This question is double. Obviously the answer to the first part is in the negative and the answer to the second part is in the affirmative. In other words the minimum balance referred to in the statute is the balance at the close of a day during which the bank is open for business, which is the minimum during the one-month period under consideration.

GROSS INCOME TAX AND STORE LICENSE DIVISION:
Taxation—Time within which taxpayer may institute proceedings to secure refund of amount illegally collected under Gross Income Tax Act.

February 3, 1936.

Mr. F. C. McClurg,
Gross Income Tax Division,
Department of Treasury,
Indianapolis, Indiana.

Dear Sir:

I have before me your request that an official opinion issue in response to the inquiry:

"We are confronted with a question concerning the limitation period as to suits for recovery against the Department of Treasury, Gross Income Tax Division, involving claim for refund of taxes—purportedly wrongfully assessed and overpaid. In some instances taxes have been collected where the question of taxability is still before the appeal courts and undecided. Taxpayers naturally wish to protect their right of suit if the period for commencing action is limited."

Section 12 of Chapter 50 of the Acts of 1933 (11 Burns Indiana Statutes Annotated, 1933 Ed., 64-2612: : Baldwin's Indiana Statutes, 1934 Ed., 15,993) provides for the recovery of any amount improperly collected in the following manner:

"Sec. 12 (a) If any person having made a return and paid the tax imposed by this act, considers himself aggrieved by the assessment made upon him for any year by the department of treasury, he may apply to the department of treasury by petition, in writing,
within thirty days after the notice of such assessment is mailed to him, for a hearing, and a correction of the amount of the tax so assessed upon him by the department of treasury, in which petition he shall set forth the reasons why such hearing should be granted and the amount in which such tax should be reduced. The department of treasury shall promptly consider such petition, and may grant such hearing or deny the same. If denied, the petitioner shall be forthwith notified thereof; if granted, the department of treasury shall notify the petitioner of the time and place fixed for such hearing. After such hearing, the department of treasury may make such order in the matter as may appear to it just and lawful, and shall furnish a copy of such order to the petitioner. Any person improperly charged with any tax provided for under this act, and required to pay the same, may recover the amount improperly collected, together with interest, in any proper action or suit against the department of treasury; and the circuit court of the county in which the taxpayer resides or is located shall have original jurisdiction of any action to recover any tax improperly collected; Provided, however, That no court shall entertain such a suit, unless the taxpayer shall show that he has given notice to the department of treasury of his claim, at least thirty days prior to the institution of the action. It shall not be necessary for the taxpayer to protest against the payment of the tax in order to maintain such suit. In any suit to recover taxes paid or to collect taxes, the court shall adjudge costs to such extent and in such manner as may be deemed equitable.

“(b) Either party to such suit shall have the right to appeal, as now provided by law, in civil cases. In the event a final judgment is rendered in favor of the taxpayer in a suit to recover illegal taxes, then it shall be the duty of the state auditor, upon receipt of a certified copy of such final judgment to issue a warrant directed to the treasurer in favor of such taxpayer to pay such judgment, interest and costs. It shall be the duty of the treasurer to honor such warrant and pay
such judgment out of any funds in the state treasury, not otherwise appropriated."

Section 12, Chapter 50, Acts 1933, p. 398-9;
11 Burns Indiana Statutes, 1933 Ed., 64-2612;
Baldwin's Indiana Statutes, 1934 Ed., 15,992.

From a study of the foregoing section of the Gross Income Tax Act I am of the opinion that a taxpayer may institute an action for the recovery of any amount improperly paid and collected at any time after having given notice to the Department of Treasury of his claim at least thirty (30) days prior to the institution of the action, provided that the suit is not otherwise barred by the general statute of limitations.

2 Burns Indiana Statutes Annotated, 1933 Ed., 2-601 : :
Baldwin's Indiana Statutes, 1934 Ed., 60.

In connection with the response to your inquiry it is interesting to note that the Appellate Court of Indiana has held in a recent case that Section 12 (a and b), of Chapter 50 of the Acts of 1933, affords the taxpayer a clear, complete and adequate remedy at law which will defeat an application to have the collection of the tax enjoined.

Department of Treasury et al. v. Iva B. Ridgely, etc., et. al., No. 15,544, ....Ind. App. .......

HIGHPWAY COMMISSION, STATE: Right of Commission to employ local counsel in condemnation proceedings.

February 5, 1936.

Hon. James D. Adams, Chairman,
State Highway Commission,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter requesting an official opinion concerning your authority to employ local counsel to assist the Attorney General in condemnation proceedings and other proceedings affecting your funds. Your letter in part is as follows: