

Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad
REGIONAL BENCH- COURT NO.3

Customs Appeal No.10832 of 2020

(Arising out of OIO-MUN-CUSTM-000-COM-04-20-21 dated 10/09/2020 passed by Commissioner of Central Excise, Customs and Service Tax-MUNDRA)

LAESEN & TOUBRO LIMITED

501, Sakar Complex I, Ashram Road, Navrangpura
Ahmedabad, Ahmedabad, Gujarat

.....Appellant

VERSUS

C.C.-MUNDRA

Office Of The Principal Commissionerate Of Customs, Port User Buld. Custom House
Mundra, Mundra
Kutch, Gujarat-370421

.....Respondent

With

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.....Respondent

APPEARANCE:

Shri Vishal Agarwal, Mrs. Dimple Gohil & Shri Abhishek Deodhar- Advocates for the Appellant

Shri Vinod Lukose, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. A/11901-11902/2021

DATE OF HEARING: 02.02.2021
DATE OF DECISION: 24.05.2021

RAMESH NAIR

The issue involved in the present case is that whether the Bronze Cladding Panel for Statue of Unity Project was classifiable under Customs Tariff Act (CTEH 83119000) as 'other for kind use for soldering, brazing, welding' which is subject to IGST @ 18% as ordered by the Respondent or the same was classifiable under CTH 8306 2110 as 'statuettes', which is subject to IGST @ 12% as declared by the appellant.

1.1 The brief facts of the case are that in 2014 the appellant won the contract for installation of a statue of Sardar Patel which is called "Statue of Unity" in the State of Gujarat. For the installation of such statue the appellant placed an order with M/s JIANGXI TOQINE METAL CRAFTS CORPORATION LTD., based in China for the fabrication and delivery of Statue. Owing to the size of the statue, it was not possible to have the statue either commissioned and / or delivered as such and hence the same was fabricated in pieces and was shipped in the form of BronzeCladding Panels (Micro Panels) which were delivered in multiple shipments. The said micro panels were reassembled by way of welding process into macro panels and the statue was finally installed at the relevant site in Gujarat. The statue imported as micro panels but the components that were assembled by way of welding i.e. the goods on which such welding process was carried out. The process of assembly by welding was undertaken by using filler metals (welding electrodes of rods). The filler metal i.e. welding electrodes of rods were separately imported and duly classified under CTH 8311. The appellant classified the statue imported in micro panel under the CTH 8306 2110 which is subject to IGST @ 12%. A Show Cause Notice was issued to the appellant alleging that classification ought to have been made under the CTH 8311 9000 which is subject to 18% IGST. The adjudicating authority has held

that the classification under CTH 8311, confirmed the demand of differential IGST along with applicable interest and penalty under Section 117 of the Customs Act, 1962. The appellant have challenged the above order of the Adjudicating Authority by way of filing the present appeal.

2. Shri Vishal Agarwal, Learned Counsel along with Ms. Dimple Gohil and Shri. Abhishek Deodhar the Advocates appeared on behalf of the appellant. Shri Vishal submits that Revenue classified the imported goods i.e. Cladding Panel for installation of Statue under CTH 8311. The entry under this head covers goods which are used for welding process and not the goods on which welding process is carried out. The Respondent has failed to give any basis for classification of the goods under CTH 8311. The respondent has merely reproduced the description under CTH 8311 and has concluded that imported goods fall under this category. He submits that it is a settled law that allegations made without adequate explanations are invalid and liable to be set aside on this ground alone. Without prejudice, he further submits that CTH 8311 covers filler metals which are used for welding process and not the base metal on which welding is done. Infact the appellant itself has imported such filler materials from China under CTH 8311 for which no dispute has been raised by the Custom Authority. The imported goods in the present case are not filler metals used for welding but are the base metal on which the welding process is carried out. Without prejudice, he also submits that CTH 8311 also requires that the goods in question be coated or cored with flux material. Such flux material prevents oxidation, impurities etc., in the welding process and hence is added to the filler metals. However, the Bronze Cladding Panel in the present case are parts of the Statue itself on which no coating or coring of flux material has taken place. There is no factual finding to this effect anywhere by the Customs Authority in the impugned order. It is his submission that in

the absence of such coating or coring with flux material the item cannot fall under CTH 8311. He submits that the imported goods are correctly classified in CTH 8306 as the same are nothing but the components of the main statue itself. He submits that in view of Rule 2(a) of General Rule for Interpretation of the Schedule which stipulates that an item presented in an unassembled or disassembled form is to be treated as the item as a whole itself. In the present case it is an undisputed fact that imported goods are components or parts of the main statute itself imported in a completely knockdown (CKD) form and hence the same would be classifiable under CTH 8306.

2.1 Learned Counsel submitted additional submission dated 09.02.2021 after hearing took place on 02.02.2021 wherein it is submitted that it is settled law that onus of establishing that the imported product falls under a particular classification entry is squarely upon the Revenue. In this regard, he placed reliance on the following judgements.

- Hindustan Ferrodo Limited 1997 (89) ELT 16 (SC)
- HPL Chemicals Limited 2006 (197) ELT 324 (SC)
- Swarna Oil Service 2020 TIOL 970 CESTAT-AHM
- PEPSICO HOLDINGS PVT. LTD.-2019 (25) GSTL 271 (Tri.-Mum)
- WARNER HINDUSTAN LTD.-(1999) 6 SCC 762

2.2 He further submits that even the Authorized Representative in his written submission filed under a cover of letter dated 01.02.2021 has not disputed that the impugned order fails to establish as to how the imported goods are classifiable under CTH 8311 9000. The entire thrust in the argument made by Learned Departmental Representative was that

classification claimed by the appellant under 8306 was incorrect.

2.3 According to the Learned DR, CTH 8306 2110 covers statutes which has been defined in Merriam Webster Dictionary to mean a small statue while the International Webster Comprehensive Dictionary define the same to mean a Statue not more than 1/2 the life size.

2.4 In this regard he submits that the contention of the Learned Departmental Representative is beyond the scope of the allegation levelled in the Show Cause Notice as also the findings arrived at by the Respondent in the impugned orders. It is for the first time during the course of the personal hearing that these submissions have been canvassed. It is not open to the Revenue to add reasons in support of its contention to reject the classification adopted by an assessee. He submits that HS Explanatory Notes to CTH 8306 does not provide for or contain any stipulation to the effect that statutes covered thereunder have any restriction or limitation with respect to their size. Had this been the intention of the legislature, the same would have been specifically so provided for in the HS Explanatory Notes if not so, in the tariff entry itself. Therefore, the submission of the Learned DR that only Statues of particular size alone would be cover thereunder is clearly without any basis and is consequently untenable.

2.5 As regard, the contention of the Learned DR that since Statue of Unity has a viewing gallery which accommodate 200 people, it has utility value and is therefore excluded from heading 8306 is concerned. He submits that merely because the Statue of Unity has viewing gallery it does not ipso factomean that the statue has a utility value. Utility value

would mean that the article in question is a mean to some other end, whereas in this case the Statue of Unity is an end in itself. Without prejudice, he further submits that assuming without admitting for the sake of argument, that the classification resorted to by the appellant is incorrect even though it is settled law in the case of Pepsico Holding Private Limited vs CCE 2019 (25) GSTL 271 (Tri. Mum) that once the classification alleged by the Revenue is found to be incorrect, the classification adopted by the importer will sustain even though the same appears to be inappropriate. The above decision of the Tribunal is based on Hon'ble Supreme Court Judgment in the case of Warner Hindustan Limited vs CCE 1999 (6) SCC 762.

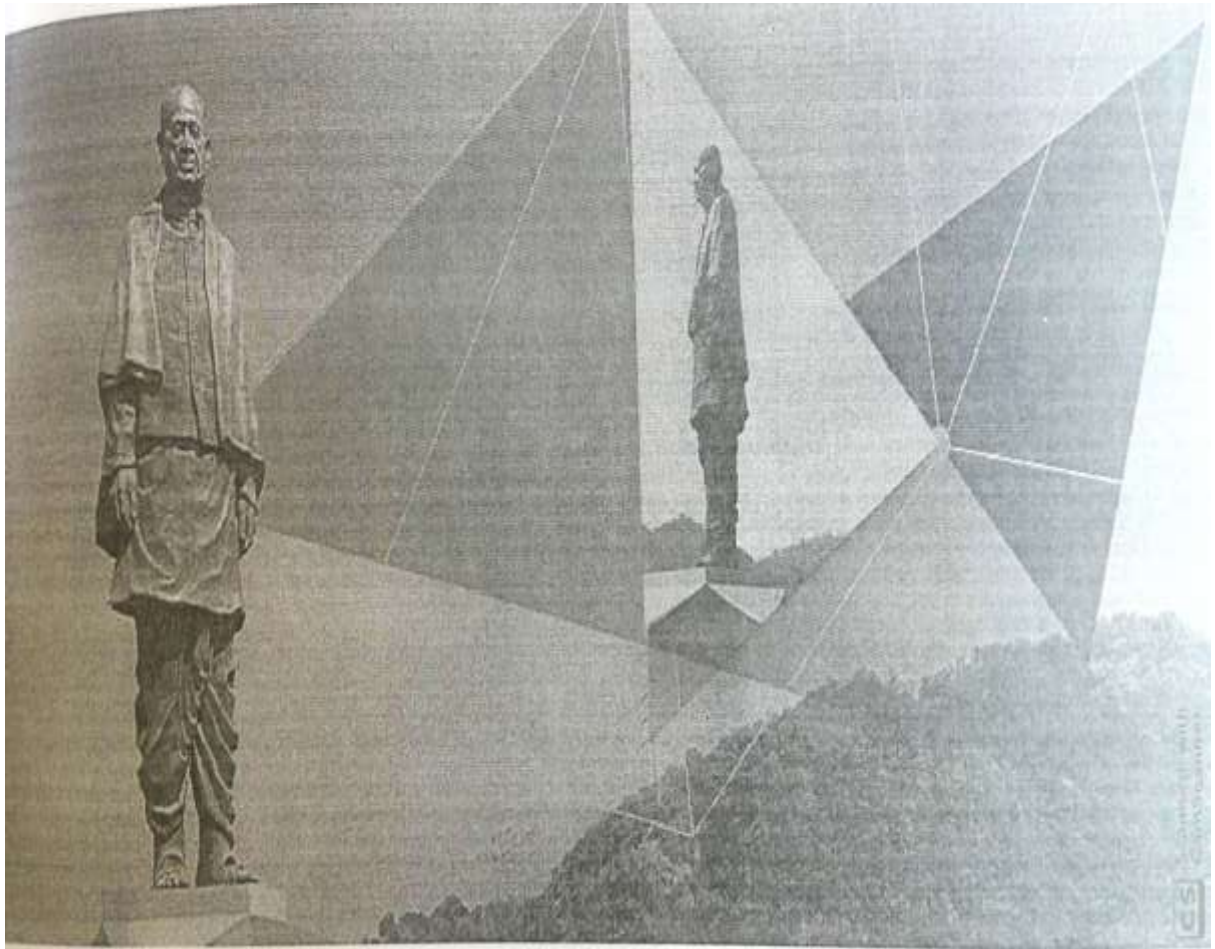
2.6 Without prejudice to the above, in the course of the personal hearing it was put to the appellant to suggest alternate tariff entry under which imported goods could have been classified. In this regard, without prejudice to the contention that the proceedings initiated against the appellant are unsustainable as the classification proposed by the Revenue under CTH 8311 is absolutely untenable, baseless and bad in law only for the sake of argument, the alternate heading under which the imported goods could be classified by it could be CTH 9703 0010 which covers original sculptures and statuary in matter. As per HS Explanatory Notes to CTH 9703 the said entry inter alia covers original sculptures and statuary, ancient or modern. They may be in any material (stone, reconstituted stone, terracotta, wood, ivory, metal, wax etc.) in the round, in relief or intaglio (statues, busts, figurines, groups, representations of animals, etc. including reliefs for architectural purposes). It is relevant to note that the import duty leviable under this heading is exactly same as that under CTH 8306 2110 namely, 10% basic duty; 10% Social Welfare Surcharge and 12% IGST in terms of Serial

Number 238 of Schedule-2 to Notification No. 1/2017 IGST (rate dated 28.06.2017). Therefore, in any case demand of differential duty does not sustain.

3. Shri Vinod Lukose, Learned (Superintendent) Authorized Representative appearing on behalf of the Revenue submitted a written submission dated 01/02/2021 wherein he reiterates the findings of the impugned order. In addition, he relied upon Webster Dictionary to submit that the Statues, under which the appellant has classified the imported goods, only covers small statues not the statues of the size in the present case. He also placed reliance on the following judgments:

- OK PLAY (INDIA) LIMITED 2005 (180) ELT 300 (SC)
- PRADYUMNA STEEL LIMITED 1996 (82) ELT 441 (SC)
- HINDUSTAN EQUIPMENT ENGG. CO.[1988 (37) ELT 146 (TRI. DEL.)]

4. We have carefully considered the submission made by both the sides. The issue involved in the present case is that whether the imported goods is classifiable under CTH 8311 9000 as held by the Revenue or CTH 8306 2110 as declared by the Appellant. We find that undisputedly the goods imported by the appellant are parts of statue of Sardar Vallabhbhai Patel which was installed and named as 'Statue of Unity', therefore, there is no doubt that the goods imported by the appellant have been used as part of entire Statue of Unity. The photograph of the said 'Statue of Unity' is scanned below:



If the contention of revenue is by any imagination is accepted then the above statue should also be called as welding material because the statue is nothing but the assembled form of the same imported parts i.e. Bronze cladding panels, which is obviously a weird imagination.

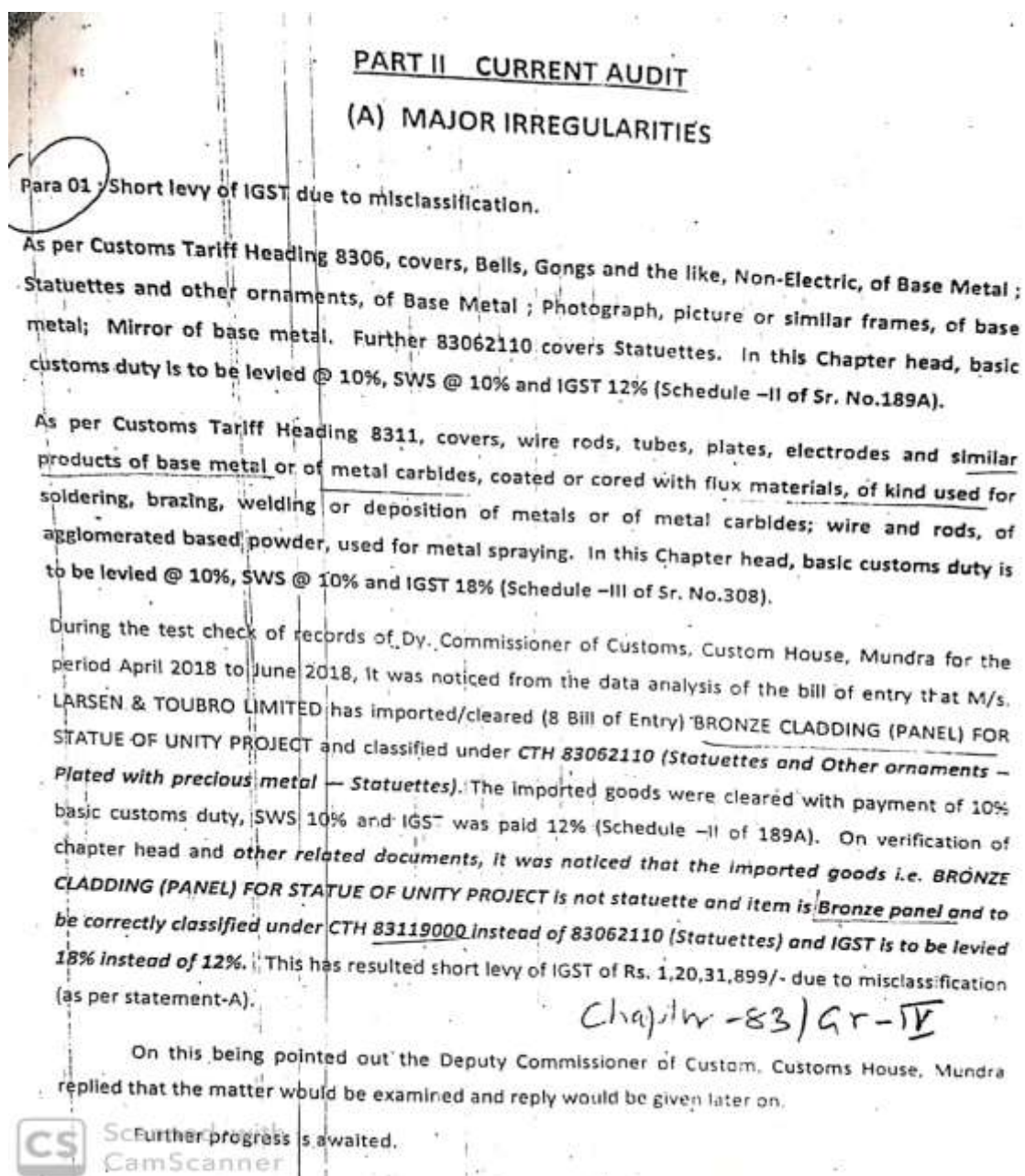
The Revenue has classified the said goods under CTH 8311 9000 the tariff entry is reproduced below:

8311	WIRE, RODS, TUBES, PLATES, ELECTRODES AND SIMILAR PRODUCTS, OF BASE METAL OR OF METAL CARBIDES, COATED OR CORED WITH FLUX MATERIAL, OF A KIND USED FOR SOLDERING, BRAZING, WELDING OR DEPOSITION OF METAL OR OF METAL CARBIDES; WIRE AND RODS, OF AGGLOMERATED BASE METAL POWDER, USED FOR METAL SPRAYING		
8311	- Other	Kgs.	10%
9000	Scanned with CamScanner		

As per the plain reading of the above CTH 8311 the goods in that tariff heading is exclusively meant for the goods which are coated or cored with flux material and of a kind used for soldering, brazing, welding or deposition of metal or of metal carbides; wire and wire rods of agglomerated metals, base metals powder used for metal spray. Revenue has classified the same under CTH 8311 9000 as others. From the description of the entry it is clear that only those goods which are used for soldering, brazing, welding and similar process are covered in the said entry. In the present case the goods imported by the appellant are not used for any of the said process described in CTH 8311. The goods itself is a part of bronze metal which are piece by piece joined by welding, soldering process achieved the form of Statue of Unity. Therefore, it is clear that the goods imported were not used as a welding material but the goods itself is a end product that is part of statue. As submitted by the appellant for the purpose of joining piece by piece the part of the statue, they have imported separately the welding material. Those

welding material are in fact classifiable under CTH 8311 and not the present goods imported by the appellant. The revenue either in the Show cause notice or in the impugned order did not give a plausible reasoning why the imported goods i.e. parts of statue are classifiable as welding material under CTH 8311 9000. If the contention of the Revenue is accepted, then any two metal parts of any goods if it is fabricated by the process of welding that goods are also classifiable under CTH 8311 which will be absolutely absurd contention and shall not be tenable. We find force in the appellant's submission that the goods classifiable under CTH 8311 must be coated or cored with flux material. It is admitted fact that the part of the statue imported by the appellant is complete part and it does not have any coating or cored with flux material, therefore, in our mind, it is clear that that parts / components of statue imported by the appellant by any stretch of imagination cannot be brought into the tariff entry of CTH 8311 9000 for the simple reason that the same is not a welding material.

5. On the direction of the Bench the Authorized Representative has submitted the CERA Audit objection which is a genesis of this entire case. The said CERA Audit Point is reproduced below:



From the above Audit Para it is observed that the objection was raised without any explanation that why the goods in question is classifiable under CTH 8311. It appears that merely on the Audit Objection which has no basis, the Show Cause Notice was issued without application of mind and the same was also confirmed by the adjudicating authority as if the Auditors who raised an objection without any basis is the supreme legal authority which was adopted verbatim without application of mind. With our above discussion we are of the clear view that in any case the goods imported by the applicant cannot be classified under CTH 8311 9000. If it is so, the entire proceedings of Show Cause Notice and

adjudication shall stand quashed. Even we need not to go into the correctness of the classification declared by the appellant. The Revenue has not discharged the onus of establishing that imported goods falls under particular classification which is clearly upon the Revenue. This settled position has support from the decision of the Hon'ble Supreme Court in the case of Hindustan Ferrodo Limited (Supra) wherein it was held:

"3. It is not in dispute before us, as it cannot be that the onus of establishing that the said rings fell within Item 22F lay upon the Revenue. The Revenue led no evidence. The onus was not discharged. Assuming therefore, that the Tribunal was right in rejecting the evidence that was produced on behalf of the appellants, the appeal should, nonetheless, have been allowed."

7. The similar view was taken by the Apex Court in the case of HPL Chemicals Limited (supra) wherein it was held:

"29. This apart, classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub-heading different from that claimed by the assessee, the Department has to adduce proper evidence and discharge the burden of proof."

8. Even assuming that the classification resorted by the appellant is incorrect but since the Revenue's claim under CTH 8311 is absolutely incorrect the classification adopted by the appellant will sustain. This has been held by the Tribunal in the case of Pepsico Holding Pvt. Ltd. (supra) as under:

8. In the light of the above, we cannot decide on a classification that has not been pleaded before us. Once the classification proposed by Revenue is found to be inappropriate, that claimed, while clearing the goods, will sustain even if it may appear to be inappropriate. We cannot also, in our appellate capacity, direct or accord the latitude for invoking Section 11A of the Central Excise Act, 1944 by obliteration of the proceedings leading to the impugned order. The mandate of the law pertaining to recovery of duties not paid or short-paid will have to be followed to the letter.

9. The above decision of the Tribunal is based on the view taken by the Hon'ble Supreme Court in the case of Warner Hindustan Limited (supra) wherein the Hon'ble Supreme Court has held as under:

In our opinion, the Tribunal was quite wrong in these circumstances in allowing the appeal of the Excise Authorities and classifying the mint tablets as items of confectionary under Heading 17.04. The correct course for the Tribunal to have followed was to have dismissed the appeal of the Excise Authorities making it clear that it was open to the Excise Authorities to issue a fresh show cause notice to the appellant on the basis that the tablets were classifiable under Heading 17.04 as items of confectionary. This would have given the appellant the opportunity to place on record such material as was available to it to establish the contrary. It is impermissible for the Tribunal to consider a case that is laid for the first time in appeal because the stage for setting out the factual matrix is before the authorities below.

10. In view of the above settled law, irrespective whether the classification claimed by the appellant is correct or not since the classification proposed by the Revenue is absolutely incorrect, the entire case of the Revenue will not sustain. Therefore, we are not addressing the issue that whether the appellant's classification was correct or otherwise. The appellant also made an alternate submission that even if the classification declared by them under CTH 8306 2110 is incorrect the goods are otherwise classifiable under CTH 9703 in such tariff entry also the IGST Rate is 12% and therefore, there will be no revenue implication. Though alternate classification suggested by the appellant appears to be prima facie correct but since we have already taken a view that Revenue's claim of classification under CTH 8311 is absolutely incorrect

and it is nobody's case in the Show Cause Notice that the goods are classified under CTH 9703 we are not addressing this issue. However, since the Revenue's claim of classification is held to be incorrect the entire proceeding of the Revenue is quashed. The impugned order is set aside. The appeal is allowed with consequential relief, if any arise, in accordance with law.

(Pronounced in the open court on 24.05.2021)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Neha