the parcel containing the Rolexes was despatched on 21 April 2020 and was addressed to Mr Mike Thomas;

(3) Mr Mike Thomas deals in Rolexes;

(4) Mr Thomas did not take any action to contact FedEx about a misdelivered parcel until after he had been told by his father that the Rolexes had been seized by the Border Force;

(5) the Straps Parcel was not sent to Mr Mike Thomas until some months after the seizure;

(6) the documentation on the parcel containing the Rolexes was not created for the Straps Parcel, because:

(a) the Straps Parcel did not exist at that time;

(b) a different customs code would have been used for a parcel containing watch straps and links; and

(c) the documentation gave a value of $500 for the contents, whereas the Straps Parcel had a negligible value.

85. We have also rejected the Appellant’s evidence that the Rolexes were sold to WTC LA and on-sold to a customer of WTC LA, because:

(1) no reliance can be placed on the WhatsApp messages;

(2) the Rolexes were not paid for out of WTC LA's bank account; and

(3) the invoice for the Rolexes does not give WTC LA's address as the delivery address.

86. Taking into account all the above, we agree with the Border Force that the parcel containing the Rolexes was mislabelled using the wrong customs code and the wrong value in order to disguise the value and nature of the contents; we also agree with the Border Force that this was not a "mistake" but was instead deliberate.

DISCUSSION AND DECISION

87. The Tribunal's task, having found the facts, is to decide whether Officer Brenton acted in a way which no reasonable Border Force officer could have acted; if he took into account an irrelevant matter or disregarded something to which he should have given weight.

88. One of the factors Officer Brenton took into account was that identical false information had been included on *four* documents. We agree with the Appellant that this was an irrelevant consideration, because the Appellant's case rested on that incorrect documentation being mistakenly attached to the parcel containing the Rolexes.

89. Officer Brenton also took into account that when Mr Thomas spoke to Officer Neal, he described Mr Mike Thomas as his "client", see §28., and "never admitted that his 'client' was actually his father". Mr Thomas said that this was because Mr Mike Thomas was a client of the Appellant. We agree that his use of the word "client" does not show that the contents of the parcel were "intentionally undervalued to evade the import duties", and that this too is an irrelevant consideration.

90. However, on the basis of the findings of fact in this decision, we have agreed with the Border Force and found as a fact that the parcel had been deliberately mislabelled with the wrong customs code and the wrong value. Had our additional findings been taken into account, the Border Force's decision would inevitably have been the same, namely that the Rolexes should not be restored. We therefore dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

91. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE REDSTON
TRIBUNAL JUDGE

Release Date: 06th NOVEMBER 2023