

# **10(23C) vs 12A – Anomalies in Law, Comparative Analysis and Practical Doubts – Immediate attention required**

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**T**he Government has taken effective and decisive steps towards removing unnecessary burdensome compliances, to ensure ease of carrying out operations. The monotony and inefficiency of existing system is being continually addressed.

In continuation of these steps, the Government introduced amendments which were undoubtedly good, in reaping the benefits of technological advancements, by bringing the process of re-registration of existing Charitable Institutions, on online mode and also in standardising the existing process which was earlier manual.

Along with the introduction of new process of registration, Government through Finance Act 2020, brought amendment by way of insertion of provisos to section 11(7), according to which Charitable Institutions (hereinafter referred to as “Institutions”) can hold either 10(23C) or 12A and not both. The same has created a lot of confusion for the Institutions across the nation.

*“It is one of the greatest dilemmas today which is faced by Institutions and professionals, that whether Institution should opt for 10(23C) or 12A. This remarkable move is the panacea for all the past practices of inappropriately using exemptions under both sections by switching over.”*

**Through this article, an attempt has been made to bring the core discussions over practical unmanageable difficulties and the key challenges arising out of this unexpected clash between 10(23C) and 12A:**

## **Which is a better option? (Section 12A vs 10(23C))**

Following are certain points of consideration which one should evaluate in their specific case to make a decision.

<b>S. No.</b>	<b>Basis of Difference</b>	<b>Section 12A</b>	<b>Section 10(23C)</b>
<b>1.</b>	<b>Restriction on nature of activity</b>	The entity can involve in any activity as per the object clause as covered under section 2(15) of income Tax Act 1961.	The entity cannot involve in any activity other than Medical and Education as the word ‘solely’ is included in section 10(23C) while defining activities.
<b>2.</b>	<b>Deemed application of income</b>	Concept of deemed application exists through Form 9A.	No concept of deemed application - No such form.

<b>3.</b>	<b>Formalities for accumulation of income</b>	Form No. 10 in the case of 12A for accumulation of income specifying the purpose.	No such formalities to be followed.
<b>4.</b>	<b>Payment to persons specified under section 13(3)</b>	Restricted. Exemption u/s 11 and 12 can be withdrawn if section 13 of the Income Tax Act 1961 is violated for any assessment year.	Allowed No such provision for withdrawal of exemption is there for section 10(23C).
<b>5.</b>	<b>Eligibility to file Form CSR-1 and thereby receive CSR Funds</b>	Eligible if Institution hold 80G.	Not Eligible.
<b>6.</b>	<b>Retrospective benefits for previous years on grant of approval/ registration subsequently</b>	Once registration is granted, it will also have retrospective exemption and pending assessment under provision to section 12A(2).	No Retrospective Tax benefit the tax exemption shall be prospective.
<b>7.</b>	<b>Provisions related to accreted income</b>	Provisions of accreted income u/s 115TD are applicable when registration u/s 12A is cancelled.	Provisions of section 115TD are not applicable if approval u/s 10(23C) is cancelled.
<b>8.</b>	<b>Parallel approval</b>	12A shall be inoperative from the date on which the trust or institution has approved under section 10(23C) or is notified under section 10(46).	Institution which is having 10(23C) can continue to be notified u/s 10(46).
<b>9.</b>	<b>Activities only within India</b>	Activities of an Institution registered u/s 12A are restricted to India only.	Section 10(23C) is silent about the place of activities.
<b>10.</b>	<b>Exemption of capital gains on reinvestment in capital asset</b>	Yes	No
<b>11.</b>	<b>Consequence if accumulation not spent within 5 years</b>	Unspent Accumulation taxable in 6 <sup>th</sup> year	Loss of Exemption

As mentioned above, Institutions earlier to 1<sup>st</sup> June, 2020 could hold both 10(23C) approval and 12A registration, on account of differences between both, as explained above.

But,

How did they enjoy benefits under both the sections?

### The Earlier Scenario

Certain institutions used to enjoy the benefits by switching between both the schemes, as per their situation, to take income-tax exemptions. These Institutions availed benefits on year-on-year wise basis. In many cases, they did not follow a consistent practice, but handpicked the best of both sections as per their choice.

**It was due to many reasons, like:**

<b>When was 10(23C) preferred</b>	<b>When was 12A preferred</b>
- Presence of payments to related parties.	- Absence of related party payments.
- Engaged solely in educational or medical purposes. Expenses incurred out of India.	- Also engaged in purposes other than educational or medical purposes, in India.
- 85% of application of income has been achieved and there is no Income which could not be applied due to non-receipt.	- Could not achieve 85% application of income due to 'income accrued but not receive' and intends to file Form 9A.



Although, it is clearly mentioned in section 10(23C), that institution should **exist** solely for educational or medical purposes, to avail the benefits, but up till now following instances were possible –

- Undertaking other activities and availing benefits under section 12A.
- Changing the objects to include other activities and availing the benefits under section 12A, and then switching over to 10(23C) for the year in which no such other activities are undertaken, however objects still include such other activities.

### Amendment made through Union Budget 2020

All the earlier unconventional practices, have now eventually ended with a big “**STOP**” sign. Earlier, there was no restriction in the Act for switch overs from section 12A to Sec 10(23C) and vice versa. The amendment has been brought in to curb such practice.

**Now the Institutions has to decide once in for all whether to take tax exemption u/s 12 A or u/s 10 (23C). Only one switch over is allowed for ensuring the ease in administration, as stated by the Finance Minister in the Explanatory Memorandum to the Finance Bill 2020, but, unfortunately the option of switch made available in the amendment provisions for F.Y. 2020-21 are not an equal trade-off.**

For the sake of brevity with respect to the core issue under consideration, we will discuss only relevant clauses out of 6, which shall only be referred in forthcoming discussions -

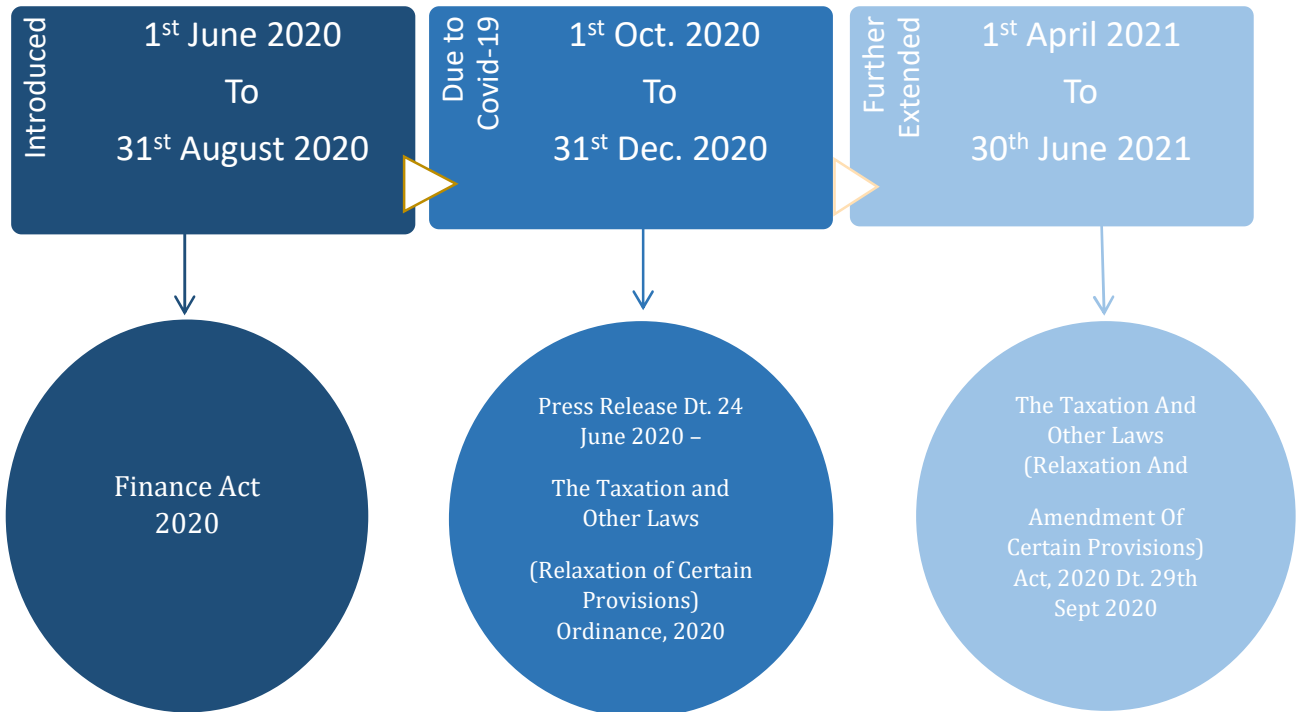
12A (1) (ac)	1 <sup>st</sup> proviso to section 10(23C)	Situations	Timeline of filing application	Validity of registration	Disposal of Application	Enquiry from Dept.	Type of Registration / Approval	Form to be Filed
(i)	(i)	Re-Registration/ re-approval of existing Registration	within three months from the 1 <sup>st</sup> day of April, 2021	5 Years	3 months	No	Regular	10A
(iv)	NA	Where Registration became inoperative due to the first proviso to section 11(7)	at least six months prior to the commencement of the A.Y. from which the said registration is sought to be made operative	5 Years	6 months	Yes	Regular	10AB
(vi)	(vi)	Provisional Registration/ Approval	at least one month prior to the commencement of the previous year relevant to the A.Y. from which the said registration is sought.	3 Years	1 month	No	Provisional	10A

With 12A getting inoperative w.e.f. 1<sup>st</sup> June,2020 Institutions have only one option i.e., to seek re-approval u/s 10(23C), which shall be made available without any enquiry. But if Institution wishes to make 12A operative then Department shall dispose-off the application in six months that too with extensive enquiries.

**It defeats the purpose of overall scheme and spirit & intent of these significant amendment brought in the Income-tax law because Institutions should be provided with the option at least once to choose between 12A or 10(23C) for 5 years and only after that, both proviso to 11(7) should have been made applicable. Then only the purpose of this amendment would have served best and neither department nor Institutions, would have faced any critical challenge.**

### THE UNSYNCD EFFECTIVE DATE

The new process of registration which was also introduced in Finance Act 2020 has already undergone series of postponement up to 1<sup>st</sup> April, 2021. But the 1<sup>st</sup> proviso to section 11(7) has never been postponed, resultantly a void has been created due to which Institution could not even apply to make 12A operative from 1<sup>st</sup> June, 2020 to 31<sup>st</sup> March, 2021, as no such option was available in the old regime. Following are the details of postponement of amendment w.r.t new process of registration-



***It is too ironical, that 12A was made inoperative w.e.f. 1<sup>st</sup> June, 2020 but there was no way to make 12A operative again until 1<sup>st</sup> April, 2021 when section 12A(1)(ac)(iv) came into effect, as no such option was available under old law.***

Moreover, Income-tax portal is allowing 10(23C) approved institution to apply for re-registration of 12A, which is creating further more doubts and unnecessary confusion.

Form 10AB which is the form required to be filed to make 12A operative again is not available for filing on Income-tax portal up to this date.

Such a myopic approach of lawmakers in deciding the effective date of mentioned proviso will not have practical sustainability in the year of transition.

## Author's Opinion

“A transition option should have been provided to the Institutions to opt any one of the two schemes, and only thereafter this amendment should have been made effective. This way Institutions could have got enough opportunity to adopt a suitable practice.”

Now, building upon above discussions the following issues arises –

### ISSUES

1. Can Institutions anyway apply for re-registration of inoperative 12A?

2. If 12A was renewed by Department due to modifications of objects after 01.06.2020 but before 01.04.2021. Will that 12A be operative?

3. Will Institutions have to amend their Deed in case it has objects other than educational or medical before seeking 10(23C) re-approval?

4. What should 10(23C) approved Institution do to be able to receive CSR Funds?

5. What will be the position of Deemed Application of Income in case of Income accrued but not received?

**Issue 1.** Why was equivalent switch option not made available i.e., ‘re-registration u/s 12A without enquiry’ in the year of transition? Can Institutions anyway go ahead with filing of application for re-registration of 12A u/s 12A(1)(ac)(i) through Form 10A?

**Explanation.** Single route of ‘enquiry’ is provided by the Government to opt for 12A. If the Institution anyway go ahead with filing of Form 10A u/s 12A(1)(ac)(i) for re-registration of 12A, it should be feared that following might ensue –

- i. Department can cancel the order and the URN as if it was never granted, at any time in future. (Rule 17A(6)), and
- ii. The benefits availed under section 12A can be withdrawn for such previous years.

**Clarification Required-** The Govt. should clarify on the steps to be taken by these Institutions and 12A should be allowed for re-registration by revising the effective date of applicability of 1<sup>st</sup> proviso to section 11(7). The effective date should be delayed to 1<sup>st</sup> April, 2021, and Institutions should be allowed to file application for re-registration of 12A under section 12A(1)(ac)(i).

Such a law has created an unnecessary hardship for Institutions in the year of transition.

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**Issue 2.** What if already 10(23C) approved Institution holds 12A registration which is granted to it after 01.06.2020 and before 31.03.2021 due to modification of objects?

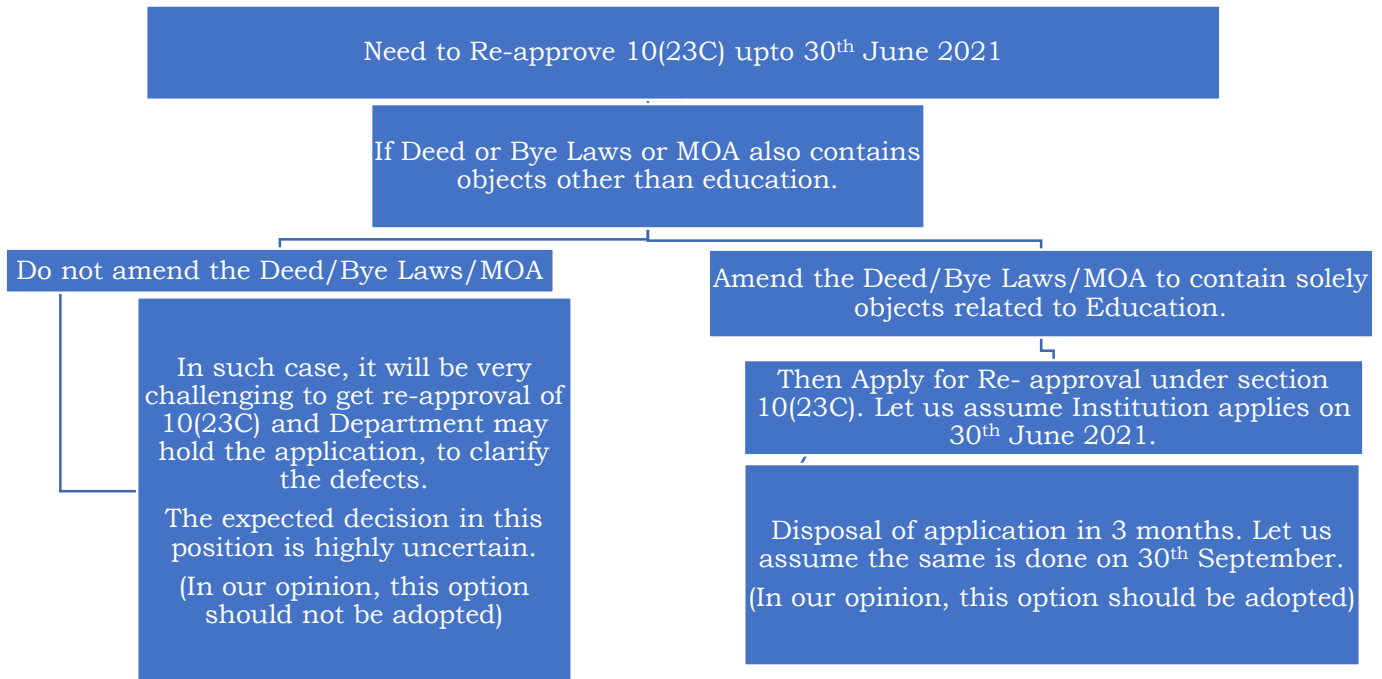
Can Institution apply for re-registration of 12A in that case?

**Explanation.** No, this is a procedural lapse where Govt is not be able to cross verify the presence of 10(23C) approval, and surprisingly, they have issued 12A registration between 01.06.2020 and 31.03.2021 to those institution, who are already approved under 10(23C), in cases where they have applied for 12A due to the modifications of the objects. In our opinion, the re-registration for 12A cannot be applied after 01.06.2020 31.03.2021, in this situation.

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**Issue 3.** Will Institutions having other objects as well, be granted with re-approval u/s 10(23C)(vi)? Or will they have to amend such objects?

**Explanation.** If Deeds and Bye Laws contain objects other than education then two situations may arise as explained in the flowchart -



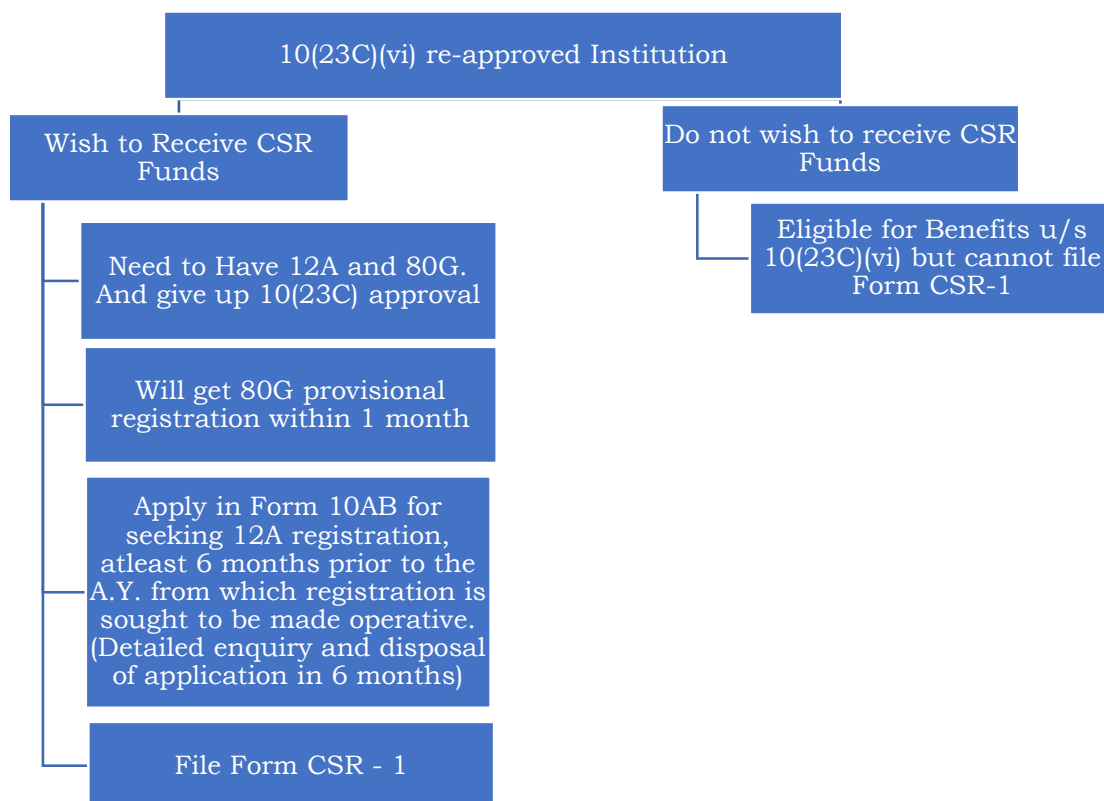
## Author's Opinion

“Deed should be amended to contain object clause limited to education only before applying for re-approval under section 10(23C)(vi).”

**Issue 4.** What shall be the course of action for 10(23C)(vi) approved Institutions not holding 80G approval, if it is desirous of obtaining CSR Funds, as right now, Form CSR-1 is required to be filed in order to be listed as one of the CSR eligible Institutions on MCA?

**Explanation.** CSR-1 can be filed by 12A & 80 G registered Institutions only.

There are 2 possible situations as enumerated in the flowchart below-





## Author's Opinion

“Non-eligibility to file Form CSR-1 by 10(23C) approved Institutions is an unintended anomaly which needs to be rectified by the Government. However, till any clarification comes, Institutions need to apply for 12A to file Form CSR-1.”

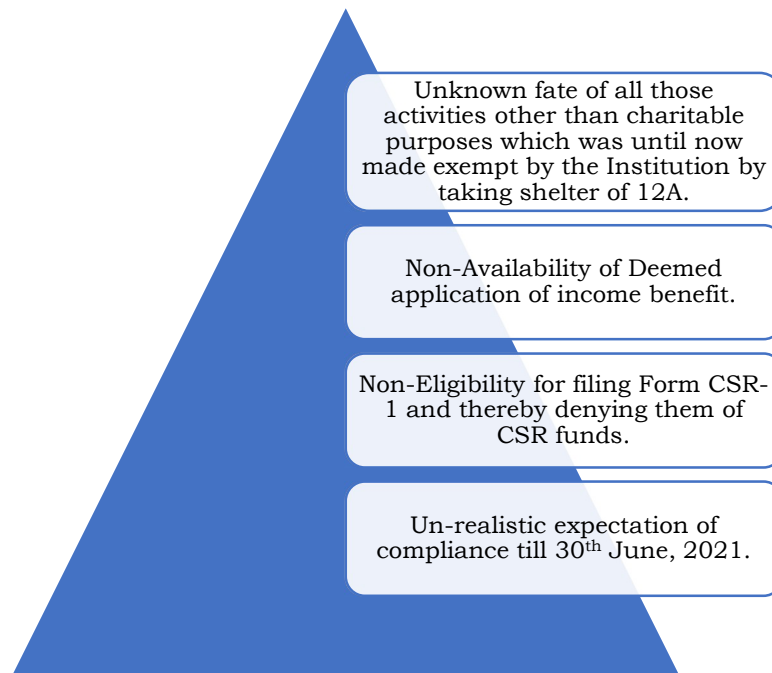
**Issue 5.** Due to COVID-19, many Educational Institutions did not receive income, especially fees from students. In that case, can these Institutions file Form 9A to claim exemption on such income as “Deemed Application of Income”?

**Explanation.** Govt should also harmonise section 10(23C) with section 12A so that common benefits like “Deemed application of income” can be availed, at least for the F.Y. 2020-21.

### FAQs

Questions/Doubts	Answers
<b>Why can't Institution drop re-approval of 10(23C) and apply for 12A provisional registration as it is necessary for seeking CSR funds?</b>	<p>It is not advisable to do so. As re-approval of 10(23C) shall be granted for 5 years without any enquiry.</p> <p>Whereas, in case of 12A provisional registration, the same will be provided within 6 months after detailed enquiry.</p> <p>And if such registration is not granted due to any reason, then, Institution may have to face litigation to obtain 12A registration.</p>
<b>Can Institution file application of making 12A operative again under section 12A(1)(ac)(iv), or will it have to wait for order granting re-approval under section 10(23C) first?</b>	<p>In our opinion, Institution can go ahead with filing of application under mentioned section, it does not have to wait for order granting re-approval u/s 10(23C).</p> <p>However, the requisite form 10AB is still not available on income-tax portal till 17.06.2021, whereas proviso to make 12A inoperative applicable from 01.06.2020.</p>

**Apart from the above discussed issues following are few of many possible repercussions of midway cancellation of 12A registration.**



**END NOTE –**

These Institutions being forced in such an unsettling disposition and imposition of unrealistic time limits without clarifications is not only unjust but also an impractical expectation.

It seems a serious lapse on the part of Government while finalization of the said amendment, specially not postponing the both provisos to 11(7). We hereby summarize the repercussions from the above discussion-

1. The both provisos should be realigned w.r.t the time period for re-registration of existing institutions, which was postponed and is to be completed by 30.06.2021. And, if it further gets postponed, the applicability of provisos should also be postponed.
2. It was contended that Government should either allow 12A re-registration to these discriminated Institutions Or harmonise section 10(23C) to include benefits at par with 12A at least for F.Y. 2020-21.
3. 10(23C) approved institutions are advised not to go for re-registration of 12A until and unless a clarification is received from Department in this regard.
4. Institution should amend objects of the Deed to include objects that solely corresponds to educational or medical purposes, before filing of Form 10A for seeking re-approval u/s 10(23C), in order to avoid any litigation from the Department on account of this.
5. The concept of 'Deemed application of income' is not available with section 10(23C). Govt. need to bring the same at par with 12A at least for F.Y. 2020-21, which is the immediate need in this whole issue.

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