GOLDBERG & BOKOR, LLP
ATTORNEYS AT LAW
505 CHESTNUT STREET
CEDARHURST, NEW YORK 11516

TELEPHONE (516) 889-1107
FACSIMILE (516) 813-0997

JASON D. BOKOR
jbokor@goldbergandbokor.com

SCOTT GOLDBERG
sgoldberg@goldbergandbokor.com

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COMMENTS/OBJECTIONS TO THE PROPOSED MODIFICATIONS BY NEW YORK CITY DEPARTMENT OF FINANCE ("DOF") PERTAINING TO TAXPAYER INITIATED REQUESTS FOR REVIEW ("RFR") AND REQUESTS TO CORRECT CLERICAL ERRORS AND ERRORS AND DESCRIPTION.

Executive Summary:

The proposed rule, which serves to amend and significantly curtail the existing rules and policies of DOF, is anti-taxpayer and serves to undermine DOF's mission, duty and responsibility to strive to maintain the real property tax roll free and clear of errors. This is admittedly a difficult task and, as such, the need to be able to correct these errors has been recognized by the State and City legislatures, by the New York State Courts and by DOF. The proposed rule will curtail this ability.

The proposed rule is designed to allow DOF to treat taxpayers in a disparate manner and imposes obligations on the taxpayer that are unreasonable.

The proposed rule ignores the current state of the law and instead focuses on case law dating back to the post-Civil War period (*Hermance v Board of Supervisors,* 71 N.Y. 481 (1877)) and two other cases, one from 1890 and the other from 1925. What should be focused on is the Second Department decision in *Better World Real Estate Group v New York City Department of Finance,* 122 A.D.3d 27 (2014). *Better World* led to the enactment of DOF's existing Clerical Error Rule (19 RCNY § 53, *et seq.)* which the proposed rule seeks to essentially eliminate. It is unreasonable to ignore the decision in *Better World* when presenting this proposed rule to the

public, but instead choosing to focus on antiquated, and no longer relevant precedent that dates back almost 150 years.

Respectfully, DOF has lost sight of its mandate to do its best to properly assess taxpayers and to do so in a fair, equitable and consistent manner. The proposed rule will serve to deny taxpayers the right to have errors corrected that ought to be corrected.

It is respectfully requested that DOF not proceed with the enactment of this rule and instead schedule interactive meetings with the public so that the proposals contained in the rule can be discussed and vetted prior to any modifications being made.

Detailed Analysis of the proposed rule:

In New York "the law regarding real property assessment proceedings is remedial in character and should be liberally construed to the end that the taxpayer's right to have his assessment reviewed should not be defeated by a technicality." *Matter of Better World Real Estate Group v. New York City Dept. of Fin.*, 122 A.D.3d 27, 38 (2d Dept. 2014) (quoting the Court of Appeals in *Matter of Garth v. Board of Assessment Review for Town of Richmond*, 13 N.Y.3d 176, 180 (2009)). The proposed amendment to the Clerical Error Rule, 19 RCNY §53, *et. seq.* (the "Proposed CER") is not faithful to the letter or the spirit of this principle articulated by the New York Court of Appeals and reiterated by the Second Department in *Better World. Better World* involved the same provision, New York City Administrative Code § 11-206 ("11-206"), under which the Proposed CER is being enacted. The Proposed CER is a regressive attempt to curtail taxpayer rights by starkly contracting the categories of errors that may be corrected through its procedure and placing new limits on the time to correct errors that would otherwise still be available for correction.

I. THE APPELLATE DIVISION, SECOND DEPARTMENT'S 2014 DECISION IN *BETTER WORLD* REJECTED THE POSITION THAT ERRORS AVAILABLE FOR CORRECTION UNDER 11-206 SHOULD BE NARROWLY CONSTRUED

The current Clerical Error Rule (the "CER") was enacted in 2016 on the heels of the Second Department's decision in *Better World.* In that 2014 decision, the Court rejected a number of arguments put forth by DOF.

First, DOF took the position in *Better World* that clerical error review should be limited to errors of mere form: "clerical errors were limited to transcription errors, and arithmetic or mathematical errors." 122 A.D.3d at 39. The Second Department rejected this argument: "DOF's authority [under 11-206] is not limited to transcription errors or arithmetical errors." 122 A.D.3d at 40.

Second, the Court in *Better World* rejected the argument that the legislative history of 11-206 indicates that the definitions of a "clerical error" and "error in description" should be narrowly construed. *See* 122 A.D.3d at 41.

Third, the Second Department rejected DOF's argument that RPTL Article 7 is the exclusive method to challenge a real property tax assessment: "[w]e also note that acceptance of the respondents' view that RPTL article 7 is the sole vehicle for challenging a real property tax assessment would render Administrative Code §11-206 *superfluous and meaningless*." 122 A.D.3d at 38 (emphasis added). The Court noted, relying on Court of Appeals precedent, that the law regarding real property assessment proceedings should be liberally construed:

> Our determination in this regard is generally supported by the "view that the law regarding real property assessment proceedings is 'remedial in character and should be liberally construed to the end that the taxpayer's right to have his assessment reviewed should not be defeated by a technicality' " (*Matter of Garth v. Board of Assessment Review for Town of Richmond,* 13 N.Y.3d 176, 180, 889 N.Y.S.2d 513, 918 N.E.2d 103, quoting *Matter of Great E. Mall v. Condon,* 36 N.Y.2d 544, 548, 369 N.Y.S.2d 672, 330 N.E.2d 628). *Indeed, the ultimate goal of property valuation in any tax proceeding "is to arrive at a fair and realistic value of the property involved"* (*Matter of Great Atl. & Pac. Tea Co. v. Kiernan,*

> 42 N.Y.2d 236, 242, 397 N.Y.S.2d 718, 366 N.E.2d 808) so that "all property owners contribute equitably to the public fisc" (*Matter of Allied Corp. v. Town of Camillus,* 80 N.Y.2d 351, 356, 590 N.Y.S.2d 417, 604 N.E.2d 1348).

Better World, 122 A.D.3d at 38-39 (emphasis added).

Fourth, the Second Department held that "[t]o the extent that [DOF] contend[s] that Administrative Code § 11-206 be construed as having a limitations period, *any such limitations period must be crafted by the New York City Council*...." *Better World*, 122 A.D.3d at 40 (emphasis added).

II. DOF'S 2016 ENACTMENT OF A RULE RECOGNIZING THE LAW AS SET DOWN IN *BETTER WORLD* AND MAKING IT EASIER FOR PROPERTY OWNERS TO CORRECT ERRORS ON THE NEW YORK CITY TAX ROLLS

In the aftermath of *Better World*, DOF enacted the CER in 2016, which accepted the Second Department's decision in *Better World* as law. DOF, through the CER, made clear that "clerical errors" and "errors in description" are not limited to typographical and arithmetic errors, and that these errors should not be construed narrowly but rather include a wide variety of errors, including classification errors such as an "inaccurate building class that affected assessed value" (19 RCNY § 53-02(b)(10)). The CER also made clear that these expanded categories of errors could be corrected outside of the procedure set forth in RPTL Article 7 and laid down a procedure to request administrative review of assessment errors. The Statement of Basis and Purpose in the Notice of Rule Making for the 2016 CER made clear that DOF was conforming to the Second Department's pronouncements on 11-206, as it was legally required to do:

> Section 11-206 of the Administrative Code of the City of New York gives the Commissioner of the Department of Finance the ability to correct any assessment or tax which is erroneous due to a clerical error or error in description. *Historically, the authority granted under section 11-206 has been exercised narrowly*, leaving unaddressed many categories of errors that could be corrected under this section. *This rule significantly expands the categories of errors for which the Department of Finance will offer an opportunity to correct*. Corrections would apply going forward, but could also apply to errors occurring up to six years prior to the date an application for a correction is submitted. *These*

> *rules also specifically outline the types of errors that are correctible under section 11-206. A correction made according to this section is separate and apart from an appeal to the Tax Commission.*

19 RCNY §53, June 16, 2016 Note (emphasis added).

III. DOF'S REGRESSIVE PROPOSAL TO AMEND THE CER, VIOLATE THE APPELLATE DIVISION'S PRONOUNCEMENTS ON 11-206 AND MAKE IT MORE DIFFICULT FOR TAXPAYERS TO CORRECT ERRORS ON THEIR PROPERTIES

The Proposed CER regresses to the DOF's positions on 11-206 before those positions were rejected by the Second Department in *Better World*. The Statement of Basis and Purpose of Proposed Rule (the "Statement of Basis and Purpose") states:

> *Evidence from the legislative histories of these provisions suggests that in 1915, the Legislature when enacting the precursor to today's Administrative Code § 11-206, intended "clerical error" and "error of description" to refer to only ministerial mistakes*. ... The changes proposed in this rule would more clearly align Chapter 53 with the intent of the State laws authorizing the correction of clerical error and errors in description by clarifying that the Chapter 53 process only applies to correcting inadvertent clerical errors. Substantive challenges to property tax assessments on the merits continue to be heard by the Tax Commission or through a tax certiorari proceeding.

(Emphasis added).

Even though *Better World* held that "DOF's authority [under 11-206] is not limited to transcription errors or arithmetical errors" (122 A.D.3d at 40), the Proposed CER limits corrections to clerical errors and errors in descriptions to those very type of errors, also known as "ministerial mistakes." The Proposed CER carves out from the definition of the CER (1) any discretionary act or an act based in whole or in part of an individual's judgment; or (2) any interpretation of law, regulation or policy. To support this proposition, the Proposed CER's Statement of Basis and Purpose states that "[t]hese rule changes clarify the scope of Chapter 53 consistent with the intent of the Legislature in enacting what has not become Administrative Code § 11-206..." This is false. The Proposed CER relies on the same "legislative history" that the Second Department held did

"*not indicate that the subject terms should be narrowly construed*." 122 A.D.3d at 41 (emphasis added).

The Proposed CER deletes all examples of clerical errors and errors in description, regressing to the landscape recognized by both the majority and dissent in *Better World* of having "no definition of a 'clerical error' and 'error in description.'" 122 A.D.3d at 43-44. While the current CER recognizes that a correction under 11-206 is made "separate and apart" from Article 7, the Proposed CER states that all substantive challenges to real property assessments must be through RPTL Article 7.

The Proposed CER also violates *Better World's* holding by changing the time period in which the CER procedure can be used from six years prior to the application to just the tax year in which the application was submitted *or* during the two directly preceding tax years. In *Better World*, the Second Department held that "[t]o the extent that the respondents contend that Administrative Code § 11-206 be construed as having a limitations period, any such limitations period *must be crafted by the New York City Council*...." *Better World*, 122 A.D.3d at 40. Here, DOF is trying to limit the time period to bring a challenge under 11-206 itself, which is an *ultra vires* act. Further, even the manner in which DOF defines this two year period is confusing at best. The exact language seems to allow the taxpayer to contest *either* the current year *or* the two preceding tax years. The disjunctive instead of the conjunctive was used to set this limitation period.

The Proposed CER was also crafted in a manner that will allow DOF to adjust accounts beyond the shortened limitation period when *DOF* deems it to be appropriate to do so.

The Proposed CER should not be enacted.

Respectfully submitted,

Scott Goldberg